

The ICANN GNSO “Business Constituency”



1-Jun-2021

Business Constituency (BC) comment

GNSO New gTLD Subsequent Procedures Final Outputs for ICANN Board Consideration (SubPro)¹

General comment

The Business Constituency (BC) has been an active participant throughout past public comment opportunities of SubPro, most recently in our submission of September 2020 Final Draft Report².

At that time, the BC commented on 13 Topics which we want to share with the ICANN Board as added context for our public comments today. While we understand that this current Public Comment is intended to focus on Outputs approved by GNSO Council, in September 2020 we provided our views on Topics 23 (Closed Generics) and recommendations in Topic 35 (Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets) which were not approved as SubPro Outputs. Nonetheless, we are including these comments for your information, and where applicable we’ve recommended follow up action by the Board beyond mere approval of SubPro Outputs. Indeed, many of the issues the BC identifies herein necessitate a solution prior to the acceptance of any additional new gTLD applications.

As the Board of ICANN prepares to take action on the SubPro Outputs, despite our general support for them, we especially want to reiterate our position on these topics as submitted in our public comment of September 2020. For ease of reference, we are providing them here along with our recommended follow up actions.

Topic 2: Predictability

With reference to the formation of a Standing Predictability Implementation Review Team (“SPIRT”) (Pronounced “spirit”) to serve as the body responsible for reviewing potential issues related to the Program, to conduct analysis utilizing the framework, and to recommend the process/mechanism that should be followed to address the issue:

The BC appreciates the thorough analysis that has been given to creation of the SPIRT as a mechanism to deal with the Predictability Framework. In Annex E we note that the SPIRT does not require broad representation across the ICANN community when it states “The SPIRT should be open to all interested parties, but may not necessarily be representative of the ICANN community, as actual participation may depend on interest and relevance of the new gTLD Process. Membership criteria should identify knowledge, experience, responsibilities to their

¹ ICANN public comment page, at https://www.icann.org/public-comments/gns0-gtld-subsequent-procedures-final-outputs-2021-04-22-en/mail_form

² Sep-2020, BC comment on Subsequent Procedures Draft Final Report, at https://www.icannbc.org/assets/docs/positions-statements/2020/2020_10October_01%20BC%20response%20to%20SubPro%20Final%20Report.pdf

respective organization, rules of engagement, a Statement of Participation, etc.” While we agree with these basic qualifications, we believe that the SPIRT should be representative of the ICANN community and that specific qualifications should be determined before adopting the process.

BC Recommendation to the Board: The Board should instruct ICANN staff to monitor and publish regular reports on the composition and participation of SPIRT members on specific issues it handles within the Predictability Framework, much the same as ICANN staff currently do for GNSO Working Groups.

Topic 9: Registry Voluntary Commitments / Public Interest Commitments

In Recommendation 9.2, the WG stated it did not believe that PICs were required for TLDs where there was a single registrant, specifically, Spec 11 3(a) and 3(b) because such applicants have a much lower threat profile:

The BC believes that all the same obligations should apply for all applicants with regard to Mandatory Public Interest Commitments (PICs) currently captured in Specification 11 3(a)-(d) of the Registry Agreement without exception. The BC further believes that steps -- even incremental steps -- to combat domain name system abuse are warranted. Accordingly, the BC diverges with the working group here and advocates for the inclusion of enforceable DNS abuse mitigation measures in contracts governing new gTLDs.

BC Recommendation to the Board: Irrespective of whether or not all PICs apply to single registrant TLDs, in line with our general recommendation below, the Board should request an Issues Report to launch a PDP for the development of consistent, uniform, enforceable, and meaningful DNS abuse mitigation measures for all registry and registrar agreements.

Topic 11: Universal Acceptance

“The BC supports The Working Group’s recommendation that ICANN should clearly and thoroughly illustrate the possible problems that IDN registrants may face with user and platform acceptance, as well as the work previously initiated to address this challenge. We believe strongly that ICANN must commit resources to address universal acceptance and note that the Final Report includes a recommendation to resource future work to address various technical issues.”

Topic 12: Applicant Guidebook

Recommendation 12.8 states that the AGB should be published 4 months prior to commencement of applicant submission period, while Recommendation 2.9 states that the AGB should be published in the 6 UN languages only 2 months prior:

The BC believes that businesses in all regions of the world should have equal access and opportunity to apply for TLDs in the next round. Accordingly, we believe that the AGB should be published simultaneously in English and the 6 UN languages, both 4 months prior to the commencement of the application submission period.

Topic 17: Applicant Support

Question for Community Input

Recommendation 17.2 states: "The Working Group recommends expanding the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process."

Question: Should the Applicant Support Program also include the reduction or elimination for eligible candidates of ongoing registry fees specified in Article 6 of the Registry Agreement? If so, how should the financial impact to ICANN be accounted for?

The BC responded:

No. Applicants must be financially capable of running a registry. Applicants may qualify for assistance in preparing their application but once they sign the registry agreement they should be financially sound and be able to meet the ongoing fee obligations in Article 6. The BC has expressed previously that it does not support subsidizing registry businesses although it does support the application support measures recommended by the Working Group³.

Topic 19: Application Queuing

The BC reviewed the Recommendations of the WG which involves the assigning of priority numbers for both ASCII and IDN applications. We indicated a response that they were:

Not ideal, but willing to accept Outputs as written.

Topic 23: Closed Generics (also known as Exclusive Generics)

The Working Group had considerable deliberations on this matter, including 3 written proposals for consideration to define Public Interest (which was the basis on which the GAC believes a closed generic could proceed) in which different perspectives were expressed, and the Working Group did not come to any agreement on the proposals. Ultimately, the WG was not able to agree on the conditions for which Closed Generics could be allowed, and this topic was not included as one of the current Outputs for Board consideration.

The BC's view:

The BC does not support a non-recommendation from the working group on the issue of closed generic TLDs. The working group should conduct a formal assessment of consensus, at least with respect to support for versus opposition against closed generic TLDs in general, as opposed to various restrictions and implementation proposals, which may warrant further consideration once this basic principle has been addressed.

The BC remains opposed to any blanket rule against closed generic TLDs, whereas legal and public policy issues can be addressed on a case-by-case basis.⁴

Question for Community Input in Topic 23, which again was not included as one of the current Outputs for Board consideration: Review the 3 proposals for public interest generics submitted to WG:

The BC commented:

We believe the views expressed in the proposal for public interest closed generics submitted by Greenberg, Kleiman, Shatan warrants further consideration. We believe that reasonable criteria for operating a closed generic in the "public-interest" can be developed and applied objectively, and that operating in the "public interest" could include both non-profit and commercial use cases. It is important for applicants who seek to apply for a closed generic in the second round

³ May-2017 BC comment, page 3 at https://www.bizconst.org/assets/docs/positions-statements/2017/2017_05May_22%20BC%20reply%20to%20questionnaire%20on%20new%20gTLD%20Subsequent%20Procedures.pdf

⁴ May-2017 BC comment, at https://www.bizconst.org/assets/docs/positions-statements/2017/2017_05May_22%20BC%20reply%20to%20questionnaire%20on%20new%20gTLD%20Subsequent%20Procedures.pdf

understand the criteria and policies for this special class of TLDs. The BC affirms its previous comment that a “one-size-fits-all” prohibition on closed generics “unnecessarily stifles opportunity and creativity, and protects a regime designed around a status quo business model.”

In addition, we believe that ICANN needs to create a framework to determine “public interest” in this context. Previously, the BC has said that “public interest” for ICANN purposes was about improving the availability and integrity of domain name registration and resolution.

BC Recommendation to the Board:

Resolution of issues surrounding closed generic TLDs are integral to subsequent new gTLD procedures. The issue will continue to arise, whether or not closed generics are technically prohibited. For example, registries remain free to set pricing so high in open generic TLDs so as to effectively close the TLD for internal use only. The community is likely to develop other subtle and creative work arounds as well. It is better for ICANN to come to some form of consensus on when closed generic TLDs are and are not permissible. To that end, and in line with the BC’s above comments, the Board should request a separate Issues Report to commence a dedicated PDP to establish (a) whether a baseline community consensus is possible that either closed generics should, or should not be allowed at all; and (b) how the public interest can be defined in a way that can allow for closed generic TLDs in a manner that is consistent with the ICANN Bylaws.

Topic 33: Dispute Resolution Procedures After Delegation

The BC continues to support the output as written but maintains the new information we have offered for consideration.

The Business Constituency notes that while the Working Group did not conduct an exhaustive review of the PICDRP due to a small number of cases, in at least one instance the timeline and transparency of the process as well as the findings of the Standing Panel were disregarded (see <https://www.icann.org/en/system/files/files/pharmacy-picdrp-panel-report-10jul18-en.pdf>), and no action was ever taken by ICANN to obtain necessary responses from the registry operator to inform the reporter.

This was well documented in a post at CircleID (see http://www.circleid.com/posts/20181020_enough_with_blacklisting_online_pharmacies_time_to_white_list/), and we believe this instance can be useful for improvement by ICANN’s Contractual Compliance Department to address the Working Group’s recommendation for clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process which must be publicly available. This will enable ICANN to demonstrate that not only does it have the power to make registries operate for the common good, it takes that responsibility seriously and fulfills its role of enforcement.

Topic 34: Community Applications

On this topic, BC indicated that the outputs were not ideal, yet we were willing to accept as written though we did not support certain aspects.

Specifically we said:

As documented in our comment on the initial report, the BC requests increased clarity around the definition of community in a community application. Make the outlines of “community” clearer, more transparent and less open to interpretation.

Topic 35: Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets, which again are not entirely included in Outputs for Board consideration:

BC did not support the recommendations of the WG and explained:

While applicants should transparently declare whether they intend to operate the registry, or whether they anticipate selling some of their pending applications to others (as the BC previously commented), the BC cautions against the proposed criteria against which “bona fide” intentions may be measured (e.g., the applicant “loses” 50% of private auctions it enters into). Such criteria call for subjective interpretation and could be gamed themselves by others with an interest in the contended-for string or an interest in an auction loss windfall (by attempting to influence those interpreting applicant intentions). It is conceivable that an applicant with a number of auction losses simply doesn’t possess the resources necessary to compete financially for the string, and did not anticipate the auction scenario at application time. Subjective interpretations in circumstances such as these tend to detract from, rather than contribute to, predictability.

As the BC commented in 2018, we remain concerned about applicants applying for multiple strings with the intention of selling or auctioning their contention position to other applicants. As we said in 2018, the BC recommends that private auctions be eliminated.

Regarding the last resort auction mechanism, the BC continues to support the Vickrey method where the applicant that submitted the highest Last Resort Sealed Bid amount pays the second-highest bid amount. An exception is for contention sets involving .Brand TLD applications, which should be exempt from any “sealed bid” auction types. Prior to blindly entering an auction, in order to assess legitimate rights to operate certain TLDs, .Brand TLD applications in contention sets should be made aware of third party applications in contention, the identity of the applicants, their intended uses of the TLDs, and whether or not certain uses are proscribed by voluntary PICs.

Topic 36: Base Registry Agreement

BC supported the outputs as written and added in the ‘Question for Community Input’:

Recommendation 36.4 states: “ICANN must add a contractual provision stating that the registry operator will not engage in fraudulent or deceptive practices.” The Working Group discussed two options for implementing the recommendation: the addition of a PIC or a provision in the Registry Agreement. A new PIC would allow third parties to file a complaint regarding fraudulent and deceptive practices. ICANN would then have the discretion to initiate a PICDRP using the third-party complaint. If a provision regarding fraudulent and deceptive practices would be included in the RA, enforcement would take place through ICANN exclusively. Which option is preferable and why?

The BC prefers leveraging the PICDRP, unless ICANN can substantively demonstrate improvement in its compliance and enforcement capabilities.

Topic 37: Registrar Non- Discrimination & Registry/Registrar Standardization

BC supported the outputs as written and added in the ‘Question for Community Input’:

The Working Group discussed specific circumstances in which it may be appropriate for ICANN to grant Code of Conduct exemptions. In particular the Working Group considered a proposal that if a registry makes a good faith effort to get registrars to carry a TLD, but is unable to do so after a given period of time, the registry should have the opportunity to seek a Code of Conduct exemption so that it can be its own registrar without needing to maintain separate books and records and legally separate entities. What standard should be followed or what evidence should be required of the registry in evaluating if a

"good faith effort" has been made? Is a Code of Conduct exemption as it currently exists the right mechanism for a registry that lacks registrar support for its gTLD, considering that the Code of Conduct is primarily focused on registrant protections?

The BC is not opposed to registries having the opportunity to apply for and operate a registrar. However, the BC is generally cautious about subjective evaluations of the intentions of others (e.g., determining whether or not the (sometimes confidential) efforts of others are made in good faith and discourages such interpretations. The BC is not in favor of Code of Conduct exemptions in as much as they are intended to protect registrants.

Section 3: Other Comments & Submission

The BC long has advised ICANN Org, the Board and the ICANN community that a number of issues should be prioritized as a matter of necessity, though not all have been. Consideration of procedures governing a subsequent gTLD round provides an opportunity to productively direct community attention toward these matters.

Strengthened registry and registrar contracts. The BC believes now -- before a new gTLD round is initiated -- is the opportune time for ICANN to amend its badly out-of-date contracts with registries and registrars. Now nearly eight years since the last update (prior to the last gTLD round), these agreements need to be brought in line with current community needs. For example, contracts must contain provisions -- auditable and enforceable by ICANN -- that outline the specific tools contracted parties must employ to mitigate DNS abuse.

BC Recommendation to the Board: Further to our foregoing comments and recommendations, the Board should request an Issues Report to launch a PDP for the development of consistent, uniform, enforceable, and meaningful DNS abuse mitigation measures for all registry and registrar agreements.

Substantive enforcement of contract obligations. As often expressed by the BC and others, ICANN has serious deficiencies in the area of enforcement capability with regard to contracts and the interim Whois policy. ICANN Org has an opportunity to earn some community goodwill and demonstrate strength and leadership by putting forth a robust compliance function.

BC Recommendation to the Board: This point dovetails with our above comment regarding strengthening registry and registrar contracts to the extent that deficiencies are not solely resultant from a lack of enforcement capability, but are also resultant from a lack of meaningful contractual language from which enforcement action can be taken by ICANN. To this end, we recommend that the Board initiate new negotiations of the Registry Agreement and Registrar Accreditation Agreement to address the important topic of DNS Abuse pursuant to Sections 7.7 and 7.4 respectively, with full input from, and transparency to, interested community stakeholders.

Voluntary trusted notifier programs. Trusted notifier programs have been productive in bringing to registry and registrar attention problems within the namespaces they govern. ICANN should explore the formal expansion of such programs as a feature of subsequent rounds.

This comment was drafted by Tim Smith and Andy Abrams.

It was approved in accord with our charter.