

# The ICANN GNSO “Business Constituency”



## ICANN Business Constituency (BC) Comment on Draft Framework from the Facilitated Dialogue on Closed Generic gTLDs 15-Jul-2023

This document provides input from the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

The BC appreciates the commitment of GAC, GNSO and ALAC participants to address the ICANN Board’s interest in establishing a Framework on Closed Generic gTLDs for the next round of applications. The BC was indirectly represented in this process through the CSG and understands the depth of discussions to develop the Draft Framework.

The BC understands that the Facilitated Dialogue participants are sharing this Draft Framework with the broader community to invite input on elements for which the community seeks additional clarification.

Early in this process, the BC shared a firm and specific position we developed on Closed Generics during the 2012 gTLD expansion<sup>1</sup>:

**The BC would be concerned about consumer deception and competitor exclusion if a single competitor in an industry manages a closed TLD where the TLD string is closely identified with the industry.**

For example, say a travel company or a hotel chain runs **.HOTELS** as a closed TLD -- not allowing competitors to register second level names, while also controlling content on domains such as search.hotels, eco.hotels, family.hotels, best.hotels, cheap.hotels, luxury.hotels, etc. It’s easy to see how the TLD owner could bias content and search results on those consumer information sites, without consumers being fully aware.

While the BC appreciates that the concern above has been partially adopted by Facilitated Dialogue participants, we believe there is need for clarification, as explained in our comments below.

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<sup>1</sup> Mar-2013 BC comment on Closed Generics, at <https://www.icannbc.org/assets/docs/positions-statements/bc-comment-on-closed-generic-tlds.pdf>

## The Application Process

3.a.	The applicant should provide detailed explanations to enable a thorough evaluation of its application. Abstract or generalized statements may not be sufficient for evaluation.
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We agree that the applications must contain no abstract or generalized statements. The prospect of an applicant being able to modify the intent of its closed generic gTLD due to vague criteria should not be accepted. We are interested to know if this was part of the rationale for the Facilitated Dialogue team's decision on this matter.

## Approach to a Baseline Understanding of Closed Generic gTLDs

For purposes of the Facilitated Dialogue on Closed Generic gTLDs, it was necessary for the group to have a shared understanding of concepts relevant to closed generic gTLDs. Bearing in mind relevant definitions found in the [Base gTLD Registry Agreement](#), Section 2.9(c) ("Affiliate") and Specification 11, Section 3(d) ("Generic String"), the group agreed that there are several other relationships and entities beyond the narrow definition of "Affiliates" that must be included as potential registrants and beneficiaries in a closed generic gTLD, depending on the operational model of the gTLD.

Specifically, the group identified (a) members of a trade association, where the trade association is the registry operator, (b) independent chapters that are members of a larger federation or organization<sup>1</sup> where that federation/organization is the registry operator, and (c) members of a consortium of similar organizations, where the consortium is the registry operator. The policy group that takes up the Closed Generics issue may identify additional relationships and entities. Please note, these additional categories would be their own sub-group (separate from Affiliates) that applies only to Closed Generic gTLDs. These should not impact any other types of new gTLDs including Open, Community, Geographic or other types of new gTLDs set forth in the [New gTLD Subsequent Procedures Final Report](#).

The BC appreciates the expansion of understanding about eligibility to apply and operate a closed generic gTLD, however, when talking about trade associations or a consortium of similar organizations, it needs to be recognized that there may be multiple such organizations for a single industry or focus area, and awarding the use of a generic name to one group may create consumer confusion and not meet the public interest. How would such a situation be addressed during the application process?

We also ask if the Facilitated Dialogue group intends not to permit a **single corporation** to apply for a closed generic gTLD? Our reading of the framework suggests that only **representative organizations** could fulfill the application criteria.

## The Application

4.a.	The applicant must also demonstrate how its closed generic gTLD will serve the broader public interest; for example, by providing a positive societal benefit or contributing to the general welfare and wellbeing of the public. <sup>3</sup> For clarity, this requirement will apply to all closed generic gTLD applicants, including those whose proposed closed generic gTLD is intended to serve a public interest goal(s) targeted toward a small intended segment of the public. The public interest goes beyond the commercial or individual interest of the applicant.
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In keeping with the need for use of a generic name to be clear to consumers, the focus on Public interest, which goes beyond commercial or individual interest of the applicant, is imperative.

5.a.	The applicant must provide information clearly describing the intended purpose, which must not be to solely exclude other parties from using the gTLD or solely serve the applicant's own commercial interests. The purpose must relate to the specific public interest goal(s) stated by the applicant in its application.
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The BC agrees that the granting of a closed generic gTLD must not exclude other parties that are engaged in the same scope of function. However, the framing in the draft using the word 'solely' stands in the way of accomplishing these goals. An applicant could easily satisfy this condition by simply asserting that their planned exclusion of competitors was not their 'sole' purpose in closing the TLD to registrations.

Moreover, even if the TLD is open to competitors to register names, the generic TLD operator can still confuse users by its unregulated use of "reserved" second level names. For example, the generic TLD operator can control content on domains such as search.TLD, info.TLD, eco.TLD, family.TLD, reviews.TLD, best.TLD, etc. It's easy to see how the TLD owner could bias content and search results on those consumer information sites, without consumers being fully aware that the content was controlled by a single competitor.

This concern is not addressed by requirements that competitors could not be prevented from registering names. However, concerns about biased content are arguably beyond the scope of ICANN and are rightly the concern of consumer protection authorities. Still, the application process should require a closed generic applicant to disclose the policies they would follow in managing reserved second level domains. And this disclosure would inform the public interest evaluations for the application.

10.	Demonstrate the requirement of representativeness OR of non anti-competitive behavior.	
10.a.	Track 1: For “representativeness”, applicants must demonstrate that the applicant represents all or a significant part of the businesses (or has their agreement) in the industry or group related to the closed generic term.	
	10.a.i.	This criterion can be fulfilled, for example, by the applicant being an umbrella organization of the industry in question.
	10.a.ii.	The application must show that significantly "interested parties," including competitors, have been consulted and engaged for input prior to submission of the application.
10.b.	Track 2: For “non anti-competitive behavior”, applicants must commit that its use of this closed generic gTLD will be consistent with principles of competitive neutrality <sup>4</sup> , non-discrimination <sup>5</sup> and transparency <sup>6</sup> . This commitment must be reflected in the registry operator’s contract with ICANN, which may be in the form of a Code of Conduct or as part of a Specification to the extent that one is developed to govern a registry operator’s use of a closed generic gTLD.	
	10.b.i.	This criterion builds on the requirements that applicants of closed generic gTLDs must state their public interest goal(s) and intended purpose for the gTLD, and the intended purpose(s) must not be to solely exclude other parties from using the gTLD or to serve the applicant’s own commercial interests.

<sup>4</sup> “Competitive neutrality” in this regard means that the applicant will not use its control of the closed generic gTLD to gain an advantage in the market or segment of the public toward which its use of the gTLD is directed, to the detriment of its competitors and other entities also operating in that market or sector.

<sup>5</sup> “Non-discrimination” in this regard means that the applicant will act fairly in respect of all third parties that also provide the same goods, information or services to the same target market or segment of the public, and will not exclude access to its goods, information or services on the basis of race, color, religion, sex, age, or other attribute generally recognized as protected categories or classes of people.

<sup>6</sup> “Transparency” in this regard means that the applicant will operate its closed generic gTLD in a manner consistent with these principles by establishing, publishing, and adhering to policies governing its provision of goods, services or information through the gTLD.

In 10.a, requiring the applicant to be representative of all or a significant part of the businesses in the industry or group (or has their agreement) is a step toward ensuring nobody is excluded. However, in cases where there are multiple industry groups, trade associations or consortia of similar organizations as outlined above, it is possible for an applicant to omit engaging with those that may oppose the applicant’s mission or scope. In so doing, the application does not meet the intent of this section. How can this be addressed as part of the application process?

In 10.b, it must be clear that the three criteria (competitive neutrality, non-discrimination, transparency) are not isolated in evaluation. While each is distinct, an applicant could violate one but pass on others. All three must be evaluated in each application.

13.	Identify any threats or risks that could reasonably be posed if the closed generic gTLD is delegated, and detail the specific mitigating actions that the applicant plans to take to minimize these threats and risks.
13.a.	Evaluators should review the threats and risks to competition along with the proposed mitigating actions and public interest goal(s) of the closed generic gTLD.

This appears to be more suited to Public Comment and intervention than to the applicant. An applicant could provide reasonable explanation to risks that do not reflect the ultimate impact of improper delegation of a gTLD. The intervention needs to have equal footing.

**The Evaluation Process**

19.	The evaluation of closed generic gTLD applications must be performed by a panel consisting of suitably-qualified individuals.
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We seek clarification of what a suitably-qualified panel looks like. It will differ with every applicant in every business or group. What is envisioned?

21.b.	While the scoring system should enable multiple paths for an applicant to succeed, some evaluation criteria may be weighted more heavily than others.
21.c.iv.	The representativeness of the applicant (#10.a. on page 5): For applications that follow the “representativeness” track (as opposed to the “non anti-competitive behavior” track) representativeness may be scored with a sole individual being on the lowest end of the scoring spectrum, and a transparent international organization with wide membership being on the highest end of the spectrum.

We note that the group is introducing a scoring system for 10.a which deals with representativeness.

Why has the group not introduced the same scoring system for 10.b to cover competitive neutrality, non-discrimination, transparency – each of which should be scored with anti-competitive behavior figuring prominently into the scoring?

## Contracting and Post-Delegation

Contracting & Post-Delegation	
24.	The Base gTLD Registry Agreement should also apply to closed generic gTLDs.
24.a.	This agreement can be supplemented by an additional Specification documenting the unique terms, conditions, commitments and obligations specific to closed generic gTLDs. In this regard, it may be helpful to look to the development and purpose of <a href="#">Specification 13</a> as a guide for a Specification that applies to closed generic gTLDs. The <a href="#">New gTLD Registry Code of Conduct (Specification 9) FAQs</a> document may also be helpful.

24.a suggests that the agreement ‘can’ be supplemented by additional Specification to document terms, conditions, commitments and obligations. The BC believes that commitments in a successful application ‘must’ be supplemented and adhered to throughout the operation of the gTLD.

We would also suggest requiring a prominent explanation on any closed generic websites, explaining which entities are included in this space so that users are aware that the gTLD does not allow all players in the relevant market. We firmly believe that this is a necessary transparency measure to avert potential consumer confusion.

### Concluding Comment and Question

This draft framework presents a very complicated process with multiple evaluation points that are highly subjective, such as “public interest” tests. We believe the proposed process would likely prevent any closed generics in subsequent rounds.

Question is, does the Facilitated Dialogue group *intend* for their process to prevent *any* closed generics?

If not, the Framework should be simplified to the point that a well-intentioned applicant has some hope of running the gauntlet of evaluations and objections.

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This comment was drafted by Tim Smith, Steve DelBianco, and Marie Pattullo.  
It was approved in accord with our Charter.