

## Reconsideration Request Form

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### 1. Requester Information

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### 2. Request for Reconsideration of (check one only)

Board action/inaction

Staff action/inaction

### 3. Description of specific action you are seeking to have reconsidered

This request is submitted against **Resolution 2014.03.22.NG01** since the NGPC did not consider it to be superseded by Resolutions 2014.04.04 NG01-2014.04.04 NG04. The undersigned considers that once Resolution 2014.03.22.NG01 is duly reconsidered, Resolutions 2014.04.04 NG01-2014.04.04 NG04 should be declared null and void, since they depart from the mistaken conclusions drawn in Resolution 2014.03.22.NG01.

The undersigned seeks that Resolution 2014.03.22.NG01 issued by the ICANN Board New gTLD Program Committee (NGPC) be reconsidered, due to the Resolution conclusion that that "*the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such conclusion was drawn given the following Rationale 2014.03.22.NG01: "*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*". The effect of the NGPC's action concerning the Governmental Advisory Committee advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs, and renders useless any on-going negotiations among the parties

It should be noted that the aforementioned the GAC Register of Advice identified as 2013-09-09-wine and vin, which constitutes the basis for this Resolution, **is the result of a breach of GAC Operating Procedure number 47 (OP47)**. The GAC Consensus given in Beijing (not to delegate the strings pending negotiations between the parties) was **overruled inappropriately when the GAC Chair advised the Board to proceed**

**with the delegation of the WINE gTLDs instead of presenting the different views on the matter and the fact that no consensus was reached, as clearly indicated in OP47.** Accordingly, the statement that "*The GAC has finalised its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*" is not a consensus view of the GAC as per the aforementioned Operating Principle, it does not convey the full range of views in the GAC, and does only represent a mere interpretation and opinion of the GAC Chair. As such, due to the procedural mistake, it should not be taken by the NGPC or the ICANN Board as a basis for any of its Resolutions.

In addition, reconsideration is requested on the grounds that the cited Resolution is not based on the relevant materials and communications addressed by European Commission and other stakeholders to the ICANN Board via ICANN's correspondence site, and on the grounds that, to the contrary, the Resolution is based on a piece of **flawed legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN**, provided by a selected expert to the ICANN's Board NGPC.

As per the legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the breach of **three** sections of the **Bylaws**.

a) **Bylaws Article XI-A, Section 1 subsection 3 which states:**

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice**". (emphasis added).

In this regard, the GAC can request "**at any time**" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, **will consult with the GAC regarding the appropriate source** from which to seek such advice including "**definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

b) **Bylaws Article XI-A, Section 1 subsection 6 which states:**

"6. *Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board*". (emphasis added)

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN is still trying to define appropriate safeguards for the protection of the public policy interest in the new gTLD Program. Despite the argument that the new gTLD policy development finalized in 2007, several policy changes had still taken place since 2007. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" received prior to "any" decision by the Board.

**c) By-law XI.A Section 5 which states:**

That the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its responsibilities", without specific reference to implementation or policy-development process.

In any event, and despite the fact that the case in hand is **clearly a matter of public policy relevance**, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least **the Board failed to clarify on which basis it was seeking such advice, and would need to include on its next Rationale due explanations as regards the reasons why**

- a) the protection of new gTLDs is not a matter of public policy;**
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and**
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.**

Unfortunately, to date none of the .WINE and .VIN applicants have unequivocally included in their applications appropriate safeguards for the protection of Geographical Indications (GI's). Therefore, if according to the Resolution 2014.03.22.NG01, these applications were to proceed through the normal evaluation process, **then there would be significant concern that the safeguards which are necessary for a sound and acceptable functioning of the TLDs would not be guaranteed.**

The text of the Resolution reads as follows:

*"Main Agenda:*

*a. Outstanding GAC Advice*

*Whereas, on 11 September 2013, the Governmental Advisory Committee (GAC) issued advice to the ICANN Board that it had finalized its consideration of the strings .WINE and .VIN.*

*Whereas, the GAC advised the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Whereas, in the Buenos Aires Communiqué, the GAC noted that the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on*

*its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.*

*Whereas, the NGPC commissioned an [analysis](#) [PDF, 772 KB] of the legally complex and politically sensitive background on the GAC's advice regarding .WINE and .VIN, which the NGPC considered as part of its deliberations on the GAC's advice.*

*Whereas, the Bylaws (Article XI, Section 2.1) require the ICANN Board to address advice put to the Board by the GAC.*

*Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012 to exercise the ICANN Board's authority for any and all issues that may arise relating to the new gTLD Program.*

*Resolved (2014.03.22.NG01), the NGPC accepts the GAC advice identified in the GAC Register of Advice as 2013-09-09-wine and vin, and directs the President and CEO, or his designee, that the applications for .WINE and .VIN should proceed through the normal evaluation process.*

*Rationale for Resolution 2014.03.22.NG01*

*The NGPC's action today, addressing the open item of GAC advice concerning .WINE and .VIN, is part of the ICANN Board's role to address advice put to the Board by the Governmental Advisory Committee (GAC). Article XI, Section 2.1 of the ICANN Bylaws <http://www.icann.org/en/about/governance/bylaws#XI> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The GAC also issued advice to the ICANN Board in a letter dated 9 September 2013 concerning .WINE and .VIN. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.*

*The action being approved today is to accept the GAC's advice to the ICANN Board that there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the GAC "has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process." The effect of the NGPC's action concerning the GAC advice on .WINE and .VIN is that the strings will continue to proceed through the normal evaluation process and no additional safeguards will be required for the TLDs.*

*As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The complete set of applicant responses are provided at: <http://newgtlds.icann.org/en/applicants/gac-advice/>. The NGPC has considered the applicant responses in formulating its response to the item of GAC advice being addressed today.*

*Additionally, on 28 September 2013, the NGPC noted that it stood ready to hear from GAC members as to the nature of the differences in views expressed in the advice while*

*the NGPC analyzed the GAC's advice. Several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed, with some individual governments expressing concerns that additional safeguards should be imposed before the strings are delegated, while others recommended that no additional safeguards should be imposed on the strings.*

*In response to the GAC's suggestion in the Buenos Aires Communiqué, the NGPC commissioned an analysis of the legally complex and politically sensitive background on this matter in the context of the GAC advice in order to consider the appropriate next steps of delegating .WINE and .VIN. The expert analysis concluded that "[a]s regards the applications for the assignment of the new gTLDs '.vin' and '.wine' filed by the Donuts company, there is no rule of the law of geographical indications, nor any general principle which obliges ICANN to reject the applications or accept the applications under certain specific conditions.*

*As part of its deliberations, the NGPC reviewed the following materials and documents:*

*GAC Beijing Communiqué:*

*[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130718.pdf?version=1&modificationDate=1375787122000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB]*

*GAC Durban Communiqué:*

*[https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 104 KB]*

*GAC Buenos Aires Communiqué:*

*[https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB]*

*Letter from H. Dryden to S. Crocker dated 11 September 2013 re: .vin and .wine:*

*[https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board\\_20130909.pdf?version=1&modificationDate=1379026679000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Letter%20from%20GAC%20Chair%20to%20ICANN%20Board_20130909.pdf?version=1&modificationDate=1379026679000&api=v2) [PDF, 63 KB]*

*Applicant responses to GAC advice:*

*<http://newgtlds.icann.org/en/applicants/gac-advice/>*

*Applicant Guidebook, Module 3:*

*<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]*

*There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. As part of ICANN's organizational administrative function, ICANN posted the Buenos Aires GAC advice and officially notified applicants of the advice on 11 December 2013. The Durban Communiqué and the Beijing Communiqué were posted on 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1".*

**4. Date of action/inaction**

The ICANN Board New gTLD Program Committee (NGPC) Resolved on 22.03.2014. Even though the URL <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-22mar14-en.htm> now shows 22.03.2014 has the date for Resolution 22.03.2014 it was only published on **25.03.2014**. The latter date was shown for some days on that very URL as the date of publication of the resolution and its rationale, **but it has now changed**.

**5. On what date did you become aware of the action or that action would not be taken?**

The undersigned and the European Commission representatives to the Governmental Advisory Committee present in Singapore became aware of the ill-founded action of the ICANN Board on 26.03.2014 during the GAC Communique drafting session. It should be highlighted that Governmental Advisory Committee was not informed of the existence of this Resolution during the specific session between the GAC and the NGPC that took place on 25.03.2014 (**the date of online publication of the Resolution challenged**).

**6. Describe how you believe you are materially affected by the action or inaction:**

A considerable number of GAC Members including the European Commission, representing the interest of the European Union as a whole, have serious concerns with the Resolution 2014.03.22.NG01 as well as its Rationale and the process that has been followed to arrive at this Resolution.

Despite having a GAC liaison member on the NGPC, the GAC was not aware until 26 March of this decision or its mistaken rationale. Had it been the case, the GAC could have corrected any misunderstandings and thus pre-empted the NGPC's resolution.

It is also worth noting that the NGPC resolved on the grounds of false information as it is our understanding, as reported by ICANN's CEO, that members of the NGPC were informed that the negotiations between applicants and wine rightholders had come to a satisfactory ending, which was not the case.

The Resolution, its Rationale and the procedural breaches connected to such Resolution and Rationale materially affect the Requestors for the following reasons:

1) Grounds for the Resolution

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

However, such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 09.09.2013 without it being circulated to GAC members.

Principle 47 of the GAC Operating Principles provides that "*[t]he GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.*"

Principle 47 of the GAC Operating Principles refers to the concept of "consensus" as per the practice of the United Nations. In this respect, consensus is understood as follows: "*the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions "without a vote", "by consensus" and "by general agreement" are, in the practice of the United Nations, synonymous and therefore interchangeable.*"

The statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*" is not a consensus view of the GAC.

Given the lack of consensus and the fact that the letter of 09.09.2013 did not convey the full range of views expressed by the GAC members, the Requesters conclude that such letter was sent to the ICANN Board in breach of the GAC Operating Principles and can't therefore be taken as a basis for any Resolution.

Practically speaking, the fact that the GAC has actually not reached any consensus in this matter cannot have the effect of having the strings proceed through the normal evaluation process without further consideration. To the contrary, the lack of consensus means that this matter requires further consideration.

(b) an apparent lack of liaison

(i) in relation to the alleged consensus

The GAC Chair, as a non-voting liaison member of the NGPC, should surely have brought the lack of consensus and background to the attention of the NGPC more fully, or the NGPC should have enquired about this knowing the seriousness of the issue for a number of governments, and surely provided background to the letter of 11 September 2013 with the claim therein that the GAC has advised the ICANN Board that there was no GAC consensus advice on additional safeguards for the .WINE and .VIN TLDs, and the GAC "*has finalized its consideration of the strings .wine and .vin and further advises that the application should proceed through the normal evaluation process*". Indeed such claim is disingenuous at best as it was clear, and is still clear, if the subsequent

correspondence from the European Commission, available at <http://www.icann.org/en/news/correspondence/kroes-to-chehade-crocker-12sep13-en> and <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>, is considered, that there was no consensus within the GAC that additional safeguards were not necessary, nor was there consensus to proceed through the normal evaluation process. (ii) in relation to the status of the negotiations between the interested parties.

Some NGPC members have stated that they were under the impression that the negotiations with the applicants were concluded or almost concluded when this was not the case when the Resolution was passed. Such statement is based upon misinformation and, as such, in itself undermines the ongoing negotiations in that there is then no incentive for the applicants to finalise the negotiations or resolve the outstanding points.

In that regard, it should be noted that the subsequent Resolution issued by the NGPC on 04.04.2014 does grant additional time, namely 60 days, for the interested parties to negotiate. However, this Resolution provides that, "*[a]dditional time (60 days) should be allotted before proceeding with the .WINE and .VIN contracting*". This seems to mean that, when the 60 day deadline lapses, the new gTLDs for .VIN and .WINE will proceed to the contracting phase. Therefore, once again, the applicants would be under the impression that they need not necessarily resolve any points of contention since, whilst they will negotiate during 60 days, once such deadline has passed, whether an acceptable solution has been reached or not, the .VIN TLD will be delegated to its only applicant and the .WINE TLD will be delegated to one of its applicants. Such context is far from being favourable to negotiations in good faith and to the pursuit of a balanced agreement.

(c) Jérôme Passa's legal opinion

The resolution challenged is also based on an opinion issued to the ICANN Board NGPC by a University Professor, Jérôme Passa, a piece of **flawed and misinterpreted legal advice regarding the public policy implications of the delegation without safeguards of the new gTLD's .WINE and .VIN.**

As per such legal advice requested by the GAC on the implications of the delegation of .WINE and .VIN without adequate safeguards, there have been at least **three** process violations and procedural errors originating in the **breach of at least three sections of the Bylaws.**

i) Bylaws Article XI-A, Section 1 subsection 3 which states:

3. Process for Seeking Advice-Public Policy Matters.

a. "The Governmental Advisory Committee may **at any time** recommend that the Board seek advice concerning one or more issues of **public policy** from an external source, as set out above". (emphasis added).

b. "In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, **the Board shall, as appropriate, consult with the Governmental Advisory Committee**



regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice". (emphasis added).

In this regard, the GAC can request "at any time" the Board to seek advice concerning matters of public policy, and that if the Board decides to seek such advice, "shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.

ii) Bylaws Article XI-A, Section 1 subsection 6 which states:

*"6. Opportunity to Comment: The Governmental Advisory Committee, in addition to the Supporting Organizations and other Advisory Committees, shall have an opportunity to comment upon any external advice received prior to any decision by the Board".* (emphasis added)

In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation", while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, ICANN and the GAC is still trying to define appropriate safeguards for the protection of the public policy interest in wine-related new gTLDs. In addition, this section of the By-laws provide that the GAC shall have an opportunity to comment upon "any external advice" receive prior to any decision by the Board.

iii) Also By-law XI.A Section 5 clearly says that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its responsibilities", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its Rationale due explanations of the reasons why**

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

2) Failure to consider relevant comments and communications

The Resolution fails to refer to and to take into consideration comments and documentation provided by the relevant stakeholders to the ICANN Board, such as follow up letters sent by the European Commission to the ICANN Board and the NGPC

and letters sent by worldwide wine-related stakeholders. **This constitutes an additional breach of the ICANN Bylaws which promotes the notions of fairness, transparency and openness.**

3) Lack of information from the GAC Chair

The GAC Chair is a non-voting liaison on the NGPC. In this respect, Article VI, Section 9 of the ICANN Bylaws provides that "*non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization*".

The GAC Chair therefore had a duty to inform the GAC of the Resolution but the GAC Chair failed to do so. In addition, the GAC Chair should inform the GAC of its presence or absence at the meetings in which the NGPC considers, among its agenda points, issues pertaining to the public policy interests and pertaining to the work of the GAC.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The protection of GIs serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Consumers procuring wine on line via Internet could indeed be deceived into believing that they are buying a genuine EU product with specific qualities and characteristics of a product with geographic indication, when they are in fact they are buying an imitation. Further the rights of holders of geographic indication would be impaired. Therefore, the adverse impact of the Resolution could be considerable.

If the applications for .WINE and .VIN proceed through the normal evaluation process, as per the Resolution's conclusion, the direct consequence would be that no adequate measures would be in place to ensure that the domain names and associated content available under these extensions would protect wine and spirit consumers and, more generally, the public.

The global wine market is very fragmented and there is an important number of small wine producers which play a crucial role for the sustainability of their communities and regions and who could be negatively affected by the lack of protection of their GIs under the .WINE and .VIN TLDs. There are already many cases of GI name misuse and cybersquatting and the costs which wine producers around the world are put to dealing with misuse of GIs and cybersquatting is already considerable.

The existing misuse and fraudulent activities are presently limited as a result of the protection granted at the international, European and national levels to GIs. However, the Requesters fear that the potential for abuse would considerably increase in online spaces where no specific protection would be granted to GIs. If wine and spirit GIs are not adequately protected, the .WINE and .VIN spaces could rapidly be the target of misuse

and fraudulent activities. The global scope of the .WINE and .VIN TLDs and a lack of clear rules and safeguards can indeed only amplify these problems including as follows:

- Consumers risk accessing websites with a GI name which sell wines that have no link with the real origin of the product, with no guarantee on the quality and origin;
- Sale of counterfeited products may be facilitated;
- Small wine producers may not become aware of cybersquatters abusing their GI names.

Consumers and producers may then decide to avoid using or being present on the .WINE and .VIN TLDs and this is certainly not the result expected by the applicants to these TLDs.

To have a new gTLD such as .WINE or .VIN dedicated to the WINE industry be delegated with no protection for GIs is not only clearly something that will affect the industry concerned in Europe and also across the globe but also is an incredible missed opportunity to create a secure and safe space in the DNS which is supported by the key players in the industry and thousands of small wine producers who seek or will seek to market their produce on the Internet in decades to come.

The Requesters therefore call for a reliable and safe place on the internet for consumers, GIs right holders and producers of wine and spirits.

## **8. Detail of Board or Staff Action – Required Information**

**This request relates to a Board Action, namely the adoption of a Resolution which is due to: a) material information not considered by the Board and b) based upon inaccurate, false or misleading materials (and information) presented to the Board and which formed the basis for the Resolution to be reconsidered.**

1) The Board has not considered certain material information. Although the body of the Rationale for Resolution notes that "*several governments provided letters to the NGPC expressing the nature of their views on whether the GAC's advice on the .WINE and .VIN TLDs should be imposed*", the list of materials and documents reviewed by the NGPC as part of its deliberations does not list any of the documents provided by the European Union (currently posted under ICANN's correspondence and which should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/kroes-to-icann-board-07nov13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/steneberg-to-crocker-et-al-03feb14-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/schulz-to-crocker-et-al->

19mar14-en

Moreover, the NGPC has carefully reviewed the responses from .vin and .wine applicants to GAC advice on the matter but has left out of the scope of its Resolution the views of several other wine-related stakeholders (including US-based wine rightholders). The following communications are also published under ICANN's correspondence site and should be duly taken into account:

- Letter 1: <http://www.icann.org/en/news/correspondence/curbastro-to-crocker-et-al-23apr13-en>
- Letter 2: <http://www.icann.org/en/news/correspondence/barbier-to-crocker-et-al-26apr13-en>
- Letter 3: <http://www.icann.org/en/news/correspondence/lafaille-to-crocker-20jun13-en>
- Letter 4: <http://www.icann.org/en/news/correspondence/figueroa-et-al-to-crocker-et-al-09jul13-en>
- Letter 5: <http://www.icann.org/en/news/correspondence/cakebread-to-crocker-08aug13-en>
- Letter 6: <http://www.icann.org/en/news/correspondence/curbastro-farges-to-crocker-et-al-19aug13-en>
- Letter 7: <http://www.icann.org/en/news/correspondence/goerler-to-crocker-29aug13-en>

Such correspondence would, or at least should, have had an important impact on any Resolution issues, with respect to the delegation of the .WINE and .VIN extensions.

2) The ICANN Board NGPC has also based its Resolution upon inaccurate, false and misleading materials (and information), and which formed the basis for the Board action being challenged.

(a) the GAC's alleged consensus

One of the grounds for the Resolution is the GAC's alleged statement to the ICANN Board that "*there was no GAC consensus advice on additional safeguards for .WINE and .VIN, and the applications for .WINE and .VIN should proceed through the normal evaluation process*".

Such statement is based on a letter which was sent by the GAC Chair to the ICANN Board on 9 September 2013. However:

- (i) such letter was sent to the ICANN Board without being circulated to GAC members first.
- (ii) as explained in section 6. above, as per the practice of the United Nations and given Principle 47 of the GAC Operating Principles, it is clear that the statement that the GAC "*has finalized its consideration of the strings .wine and .vin*" and further advised that "*the*

*applications for .WINE and .VIN should proceed through the normal evaluation process"* is not a consensus view of the GAC.

This letter, which is one of the grounds of the Resolution, is therefore clearly misleading.

(b) the failure to give the GAC an opportunity to comment on the materials used by the NGPC and the failure to clarify with the GAC the appropriate source from which the advice should be sought including the definition of the scope and process.

In first place, it should be clarified that the matter in hand it is a matter of public policy and not merely a matter of implementation. Additionally, the undersigned understands that the By-laws remain the main source of procedural rules for ICANN, and that in any case they prevail over the By-laws as it will be shown below.

- Bylaws Article XI-A, Section 1 subsection 3 states that the GAC can request "**at any time**" to board to seek advice in matters of public policy, and that the Board "**shall consult with the GAC regarding the appropriate source from which to seek such advice and the arrangements including definition of scope and process**" for requesting and obtaining such advice. None of those requirements have been followed by the NGPC.
- Bylaws Article XI-A, Section 1 subsection 6 states that the GAC has the opportunity to comment upon "**any external advice**" received by the Board and prior to "**any decision**". In this regard, the NGPC seems to have followed the Applicant Guidebook section 3.1, applicable to "implementation" matters, while it is clear that the Bylaws prevail over the Applicant Guidebook and that rather than in the implementation phase, the GAC (and subsequently ICANN) is still trying to define appropriate safeguards for the protection of the public policy interest.
- By-law XI.A Section 5 clearly indicates that the purpose of the external advice is to "augment the information available to the Board or other ICANN body in carrying out its **responsibilities**", without specific reference to implementation or policy-development process.

**In any event, and despite the fact that the case in hand is clearly a case dealing with a public policy matter, the Bylaws do not exclude that the "external expert advice" may be taken also on matters of implementation and therefore at the very least the Board failed to clarify on which basis it was seeking such advice, and would need to include on its reationale due explanations to clarify why:**

- a) the protection of new gTLDs is not a matter of public policy;
- b) the protection of new gTLDs is a matter of implementation and not of policy development; and
- b) under what circumstances the Applicant Guidebook may prevail over the General rules set forth in the By-laws.

(c) the content of the legal opinion issued by Mr Passa

Concerning the legal opinion provided by Mr Passa, the undersigned would like to remind of the content of the European Commission's comments concerning both the procedural aspects relating to such opinion and its content (available at <http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>). In particular the European Commission questions the transparency of such legal opinion given that the process of appointing Mr Passa to handle the question of whether the various objections raised against the reservation of the .WINE and .VIN are well-founded has not been disclosed and neither were the instructions given to him with respect to the provision of his opinion.

In addition, the Buenos Aires Communiqué specifically refers to seeking a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings. It is debatable whether Mr Passa's external expert legal advice is sufficiently thought through and pertinent and whether Mr Passa has considered the politically sensitive background of this matter when issuing his advice. For example, the undersigned notes that Mr Passa only refers to the application filed by one of the applicants, namely the Donuts company. It is therefore suggested that additional legal advice, from other experts, designated in a transparent manner, be considered.

It is however worthwhile noting that Mr Passa clearly states in his opinion that, if ICANN *"had serious reasons for believing that the registry of the new gTLD .wine or .vin would assign domain names to third parties without taking account the protection of wine-related geographical indications i.e. without taking precautions designed to prevent infringements of these geographical indications in its relations with its contacting parties, that it would then be able to reject the application for the new gTLD."*

This would certainly appear to be a key point in the advice provided by Mr Passa, and this point is completely ignored by the NGPC not being mentioned at all in the Rationale for the Resolution. The Rationale seeks to justify the Resolution by quoting from another part of the expert expert analysis saying that there is no rule of law or general principle which obliges ICANN to reject the applications. The Requesters agree with this point but respectfully submits that this is not the point to consider. The point is, exactly as Mr Passa states, that if the registry for .WINE or .VIN were to assign domain names to third parties without taking precautions to prevent infringements of these GIs, then Mr Passa is of the opinion that ICANN should reject the application.

**In terms of the form of the legal report provided to the NGPC and the conditions surrounding its authorship and its submission:**

The undersigned seeks clarification of the following issues:

- Can the NGPC provide explanations as per how and under what circumstances the legal expert/author was selected? Has there been any open and transparent competition based on a list of experts from which the author was retained? Was the expert/author chosen *ad personam*? Can the NGPC provide the necessary

documentation or evidence that there is no conflict of interest between ICANN, any of the three applicants and the selected expert/author?

- Taking into account that the Buenos Aires GAC Communique requested the Board to "*seek a clear understanding of the legally complex and politically sensitive background on this matter in order to consider the appropriate next steps in the process of delegating the two strings*" can the NGPC clarify why this question was not addressed to the legal expert/author? What is the background information, if any, submitted to him? In particular, did ICANN inform him *in extenso* of the arguments raised by the interested parties involved, by the different GAC members and the correspondence received by ICANN as a follow up to the Buenos Aires Communique?
- Taking into account that the expert report is not dated, can the NGPC confirm the date in which the report was drafted? Can the NGPC confirm that the report seems to have been delivered on 22.03.2014 as indicated in ICANN's website <http://www.icann.org/en/groups/board/documents/analysis-wine-vin-22mar14-en> and that as such, the NGPC resolved on the matter on the very same day that the report was delivered being that the reason why the NGPC did not consult the GAC?

Pending clarification of the aforementioned matters through a response of the current reconsideration, it stems *prima facie* from the above that the circumstances related to the selection of the expert, the drafting and presentation of this report were neither transparent, nor objective, nor respectful of other parties' rights to be heard.

**In terms of substance of the legal report provided to the NGPC**, the undersigned would like to make reference to the letter sent by the European Commission to the ICANN Board on 02.04.2014 (<http://www.icann.org/en/news/correspondence/steneberg-to-icann-board-02apr14-en.pdf>), and seek clarification of why the content indicated in the following sections has not been taken into account in any NGPC Resolution, notably for what concerns the obligation for the Registry/Registrar of the .WINE and .VIN gTLDs to implement protective measures:

- In point 1, § 6, the author indicates that "*It then becomes the registrar of these third-party domain names, and as such, draws up its own naming conventions, laying down the conditions under which third parties can reserve these domain names*". This confirms our views that ICANN is not the best placed party to adjudicate on the matter and that the implementation of safeguards should be left to the concerned parties (applicants and rightholders)
- In Point 10, § 1 the author indicates that "*ICANN had serious reasons for believing that the registry of the new gTLD ".wine" or ".vin" would assign domain names to third parties without taking account the protection of wine-related geographic indications, i.e.: without taking precautions designed to prevent infringements of these geographical indications in its relations with its*

*contracting parties, that it would then be able to reject the application for the new gTLD" and "based on a simple precautionary measure designed to prevent what are deemed to be sufficiently serious risks of an infringement of the geographical indication" as set forth in Point 10, § 2, . The application of this precautionary measure appears hence justified due to the lack of commitment of the applicants to the on-going negotiations.*

- In point 2, § 1, the author rightfully acknowledges yet that "*reservation of a new gTLD may infringe prior third-party rights or, more generally, interests*".
- The author notes in Point 5, iii) that "*a party reserving a domain name does not necessarily have the right to use the geographical indication in question for wines of for products or another type which it sells on the website identified under the domain name in question*", therefore recognizing the existence of a high risk of third-party rights misuse and misappropriation.
- It is also worth noting that the author, in Point 9, § 2 explicitly mentions that "*If, however, he [understood as the "registrant"] also sells, on his website, products which do not benefit from this geographical indication, it is likely that such sales may constitute an infringement of the geographical indication*". The matter, indeed, as indicated in Point 9, § 2, would require a case by case analysis by reference to a given geographical indication "*which would allow to identify the international, regional –notably European- or national rules governing it and which are therefore applicable*".
- Moreover, as already requested by European and other GAC members, in Point 11, § 1 the author concurs with our opinion and expressed that "*Naturally, pursuant to the rules laid down by ICANN, the registry agreement – an agreement concluded between ICANN and the owner of the new gTLD – may inform this owner of the need to ensure that its co-contracting parties respect third-party rights and, in particular, geographic indications*".
- Furthermore, Point 11, § 2, also in full accordance to the views of the European Commission and other interested governments and parties, confirms that "*if this agreement did not make express provision for it, no fault could be attributed to ICANN for it is the registry of the new gTLD in its capacity as a professional to automatically take precautions designed to avoid domain name users, its partners, from infringing third party rights*". It is for that reason that applicants have been continuously encouraged since the ICANN Beijing meeting in mid-2012 to come to an agreeable solution with wine rightholders to ensure that adequate safeguards are provided in the delegation of the ".wine" and ".vin" gTLDs.

## **9. What are you asking ICANN to do now?**

The undersigned, on behalf of the European Union, respectfully request from ICANN to:



- a) reverse its Resolution 2014.03.22NG01 considering the aforementioned information and comments; and further declare null and void Resolutions 2014.04.04 NG01-2014.04.04 NG04
- b) While reconsidering, take into account the existing materials disregarded at the time of the NGPC Resolution 2014.03.22NG01 and listed across this document and notably in Section 8.
- c) Provide explanations as regards:
  - a. How ICANN's Board NGPC resolutions are affected when they are based upon GAC advice given in breach of GAC Operating Principles.
  - b. Explanation of "policy vs. implementation" as regards the application of the By-laws for what concerns expert advice, and notably the By-laws breached by Resolution 2014.03.22.NG01 an taking into account the arguments listed under Sections 2, 6 and 8 of the current reconsideration request.
  - c. Explanation of cases in which the Applicant Guidebook may prevail of the general ICANN By-laws.
  - d. Explanation of the questions raised by the undersigned in Section 8.c) and of how the relevant sections included in the expert legal advice provided by Jerome Passa and which favor the protection of GIs have been taken into account and will be taken into account.
- d) Grant sufficient time to applicants and interested parties to define the necessary safeguards for the .wine and .vin gTLDs, in order to reach a proper agreement before the delegation of the .wine and .vin gTLD strings, without a deadline. In this regard, the undersigned notes that in previous negotiations under pressure due to a tight deadline (30 days after the Durban GAC Communique) those negotiations were rendered useless as applicants had the incentive to wait until the GAC as a whole or the Board resolved on the matter.
- e) Evaluate the negative effects for the Domain Name Security, Resilience and Stability produced by the NGPC Resolution challenged, taking into account that European Union and its Member States would have to seek blocking measures in order to safeguard the protection of EU Regulation in the field of Geographical Indications, as well as in the field of consumer protection and competition.
- f) Have the full ICANN Board reconsidering the matter, according to the External Expert advice rules set forth under ICANN By-laws.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

In addition to the elements noted in Section 6 of this Reconsideration Request, it is clear that the Resolution breached the ICANN Bylaws. The conclusion of the Resolution,

which is based on such violation, is highly detrimental to the interests of the wine and spirit industry. Indeed, the Resolution concluded that "*the applications for .WINE and .VIN should proceed through the normal evaluation process*". In the EU the overwhelming majority of wines produced are covered by geographical indications ("**GIs**"). Therefore, the risk of applications for second-level domain names as part of the .WINE and .VIN TLDs, that would constitute a misuse, evocation or otherwise undue appropriation of a vested right related to an EU GI for wines is considerable. Proceeding through the normal evaluation process without additional safeguards would negate the EU wine and spirit industry's ability to protect its GIs against such misuse, evocation or undue appropriation. In addition, this would prevent the applicants and interested parties to continue their negotiations with a view to reach an agreement on the matter.

Allowing the applications for .WINE and .VIN to proceed through the normal evaluation process without additional safeguards, while the applicants and interested parties seeking GI protection have not had adequate time in order to reach proper agreement, would therefore seriously undermine the protection granted to GIs by the TRIPS and Lisbon Agreements as well as by the relevant EU regulations. The protection of GIs also serves the public interest because of the particular risks of fraudulent misuse of GIs which the interested parties regularly witness. Internet users could indeed be deceived into believing that they are buying a genuine EU product with specific qualities and characteristics, when they are in fact getting an imitation. Therefore, the adverse impact of the Resolution could be considerable.

Failure to follow the specific policies described above results in further contradiction of ICANN policies ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability. Indeed, the Requester has spent a considerable amount of time and efforts into trying to reach an agreement with the applicants to try to obtain that safeguards be implemented before the .WINE and .VIN strings are delegated and the Resolution would unfairly prevent it from reaching an agreement in this respect.

The worldwide sales value of EU GIs is estimated at € 54.3 billion in 2010, at wholesale stage. Of these total sales, EU GIs regarding wines actually account for 56 %, (€ 30.4 billion), regarding agricultural products and foodstuffs for 29 % (€ 15.8 billion), and regarding spirit drinks for 15 % (€ 8.1 billion). These sales were made in: the country of production (60 %), EU countries (20 %), outside the EU (20 %).

The main export destinations are the US (30 % of total exports), Switzerland and Singapore (7 % each), Canada, China, Japan and Hong-Kong (6 % each). The total value of EU GIs exported outside the EU is estimated at € 11.5 billion. This represents 15 % of the total EU food and drinks exports. Of these total GI exports (in value), wines account for 47 %, spirits for 44 %, agricultural products and foodstuffs for 10 %.

Products benefiting from a GI clearly enjoy a value premium, i.e.: the premium that a GI can expect from the market, compared to similar non-GI products.

In average, the whole value premium rate in the EU 27 for GI products was estimated at 2.23, which means that GI products were sold 2.23 times as high as the same quantity of

non-GI products. A comparison of the average value premium rates between schemes shows that GI wines and spirits received far higher prices than their related standard products (2,75), compared to spirits (2.57) and agricultural products and foodstuffs (1,55).

The link below refers to comprehensive data in that respect:

[http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report\\_en.pdf](http://ec.europa.eu/agriculture/external-studies/2012/value-gi/final-report_en.pdf)

It stems from the above that EU GIs for wines represent an utterly high asset, whose reputation and considerable value are undisputed. Accordingly, their protection against misuse, evocation or otherwise undue appropriation is of the utmost importance.

In order to ensure such protection:

At international level, Article 23 of the Trips Agreement requires Members to provide the legal means for interested parties to prevent use of a GI identifying wines in respect of wines not originating in the place indicated, even where the true origin of the goods is indicated or the GI is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation" or the like.

Within the EU, the European Commission is bound, pursuant to Article 17 of the Treaty on European Union, to *"promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. (...)*

Regulation (EU) No 1308/2013 *inter alia* establishes rules regarding GIs in the wine sector, in order to protect the legitimate interests of consumers and producers (see Article 92 thereof).

Article 103 of the said Regulation further indicates that a GI shall be protected against :

*"(a) any direct or indirect commercial use of that protected name:*

*(i) by comparable products not complying with the product specification of the protected name; or*

*(ii) in so far as such use exploits the reputation of a designation of origin or a geographical indication;*

*(b) any misuse, imitation or evocation, even if the true origin of the product or service is indicated or if the protected name is translated, transcribed or transliterated or accompanied by an expression such as "style", "type", "method", "as produced in", "imitation", "flavour", "like" or similar;*

*(c) any other false or misleading indication as to the provenance, origin, nature or essential qualities of the product, on the inner or outer packaging, advertising material or documents relating to the wine product concerned, as well as the packing of the product in a container liable to convey a false impression as to its origin;*

*(d) any other practice liable to mislead the consumer as to the true origin of the product."*

The Member States are accordingly bound to enforce such protection *ex officio*, and may not exclusively act upon request from an interested party (operators, consumers, etc...).

Also in that respect, Article 2 of Directive (EU) 2000/13/CE on the approximation of the

laws of the EU Member States relating to the labelling, presentation and advertising of foodstuffs requires Member States to ensure that "*The labelling and methods used must not:*

*(a) be such as could mislead the purchaser to a material degree, particularly:*

*(i) as to the characteristics of the foodstuff and, in particular, as to its nature, identity, properties, composition, quantity, durability, origin or provenance, method of manufacture or production (...)"*

Regulation (EU) No 607/2009, which focuses in particular on GIs in the wine sector, likewise stipulates in Article 19 (2) thereof, that "*In the event of unlawful use of a protected designation of origin or geographical indication, the competent authorities of the Member States shall on their own initiative (...) or at the request of a party, take the steps necessary to stop such unlawful use and to prevent any marketing or export of the products at issue.*"

It stems from the above that both the European Commission and its Member States are bound to take the appropriate measures in order to tackle any misuse of protected GIs. In the present circumstances, considering on one hand the worldwide coverage of internet, and the refusal of ICANN and accredited Registries and Registrar to establish specific and appropriate safeguards aiming at ensuring the protection of the EU GIs against any undue appropriation, one may not prevent the online advertising and marketing within the EU of wines through second-level domain names illegally referring to EU GIs, thus entailing huge potential confusion for the consumer, considerable losses for the right holders of these EU GIs, and extremely high costs in seeking judicial redress.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?**

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

The undersigned represents the European Commission and is put forwards on behalf of European citizens and consumers in the defense of the public policy interests that concerns them in the case in hand, and to ensure the rule of law in the European Union.

The European Commission plays a representative role by ensuring the representation of the European Union in third countries and in many international organizations, among others ICANN.

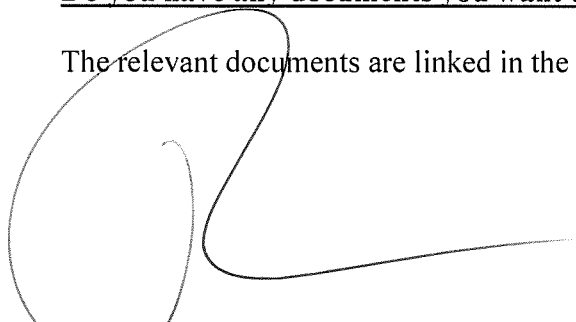
In the EU and its Member States food labeling, the common organization of the market and agricultural products as well as designations of origin and geographical indications are governed by several sets of EU secondary legislation (regulations and directives).

The European Commission as is the guardian of the Treaties and of all the EU's legislation. One of the Commission's main tasks is to ensure the proper application of the provisions of the Treaties and of secondary legislation. The ICANN Resolution 2014.03.22.NG01 leads to the attribution of the .wine and .vin TLDs to applicants who are not rightful holders of geographical indications. Without prior agreement of proper safeguards to between applicants and rightholders, this resolution likely to lead to a systematic breach of EU legislation in the field of food labelling and geographical indications within the EU market, and would infringe TRIPS provisions governing the trade of products with geographical indication. In such circumstances the EU Commission has a legal standing to submit this present Reconsideration Request in order to prevent systematic breaches of EU law and to up-hold the EU legal order.


The European Commission as well as law enforcement agencies in the EU Member States in the field of consumer protection, competition and intellectual property rights will incur enforcement costs, in amounts differing depending on their consituitional and legal settings, when persecuting breaches of EU and the EU Member States' law, caused by applicants being attributed by ICANN and allowed to use the .VIN and .WINE TLDs without prior agreement reached with GI rightholders. Rightholders would incur their legal advice and enforcement costs.

**Do you have any documents you want to provide to ICANN?**

The relevant documents are linked in the text of the Reconsideration Request.



Signature



Date