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JOHANNESBURG – Board GAC Recommendation and Implementation Working Group Session

Thursday, June 29, 2017 – 09:45 to 10:15 JNB

ICANN59 | Johannesburg, South Africa

CHAIR SCHNEIDER: Okay. Let me without delay give the floor to the co-chairs of the BGRI, Manal, Egypt, and Markus Kummer from the Board.

MARKUS KUMMER: Thank you, Thomas. Markus Kummer speaking. Good morning, all.

It's a great pleasure to be here and to look again. It's an iterative process on the effectiveness of GAC advice. But at the outset I would say I think one of the achievements of this group was to propose the post-communique call. We have done that in Helsinki, and I think it has greatly improved the process.

Now I'm aware, and we were criticized for it, our last response to the GAC advice came in a bit late, and I promise I do my utmost that this will not happen again. And I hope that we will get our response to the -- to the Johannesburg advice at least four weeks before Abu Dhabi.

With that, I hand over to you, Manal.

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MANAL ISMAIL:

Thank you, Markus, and thanks, everyone. And this session is supposed to be 30 minutes, and we're a bit late so I'll try to be as efficient as possible. So if we go to the next slide, please.

And this is a quick background so that everyone is on the same page. In Dublin, the GAC raised the need to periodically review whether and how effective the Board has taken GAC advice into account.

GAC secretariat, ACIG, prepared a review report which revealed that sometimes it's difficult to know whether or not ICANN has -- ICANN Board has accepted the GAC advice. And where there is clear evidence that the advice has been accepted, it's sometimes difficult to see to what degree it has been implemented. And finally, whether or not the GAC feel the implementation adequately meets GAC's original intent.

So the Board referred the issue to the BGRI working group to analyze the report.

If we go to the next slide, please. Those are the agreed actions to address the identified issues. For the sake of now, we're concentrating on the first three. It's the definition of what constitutes GAC advice, clarity aspects that needs to be fulfilled in any GAC advice, and the post communicate Board-GAC exchange that Markus has just mentioned.

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So if we go to the next slide, please.

The next one, please.

It sets the expectations for this meeting. We need to adopt a description of what constitutes the GAC advice and adopt the list of aspects that need to be fulfilled for clarity of GAC advice and adopt the post-communique exchanges as a standard operative procedure. And finally, agree on the net set of activities that we need to start working on.

If we go to the following slide. And I have to remind everyone that we have been discussing this for quite some time, maybe more than one year now. We received comments online and during face-to-face meetings which were reflected in the document and shared on both mailing lists, the BGRI mailing list and the GAC mailing list. And, I mean, the final iteration did not reveal any more comments.

So with this, I'm sharing with you -- we are sharing with you the final text of what constitutes GAC advice that we need to adopt and ultimately have it posted on the GAC website.

So I'll pause here for a moment to see if there are any reactions or comments.

Iran, please.

IRAN: Thank you, Manal.

With the new bylaw on the spirit of famous Stress Test 18, I have difficulty to consider number 2 as an advice. A chair of GAC writing a letter? Whether consult or not consult? What would the result of that consultation? That taking as an advice to the Board in the definition of advice? I have no objection, but I need clarification of that because I not have any doubt about the chair of GAC, how (indiscernible), but I talk of the future, what will happen. That any letter may be signed and considered as GAC advice? With consultation of the GAC member? Without consultations? And what criteria?

So it is difficult to categorize this as an advice at this stage.

Thank you.

MANAL ISMAIL: Thank you, Iran, and Thomas, if you want to chime in, please do. I understand that letters -- I mean, if it contains a GAC advice, then for sure it will be consulted with GAC members before sharing. And I think this is -- normally takes place intersessionally, but I think Thomas may be in a better position to explain this. Thank you.

CHAIR SCHNEIDER:

Thank you, Manal. Well, this is part of the operational operating principles actually of the GAC, that there are several forms of -- that GAC advice can take. One of them is a letter of the GAC chair that will declare the content of the letter as advice, and, of course, no GAC chair should and probably would dare to send a letter and call the content of it advice if it hasn't be consulted with the GAC because that would probably be the end of his chairmanship, if our accountability mechanisms work correctly. But this is something that has happened a number of times before. We have not always just given advice only at ICANN meetings. Whatever we do interim normally starts or has the form of a letter sometimes with an attachment where the advice is put in. So this is nothing new, nothing changed, and we've discussed this for quite some time in every reform of the operating principle and also in previous work as a follow-up to the ATRT reviews on the definition of advice. So there's nothing new here. This is absolutely common practice. Thank you.

MANAL ISMAIL:

So any further reactions or comments? Yes, please, China.

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CHINA: Thank you, Manal. To my understanding, the five points in this document, it's the forms of the GAC advice and on this -- to my thinking now, I would like to propose number 6 to -- that is -- may perhaps other documents agreed by GAC members in full consensus. I think that with this number 6, we may -- we can -- without limiting ourselves because on this 5 points may cover a lot of cases, but there may be other cases we would like to constitute GAC advice. Thank you.

MANAL ISMAIL: Thank you, China. And just to bring to everyone's attention that the list says it includes but not limited to. So it's -- I mean, it can include other things. So we didn't mean to have an exhaustive list. So Thomas, do you want? Okay. So China, do you still need to add anything, or we can leave it as it stands?

CHINA: I can go with what have been stated in this document right now. Thank you.

MANAL ISMAIL: Okay, thank you. Iran. Iran then Thomas, please. Thank you.

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IRAN: Thank you, Manal. I still have difficulty with number 2, letter signed by the chair of the GAC be considered or constitute as GAC advice. Please kindly read the title. What constitute GAC advice? The chair of the GAC may send any letter, but I don't think necessarily it would be GAC advice. GAC views, yes, but not GAC advice with capital A. So we should be very, very careful not so generalizing the situation.

MANAL ISMAIL: Thank you, Kavouss. I have a more specific suggestion, but maybe Thomas first and Argentina next and then -- okay. Markus.

THOMAS SCHNEIDER: Thank you, Manal. I think the important thing that should maybe, I don't know, highlighted in bold or something is the words "clearly marked as such" in the phrase that Manal has alluded to before. So what -- in whatever form advice is whatever is marked as advice. That's the basic fundament of the logic and then can take -- and then the document says it can take various forms such as and then there's the list and it says not including to. So it doesn't mean -- like not everything that is in the communique is advice, not everything that is in the letter is advice, and not every issue paper is advice. These are just forms when clearly marked as such advice can be conveyed. But

the logic is not -- it's not -- doesn't go in both direction. Otherwise, we would read here that everything in a communicate is advice. So what maybe we -- for the sake of avoiding misunderstandings, Manal, maybe you have an idea already how to say this more clearly. But the logic is very clear. Everything that is marked as advice is advice. And then we have several ways to communicate it. And these are examples of the most frequently-used examples. Thank you.

MANAL ISMAIL:

I have Argentina next and then Markus.

ARGENTINA:

Thank you, Chair. For the sake of clarity and perhaps for those reading the text which are -- who are not so much involved in how the GAC and ICANN works, the next of number 2 could be enhanced to express that the content of the letter is agreed by the full GAC or something like that, so the text could be more -- have -- I don't know if you have a suggested change to the text, but it could be enhanced so it reflects that the content of the letter is an outcome of the GAC.

MANAL ISMAIL:

Thank you, Argentina. Markus, please.



MARKUS KUMMER:

Yes. Thank you. I also find the wording in the second paragraph is extremely loose. It includes anything the GAC submits to the board in any written board and includes requests for responses and requests for studies. And you may have noticed that the board in its response did not say whether it accepted or rejected the advice which was a request for answers by essentially ICANN org, but obviously the board asked the CEO to answer the questions. But as an overarching comment, we are a joint working group between the board and the GAC, and whatever we adopt, we will have to present it to the full board. And there may be other opinions also in the board, and it might be helpful to tighten up, a little bit, the language the same way as we are going with the focus on clearly marked as such. When the GAC has a policy advice which is clearly marked as such, then we also take it as a board as a policy advice. That's -- there's always been a little bit of ambiguity, I think, in the communique, and we discussed that before. This was at the language governance use or maybe not necessarily the same language as other members of the community used. So the clearer it is and the clearer marked it is as advice, I think the more helpful it is.

MANAL ISMAIL:

South Africa, please.

SOUTH AFRICA: Thank you very much, honorable chairperson. I just wonder if you can clarify for me, I see that you -- there's a list of the -- what constitutes GAC advice, but I would like to enhance my knowledge in terms of the text that's contained talking about the instances where -- starting from the "focus on public policy issues" which is understandable and also that the instances where the GAC generates advice on other matters. I'm not sure within the text where does that fall? Is that a continuance of the list of what is considered GAC advice or maybe you have some other explanation for it because at the moment as it stands it's not really quite clear. Thanks.

MANAL ISMAIL: Thank you, South Africa. So I have Thomas first, and then I can respond to your question. Thank you. Thomas, go ahead.

THOMAS SCHNEIDER: Thank you, and as much as I most of the time agree with my dear friend and compatriot Markus, I have to disagree when he says there's some ambiguity with regard to the communique. That's history. We have, as a result of our joint work implementing the previous ATRT work, marked in the communique for quite some years now a section that says, GAC

advice to the board, and it now has also a reference to the bylaws in it so that everybody knows that we are doing this in accordance with the bylaws. So there's no more ambiguity. We have included the rationale to a piece of advice. Since we started to do that sometime ago, there's no ambiguity about the communicate, what is advice and what is other form of communication. So just to make that very precise, I think that works. And we -- again, we need to look at this on the basis of our operating principles, why these things are advice. We'll have a session on the operating principles just after the break after this one. So I don't think we should spend too much time here in this because if we agree that in whatever form we may send advice, transmit it. What counts is that it is clearly marked as advice with an understanding that advice is advice as it is defined in the bylaws, that we have the -- the definition of advice and possible, let's say, types of advice according to the new bylaws. Whatever the form is, it's not necessarily something that we should spend much time on here. We can -- I would propose that if there's a need to discuss this -- I'm not really sure whether there is -- then we do this with the operating principles review. But I think we should clearly note that advice should be clearly marked as such so that the board recognizes this is advice and these are other forms of communication. I think that's the point that matters. That would be my urge to you to

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focus on this. And if this is clear, then move to the next. Thank you.

MANAL ISMAIL: Thank you, Thomas. And I owe South Africa a reply first. And before wrapping the discussion on this and then seeing whether this would address all concerns or not. So the -- the text reads, the focus of GAC advice is mainly public policy issues but sometimes the GAC provides advice that has to do with other administrative issues like frequency of ICANN meetings and things like that. So this does not have public policy impact, but again the GAC participates or provides advice on this. So this meant to cover all aspects -- all types or forms of advice that the GAC provides. So does this answer your question, South Africa?

SOUTH AFRICA: Thank you, Chair. I think in light of the comments from the chair, it does because I was a little bit uncomfortable with the way that text is, if there's some question, you know, surrounding what the GAC deems as advice. Thanks.

MANAL ISMAIL: Thank you. So I can see Iran and Indonesia. But, first, if you allow me to make a suggestion and see if this would address the concerns. So I think we need to make it bold and clear, the part

that says "clearly marked as such." And we can move it to the first sentence along with -- I mean, "any written submission is considered GAC advice." And we insert somehow that it should be clearly marked as such. So this is one change.

The other one regarding Number 2, to address Iran's concern, maybe -- along the lines what Argentina said, maybe we can say certain letters agreed by the GAC and signed by the GAC chair on its behalf, on behalf of the GAC. I mean, it has to be agreed by the GAC first. So this is what I heard so far. I hope this addresses the concerns.

I have Iran, then Indonesia.

IRAN:

Thank you, Manal. GAC advice with capital "A" has a specific connotation and meaning and scope of application. We should be very, very careful not to put so many things which may have different interpretations. Some of the distinguished members always scrutinize everything, and so on, so forth.

Let's first finish with operating principle and then bring back, if anything, to this. I don't think that there is such an urgent situation that we have to send it now, and so on, so forth.

So I think let us go to the other side. Some of this has been from operating principle. I think we have to go back. We have serious

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difficulty with existing operating principle, which wrote 2005 and is now 2018 -- '17, '18. So let us not -- but I am not very comfortable with this list because it may have some different interpretations. Thank you.

MANAL ISMAIL:

Thank you, Iran. But, I mean, we can adopt this for the time being understand -- the understanding that we're going to review it again after the operating principles. I think this is also one way to go about it because right now we already have something on the Web site. And this should be a better version or a more reviewed version. So we can just agree on it on a temporary basis until we have more view in light of the operating principles.

I have Indonesia and then Chris Disspain.

INDONESIA:

Just to put some more points in, Thomas, our chairman mentioned if there is some ambiguity in whatever, then the chair of GAC assigning it, he or she could always be requested for clarifications. So there should be no problem on that.

And, secondly, I would like to mention also that perhaps that kind of letter or communicate is perhaps within all ICANN SOs and ACs. GAC is the only unit or only institution that cover the

total global communities from a country as big as -- which many inhabit -- which people as China and India, up to the number 172 in (indiscernible), the latest additions which only -- only have people less than 100,000. You do not see that variation in other SO or AC. Perhaps only very few countries. This is 172.

MANAL ISMAIL:

Thank you, Indonesia.

Chris.

CHRIS DISSPAIN:

Thank you, Manal. Good morning, everybody. I just wanted to ask a question for clarification.

The paragraph -- I apologize. The third paragraph up from the bottom says, "There are also instances where the GAC generates advice on matters related to the effectiveness of ICANN's procedures." And I think, Manal, you referred to an example of meeting venues or something along those lines.

I'm slightly perplexed. Are you saying that that sort of advice should actually be treated in the same way as public policy advice and, therefore, subject to the bylaw provisions that say if we don't agree with you, we have to go through -- I'm going to use shorthand here, but, in essence, a mediation process.

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Because I think that would mean -- we would need to have real clarity about that if that's what comes to us as a board at the end of this working group. I think it's important to clear about that at some point. Thank you.

MANAL ISMAIL:

Thank you, Chris. And I don't think this was the intention. And if it's not clear, we can try to make it clear.

I have Iran first and then we can think how to go about it. Iran.

IRAN:

Thank you, Manal. I fully agree with the previous speaker. If we write a letter to the board that you need to change the duration of the meeting from Y to Z, is it not GAC advice in the capital A as it has been defined in the bylaws? Some request, invitations, whatever, is not GAC advice.

I think this list is very, very broad and would have some implication. We have to reduce it to the maximum possible. Just limit it -- maybe we don't need one, two, three, four, five, we have just a paragraph saying GAC advice. I'm not comfortable with that. You can change something and put it still on the discussion. But the last one, yes, there are instances that we write a letter for. I don't think this is GAC advice. This is GAC views but not advice.



MANAL ISMAIL:

Thank you, Iran.

And, yeah, this is the type of discussion I was hoping to have intersessionally on the mailing list. But it's always good to get the reactions anyway.

So we need to decide whether this is GAC advice which triggers the bylaws or it's any form of GAC communication including GAC advice. So maybe this is a distinction we need to make. And if it's only GAC advice that triggers the bylaws, then there are a few things that need to be deleted from here.

I'll hand -- okay, Thomas, please.

CHAIR SCHNEIDER:

Thank you. Just very briefly and then we probably need to wrap up.

The definition of what public policy is, is something that I would say is up to the GAC to define and probably on a case-by-case basis because if ICANN would decide that the GAC meetings would not be organized anymore in the same building but in another city of the country, that may have public policy implications because it prevents us from doing our work.

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If the ICANN org decides that they will have organic coffee instead of non-organic coffee, that is probably not a public policy issue but a purely logistical issue -- well, Denmark may disagree.

[ Laughter ]

So there are, of course, so-called logistical or other issues that may have public policy aspects while others may have not. The effectiveness of ICANN's procedures, per se, is something that I think, as I said before, if we care about the functioning of the system, if we take the functioning of the system as a public policy issue, then the rest follows more or less naturally. But there's a limit, I think, to what is public policy.

But, again there, I think the important thing is that whatever we say, we say whether we think this is GAC advice or not. We may have the discussion to discuss what is public policy. My proposal would be to look at it on a case-by-case basis in case it is not absolutely clear.

I don't think we should discuss what is public policy here, so we may just leave that. And the ICANN bylaws don't define it either. So we may leave that out. But this is a good discussion to have.

And to support Manal, it normally helps if you're chairing something when you have some feedback before the session, of

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course, then you know what views are going to be when you start chairing the session. So I would like to thank Manal and Markus for this in any case. Thank you.

MANAL ISMAIL:

Thank you, Thomas. And as we're running out of time, it's obvious that we need another iteration. I'll do a few minor changes and circulate it again and hope to receive your feedback on line. And meanwhile, if we can go to the following slide, please. Can we go to the next slide?

MARKUS KUMMER:

Let me also add that I will take back to the full board that you also get reactions of the board on that. Thank you.

MANAL ISMAIL:

Thank you, Markus.

So very quickly, those are the aspects to ensure clarity of GAC advice. Again, I will pause here to see any comments or reactions.

Can I take it as agreed and go to the following slide? Thomas?

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CHAIR SCHNEIDER: Thank you. I think we should, based on the light what we just discussed maybe have -- if you could stay on that slide and not move up, please, or down.

The last points, I think whatever is advice should follow the same rules. And if we think matters related to the effectiveness of ICANN's procedures are -- had to have public policy relevance, that the same thing should apply. And advice in the form of high-level principles, basically we should give a rationale for "high-level principles" as well and not just for more detailed principles. I'm not sure whether this distinction actually makes sense.

MANAL ISMAIL: I think the distinction here was meant that not all the criteria applies, meaning that sometime it's not something that needs direct implementation like the high-level principles. So you cannot really indicate implementable elements and identify relevant actors and so on.

So it was meant to say that not all those apply. Okay?

CHAIR SCHNEIDER: You're right. I didn't see the "all" in that text. So then I think we may leave...

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MANAL ISMAIL: Iran, please.

IRAN: Thank you, Manal. I have difficulty with the two bullet "advice on matters" and "advice in the form," when you say "the above criteria may not all apply to."

We must be very careful about the use of the term "advice," capital A. So put the two bullets for further discussion in square brackets.

Up to that, I have no problem because it says "concise, precise, consistent with the bylaw, indicating rationale," "highlighting the intended public policy," indicating -- everything is good. But the last two one I have difficulty with that -- thank you -- being termed as "advice."

MANAL ISMAIL: Thank you, Iran.

Switzerland.

SWITZERLAND: Thank you. And sorry for coming a little bit late into this discussion. But the chapeau sentence is a bit -- I don't know --

difficult to implement in a way. What does it mean? Are these stringent obligations necessary, ensure fully implemented? Who's going to check that? Does that mean the board may refer to this, let's say, meta obligation on our GAC advice and tell us later on, well, we think it's not consistent with ICANN bylaws or how did you check that or we don't think it's precise.

MANAL ISMAIL: I think the intention here was that all such criteria should be considered by the GAC when drafting GAC advice to the board.

SWITZERLAND: Yes. Then probably, if I may, the first sentence should be something like GAC advice should be, two points, blah, blah, blah, blah, blah, and that's it. It's short. It's up to the GAC. And we don't include all these, let's say, obligations that may later give rise to issues.

MANAL ISMAIL: Noted. And do I take this as this is going to be posted on the GAC Web site as well as is because we are wordsmithing the slides? So I'm just wondering whether this is going to go on line?

So, Iran, please, very briefly so that we can -- thank you.

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IRAN: Very briefly.

MANAL ISMAIL: Thank you.

IRAN: Very briefly. Agree with Switzerland. Simply say "GAC advice should meet the follow conditions." That's all. And that's quite - it will be clear. This is addressed to ourselves. Not to put in something that is unclear, ambiguous, and not consistent with the bylaws and so forth, so that's it. Yeah.

MANAL ISMAIL: Okay. Noted.

IRAN: Thank you.

MANAL ISMAIL: Thomas?

CHAIR SCHNEIDER: Thank you. I think this is a good discussion. The problem is I think we need to be realistic in how many advices of the last two years have we indicated relevant actors, implementers, and also

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the intended public policy outcome is not always clearly -- so I think we -- this should be guidance or guidelines or something that we should try and do, but I have my doubts even if "should" isn't too strong, because sometimes it is just simply -- and that has got nothing to do with the substance of the advice, but it's not always possible to have all the elements.

So I would -- I would do this as a tentative guiding target thing. And also like who decides to follow up, and who decides whether it is precise or clear.

So this is a direction that we are trying to go to, to the extent possible, and we should mark it as such, but there's no threshold that we have to achieve, and if we don't, below then it's not advice or whatever.

So we -- this is not black and white. This is a direction or an effort that we are trying to make that is not necessarily measurable, so I would rather formulate it slightly differently. Thank you.

MANAL ISMAIL: Iran, please, very briefly.



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IRAN: Thank you, Chair. 99%, I agree with chair, but this 1% no. It must be consistent with the bylaw. You have no option. It must have rationale. You have no option. I don't think it is "may" or "should" or "would." It "shall." But don't put "shall." Say "should." I don't think that.

Don't forget the carve-out issue, that if you have something not consistent with the bylaw, it will be scrutinized by our dear GNSO people immediately. So "it shall." Thank you.

MANAL ISMAIL: Obviously, some are a "must" and some are not.

So obviously we need to finalize also over email, so if we can go to the following slide, please, I hope this is an easier one to agree. The next slide, please.

So again, as Markus mentioned, and in light of the three calls that we held post-Helsinki, Hyderabad and Copenhagen, the calls held with the board, and in light also of the feedback received so far, we think we can adopt the GAC/board post-communicate exchanges as a standard operative procedure, which I think we already do.

I mean, every ICANN meeting we try to agree on a call with the board afterwards, so I think this can be noncontroversial.

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Okay. Great.

And the very last slide, if we can go to the following slide, please.

Can we have -- yeah. Thank you.

So those are the activities. The first three are the ones we are currently finalizing. We have already agreed on Number 3. We will fine-tune 1 and 2 and share them over email. And I think we can kick-start the discussion also on the following set of activities that has to do with how to -- the logging mechanism and the tracking of GAC advice to the board and also review the existing GAC records and complete any missing information.

I think this is already also an ongoing activity, given the new GAC Web site that is being implemented, and also I understand there are other -- a portal for the board and things like that, and we're trying to link everything together. So I think this is something that we need to follow up on, starting the next meeting.

So can we agree to kick-start the discussions and maybe receive a demo or something, either intersessionally on a Webinar or later in Abu Dhabi meeting on those three activities from ICANN staff, I hope?

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So with this, I thank you. Apologize for the late start and apologize for the late finish, and Markus, would you like to say something?

MARKUS KUMMER: Yes. Well, thank you very much, Manal, for your hard work on this, and I think, as I said at the beginning, it's an iterative process and we will also get back with some comments from the board on our help to clarify the meaning of the GAC advice. And I would then also say we try and organize the next call, maybe the first half of August sometime, but ICANN org will set that in motion. Thank you.

MANAL ISMAIL: Okay. Perfect. Then I hand over to Thomas.

Iran? Okay.

IRAN: May we request respectfully to the board that not limit itself to come at the end. Should be interactive in the middle as well. If you have any preliminary comment, kindly send it to us. It would help. Because we don't want we prepare everything and at the end, say "No, it is not good. Reject that." If you have any comment, please come in and express the views. Thank you.

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MARKUS KUMMER: Point well taken.

MANAL ISMAIL: Thank you, Iran, and I'm handing over to Thomas to tell us --

CHAIR SCHNEIDER: Well, you're handing over to the coffee break, I think. Thank you.

[ Break ]