

# Co-Chair Response to the Complainants, and Subsequent Procedures for New gTLDs Working Group regarding ‘Challenge’ to ‘Consensus Designations to Recommendations in the Final Report.

January 15th 2021

On 12 January 2021 Subsequent Procedures for New gTLDs PDP Working Group (SubPro PDP) held a meeting to review and discuss the Consensus Designations.

Leadership of SubPro PDP had released the previous day their consensus designations as a result of the Consensus Call on the Recommendations made in the Draft Final Report for the work of this PDP at the end of 2020. (see [SubPro Consensus Call Comments](#) received and [Designations of Consensus](#) documents) The working group was then afforded the opportunity, should they so wish, to make any challenges to the designations of consensus, in accordance with the recommended methodology in Sec 3.6 of the [GNSO Working Group Guidelines](#)

The following challenges to consensus designations were then received and reviewed for reconsideration.

## Opposition to Topic 9 Designations

- a. Elaine Pruis: 9.10 based on
  - i. not enough time to deliberate the “ramifications of the ICANN bylaws on the proposed recommendations.”
  - ii. Application of the PICDRP and associated processes to RVCs introduces found changes to the balance of rights and obligations in the registry contract.
  - iii. Public comment concerns that the RVCs should only be permitted if they fall within the scope and mission of ICANN as set out in the new bylaws.
- b. Jim Prendergast - The ICANN Board raised concerns about the potential conflict between Registry Voluntary Commitments and the ICANN bylaws; the group was hurried in its work on this critical area because of an arbitrary deadline; the impacts to contracted parties are not fully known since this recommendation was never put out for public comment as drafted.
- c. Jessica Hooper – Objection is not to the recommendations themselves, but to the rationale and the issue of whether it contradicts the Bylaws. Asks for a PDP to look at Bylaw concerns
- d. Kathy Kleiman: Substantive challenges to PICs/RVCs

For completeness of the record there was also voiced opposition to 9.9 and 9.10 that was received several days after the extended deadline for the Consensus Call, and after Leadership released its Consensus Designations. It should be noted that for reasons expressed in a later part of this response, even if we could have considered the late objection (primarily based on the Bylaws issue), this would not have changed our overall assessment and designation.

## Opposition to Topic 35 Designations

- a. Jim Prendergast: 35.2 based on “– inconsistency of determinations between recommendations and Leadership’s desire to preserve other parts of the recommendation.”

For completeness of the record we also note that in the 'challenge' phase of this methodology we were reminded that the GAC, through its consensus input of September 29<sup>th</sup> 2020, reiterated longstanding views which were critical of private auctions:

- **[“Auctions: Mechanisms of Last Resort/Private Resolution of Contention Sets: Topic 35 in Draft Final Report](#)**

While the GAC acknowledges that, in an attempt to reduce potential gaming, the PDP WG recommendation 35.3 includes the need for applications to be submitted with a “bona fide” intention to operate a TLD, the GAC recommends further discussion on how this intention will be ensured and implemented, and notes that punitive measures for non compliance or submission of a “bona fide” intention are not sufficiently defined. The GAC expresses concerns on whether the “bona fide” intention and Contention Resolution Transparency Requirements sufficiently answer the ICANN Board concerns relative to the permission of private resolutions (including auctions) as a mechanism to resolve string contention.

Regarding Auctions of Last resort, the GAC reaffirms its view that they should not be used in contentions between commercial and non-commercial applications, **and reiterates that private auctions should be strongly disincentivized.**”

The Co-Chairs of the SubPro PDP thank the active members of the Working Group for their diligence and dedication over our long and often complex task. We also specifically wish to recognise and thank the challengers in this process for their additional dedication and desire to see the most optimal outcome of our work properly secured as we draw to a close.

## Responses to the Complainants and Brief Rationale

1. With regards to the co-signed challenge [‘Consensus Designation Reevaluation Request’](#) received from Jessica Hooper, Kathy Kleiman and Elaine Pruis regarding Topic 9 received on January 13, 2021.

The co-chairs and members of the leadership team have reviewed your challenge to the Consensus Call designations, specifically regarding Topic 9.

After careful consideration we, the co-chairs, do not agree with your assessment of the consensus call and provide the following rationale to support this decision.

We have concluded that:

The responses received to the Consensus Call that related to Topic 9 were not of a broad bases (under the notions of ‘Representativeness’ as outlined in the WG Guidelines) The responses coming from 4 individual members, three of whom identify in their SOI’s as either being employed by a gTLD Registry Operator, or has gTLD Registry Operator clients, (two from the same Registry Operator), and one other individual associated with the NCUC, were not considered by us to be a sufficiently diverse grouping to shift from “Consensus” designation to that of “Strong Support but Significant Opposition”.

The measurement of support for the Consensus Call is not intended to be a quantitative assessment, but rather based on the totality of circumstances and diversity of views; we remain satisfied that this group of objections does not equate to “significant opposition” when considering all active participants of the WG.

In addition, one of the responses to the Consensus Call stated that their objection to Topic 9 was predicated on the fact that most of the work on the recommendation contained in Section 9.9 was done after the Draft Final Report Public Comment period and stated that “the impacts to contracted parties are not fully known since this recommendation was never put out for public comment as drafted.” We disagree. Recommendation 9.9 in the Final Report is identical to the same recommendation in the Draft Final Report. The only adjustments to that section were in subsection C which contains a discussion on new issues that arose after the publication of the Initial Report. It is important to note that Section C is not part of the recommendation itself, but merely a discussion of the ICANN Board questions will likely contain. To suggest, therefore, that the impact to contracted parties was not out for public comment is not accurate in our view. We also noted that neither the registries nor the registrars opposed Recommendations 9.9 or 9.10 in their comments to the Draft Final Report.

2. Objections based on Questions raised by the ICANN Board on PICs/RVCs and enforceability under the ICANN Bylaws

i. The ICANN Board asked the Working Group whether the SubPro Working Group had “considered [the] specific language in ICANN’s Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?”

ii. The SubPro WG did have several conversations related to the applicability of the ICANN Bylaws to Public Interest Commitments and Registry Voluntary Commitments. That said, the SubPro Leadership team expressed its view that the issue of interpretation of the Bylaws is ultimately that of the ICANN Board of Directors and the Community at Large (not just this PDP nor just the GNSO). And, even if a set of recommendations (whether they relate to PICs or any other aspect of the new gTLD program) is ultimately determined by the ICANN Board as being contrary to this version of the Bylaws, there are mechanisms in place for the community to amend the Bylaws to implement substantive policy that is considered desirable for the community. This is in no way downplaying the importance of the question, but at the end of the day, it is not a policy question that this PDP Working Group (or any future GNSO PDP Working Group) can ultimately decide on its own. Therefore, as made clear in the PDP Working Group discussions of the Board comments, our focus was going to be on the substance of the policies themselves and whether we as a working group believed that the Recommendations were good substantive policy. In other words, assuming that the existing Bylaws permitted PICs/RVCs and their enforcement (or that they can be amended in the future to allow them),

iii. If the ICANN Board ultimately determines that these recommendations are unable to be enforced under the existing Bylaws, like all other recommendations in the report, at that point the ICANN Board could refer that narrow issue back to the GNSO to modify in accordance with specific instructions to either propose amendments to the Bylaws or to revise the Recommendations such that they comply.

iv. In conclusion and looking at the substance of the recommendation itself, leadership continues to believe that the recommendation has support of a Consensus of the Working Group.

Please note that the detailed elements of your objections were reviewed for the Consensus Call and again when we discussed your appeal. However, the points above were the primary focus for determining whether or not the designation from the Consensus Call should be amended.

3. With regards to the [‘Challenge to designation on Recommendation 35.2’](#) received from Jim Pendergast received on January 13, (UTC) 2021.

As a result of our reevaluation we continue to believe that the Topic as a whole continues to have Strong Support, but Significant Opposition. However, we are dissecting Section 35.2 to clarify the significant points of objections to “Private Auctions” as follows:

Topic	Designation	Designation Notes
35	Strong Support but Significant Opposition	35.1, 35.3, 35.5 Consensus
		35.2* and 35.4 Strong Support by significant opposition*
		*There is Consensus on Recommendation 35.2 and each of the bullet points contained therein except to the extent that it mentions “private auctions”. There is significant opposition to the use of Private Auctions as a means of private resolution of contention sets.

With respect to the use of words “including private auctions” in Section 35.2, we do find that there is strong support but significant opposition. Unlike Topic 9, those that opposed using private auctions as a means of private resolution contention sets come from a diverse set of members including members from the registries, ALAC, and GAC. We also note that members from the ALAC and GAC indicated in their responses to the Consensus Call that these were not just positions from themselves, but official positions of the entire ALAC and GAC.

We hope that the above information clearly explains our approach to the Consensus Call and justification for the designation of Consensus to Topic 9 and 35.2.

We want to again thank the Working Group for all of their time and hard work these past several years and for getting us over the finish line for the Final Report.

Regards,



Jeff Neuman & Cheryl Langdon-Orr  
 Co-Chairs  
 Subsequent Procedures for New gTLDs PDP Working Group






# Co-Chair Response to the Complainants, and Subsequent Procedures for New gTLDs Working Group regarding 'Challenge' to 'Consensus Designations to Recommendations in the Final Report

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