

Consensus Call Response to the Subsequent Procedures PDP Final Report of 22 Dec 2021

I am submitting this response on behalf the At-Large Advisory Committee (ALAC).

With the following exceptions, the ALAC wishes to indicate its support or non-objections to the recommendations and implementation guidance contained in the Subsequent Procedures PDP Final Report of 22 Dec 2021.

No opinion on certain topics

Firstly, the ALAC is not expressing any opinion on the WG's recommendations or implementation guidance in respect of the topics of 6. RSP Pre-Evaluation, 10. Applicant Freedom of Expression, 16. Application Submission Period, 18. Terms and Conditions, 37. Registrar Non-Discrimination, 38. Registrar Support for New gTLDs and 39. Registry System Testing.

Topic 9 Registry Voluntary Commitments / Public Interest Commitments

The ALAC's support for Affirmation 9.3, Recommendations 9.1, 9.4, 9.8, and Implementation Guidance 9.5, 9.6 and 9.7 (in respect of PICs), as well as Recommendations 9.9, 9.10, 9.11 and 9.12 (in respect of RVCs) is contingent upon achieving the following results:

- Any and all Registry Commitments incorporated in a Registry Agreement must be clear and enforceable, whether such commitments are:
 - PICs (i.e. mandatory per consensus policy);
 - RVCs that are negotiated due to GAC Advice, GAC Early Warning, an Application Comment or Objection and taken to fall within ICANN's Mission; or
 - RVCs that are voluntarily proffered by an applicant.
- Clarity of Registry Commitments, especially RVCs, ought to be achieved by ICANN Legal and Contractual Compliance, and approved by ICANN Board to ensure *prima facie* enforceability, subject only to Accountability Mechanisms, PICDRP, litigation, arbitration
 - The dispute resolution mechanism for RVCs as agreed between ICANN and applicant must continue to be inserted in its Registry Agreement
- Where an RVC is determined or ruled to be unenforceable, the ICANN Board must take action to remedy such outcome by preserving (where feasible) the original intent of the PIC or RVC and arresting any reasonably foreseeable impact of such determination or ruling of unenforceability on the enforceability of an identical or similar provision in other contracts.
- For completeness, Affirmation 41.1 and Recommendation 41.2 (under **Topic 41: Contractual Compliance**) are to apply equally to PICs and RVCs, in particular compelling Contractual Compliance to introduce/publish standards and threshold to assess registry practices, including guidelines on how each threshold is derived and applied to determine compliance or non-compliance of a PIC or an RVC through act or omission by a registry whether leading to sanctions and/or Registry Agreement termination or not.

With respect to Recommendation 9.15, while the ALAC agrees with the principle that combatting DNS abuse should be subject to community consensus policy that would apply to all TLDs and not just future batches of New gTLDs, we disagree with the approach taken by the Subsequent Procedures PDP Working Group. We reiterate that there is a need for Subsequent Procedures PDP WG recommendations to compel incremental improvements to DNS abuse mitigation policy.

Topic 23: Closed Generics

While the ALAC notes how "No Agreement 23.1" was derived, we believe, as a matter of good practice, ICANN must suspend any processing or acceptance of any applications for Closed Generics until such time the GNSO provides consensus policy recommendations on how to address applications for Closed Generics which serve a global public interest. This is consistent with GAC advice to the ICANN Board,

"For strings representing generic terms, exclusive registry access should serve a public interest goal" as contained in its ICANN46 Beijing Communique.

Topic 17: Applicant Support

While the ALAC supports the recommendations for the Applicant Support Program (ASP), we do have grave concerns over omissions to those recommendations, in particular:

- On the lack of clear objectives for the Applicant Support Program (ASP), which in turn prevents its proper evaluation, as highlighted in recommendations #29 and #32 of the Competition, Consumer Choice & Consumer Trust Final Report 2018.
- On the lack of policy guidance for implementation on ASP beyond just recommending the establishment of a Dedicated Implementation Review Team for the ASP that is charged with developing implementation elements of ASP by revisiting 2011 Final Report of Joint Applicant Support WG, 2012 implementation of ASP

Given this, we seek assurances for ALAC/At-Large participation in Dedicated IRT given that the ALAC was co-charterer for the JAS WG, and that community input is essential, especially in light of this Dedicated IRT's wide scope (including implementation of the Bid Credits for AS qualifiers in auctions as the contention resolution mechanism of last resort).

Topic 21.1: Geographic Names at the Top Level

The ALAC's dissent to the Work Track 5 Final Report is limited to omissions to recommend:

- For stronger preventive protection of Non-Capital City Names strings, in requiring letters of support/non-objection irrespective of applicant's declared use of TLD provided where city meets specified criteria (has 100k inhabitants, international airport per IATA), and to clearly extend this preventive protection to qualified non-capital city names in ASCII, native script, in current and historical forms (eg. Kolkata/Calcutta);
- A Notification Tool exclusively to participating GAC Members for informing them of any application for strings matching their conditional-submissions of names with geographical meaning; and
- Also, as part of **Topic 14: Systems**, an opt-in update system for interested parties to automatically keep them informed on application(s) for specified string(s).

Topic 31: Objections

Again, while the ALAC supports the recommendations on Objections, we are concerned over the omission to ensure the ALAC has automatic standing for Community Objections in order for each such objection it files be considered on its merit, without risk of dismissal on 'lack of standing', which risk remains an impediment to the ALAC's acting in the best interest of individual end-users.

Topic 34: Community Applications

The ALAC's supports for the recommendations on Community Applications is qualified in respect of specific omissions:

- In Implementation Guidance 34.4 – to address impediment to proving both "awareness and recognition of the community members" for CPE Criterion 1-A; while allowance has been made in respect of "recognition" to compel consideration the views of the relevant community-related experts, especially in cases where recognition of the community is not measurable, no similar allowance has been made in respect of measuring "awareness" where such measurement could also be prevented or impaired.
- In Recommendation 34.12 – to include shortlisting and final selection of CPE Provider to be also subject to community input which is reasonable because of the need to supervise ICANN Org's selection of the most suitable CPE Provider.

Topic 35: Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets

The ALAC maintains its opposition to the following:

- Recommendation 35.2 – specifically, that private auctions are allowed, on the basis of:
 - Concern about attempts to “game” application process through use of private auctions
 - Allowing shuffling of funds, i.e. the ability for a loser to apply proceeds from 1 private auction to another, only really benefits incumbent RO / multiple-string applicants; disadvantages single-TLD/niche applicants
 - No good reason for not mandating ICANN only auctions such that auction proceeds can be directed for uses in public interest – CCWG on Auction Proceeds
- Recommendation 35.3 – use of bona fide intent affirmation being presumably limited to applicants who participate in auctions or private resolution mechanisms, because:
 - If at all, this affirmation should apply to all applications, not just those that fall into contention sets
 - Factors for establishing lack of bona fide intent are too subjective, and without penalty, ultimately just mere “window dressing”
- Recommendation 35.4 – use of second-price, sealed bid auction compromise, while this compromise is superior to status quo, it remains inferior to a Vickrey auction solution in deterring speculative applications
- Recommendation 35.5 – specifically, that private auctions are allowed and the protections for disclosing applicants under the Contention Resolution Transparency Requirements framework.
 - Full transparency of terms of any private resolution is absolutely necessary to gain data for program evaluation, all terms ought to be disclosed to ICANN but some may be subject to a non-disclosure commitment by ICANN Org where necessary, in order for all data to be captured to inform future policy work (through aggregate, anonymized data)

Justine Chew

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