

## Council of Europe`s remarks

### on the Initial Report on the new gTLD Subsequent Procedures Policy Development Process

#### INTRODUCTION

The Council of Europe welcomes the efforts of the GNSO New gTLD Subsequent Procedures Working Group in elaborating the *Initial Report on the new gTLD Subsequent Procedures Policy Development Process* (Initial Report), which in its review of the Community Priority Evaluation (CPE) processes takes some of the issues raised by the Council of Europe in 2016 into account.<sup>1</sup>

The Council of Europe remains concerned, however, with continued insufficiencies in terms of general fairness, transparency and accountability in ICANN processes. It therefore wishes to build on its previous report and submit some proposals for further improvement of the CPE procedure, essential in allowing ICANN to introduce human rights and rule of law standards into its processes and bringing public interest goals into the centre of its policy making.

Thus far, human rights and rule of law perspectives were not given appropriate attention neither in the Initial Report, nor in *the CCWG - Accountability WS2 Final Report* of 24 June 2018<sup>2</sup>. While ICANN is a private-sector entity responsible for coordinating and ensuring the stable and secure operation of the global internet's systems of unique identifiers, with a specific mission as described in the Section 1.1(a) ICANN Bylaws, even private sector organisations have important responsibilities to respect and promote human rights.<sup>3</sup>

The Initial report provides an opportunity to pay attention to achieving public interest and sustainable development goals. This would require a genuine commitment to promote the interests of non-for-profit organisations or local communities in their competition for gTLDs against entities with strong commercial backgrounds. Below are the main concerns that the Council of Europe wishes to flag with the aim of supporting this process.

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<sup>1</sup> Council of Europe report DGI(2016)17 *Applications to ICANN for Community-Based New Generic Top Level Domains(gTLDs): Opportunities and challenges from a human rights perspective*, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>

<sup>2</sup> *CCWG - Accountability WS2 Final Report*, 24 June 2018, <https://cnso.icann.org/sites/default/files/field-attached/ccwg-acct-ws2-final-24jun18-en.pdf>

<sup>3</sup> See *UN Guiding Principles on Business and Human Rights*, [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf), as well as Council of Europe`s standardsetting document *Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries*, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680790e14](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680790e14)

## I. MAIN COMMENTS

### A. Fairness

There is a need to introduce safeguards strengthening general fairness and equality of arms standards within the ICANN decision making processes, as well as to recognise public interest goals going beyond purely commercial contexts. Some of these considerations appear in the Initial Report but they need to be reinforced. Should the ICANN community recognise the need to effectively promote diversity and the rights of underserved communities, providing facilitating environment for communities serving public interest goals, such an approach should be reflected in the ICANN policies and Bylaws, thus securing an equal playing field for all applicants.

The fairness-related issues that require further attention includes ascertaining the ICANN policies concerning human rights protection and promotion. It is to be noted that the notion “Global Public Interest” (GPI) is referenced in ICANN’s Bylaws under Article 1 Section 1.2 (b)(ii) referring to “Core Values” that should guide the decisions and actions of ICANN and further considered in the Initial Report. Yet, there is still little clarity as to what is considered by the ICANN community as GPI, and there are no safeguards within ICANN’s decision-making processes to protect GPI. It is advisable that the Final Report provides specific recommendations in this regard, taking into account human rights, sustainable development and corporate responsibility perspective.

Furthermore, the concept of “community” is too broad and not connected with GPI. Notably, there is no policy of prioritising communities genuinely serving public interest goals. Community applicants are not provided with equality of arms and accessibility safeguards. The ICANN multistakeholder, open and participatory model of governance should take into account the unequal bargaining powers of particular groups of stakeholders and offer a remedy to the observed inequalities once GPI are at stake.

Moreover, the existing safeguards against conflict of interests are too general and not sufficient. It needs to be underlined also that the gTLD community applicant or objector is not provided with an opportunity to present his or her arguments in person, and preferably in public. Finally, there are no quality requirements concerning justification of the panel opinion (such as Community Priority Evaluation – CPE expert determination). Experts with relevant background in community and human rights should be sitting on the panels that evaluate and examine applications at various stages of the process leading to the relevant gTLD allocation.

### B. Transparency

In its current format, the applicant once submitting an application is not provided with sufficient information regarding the time (both in terms of time required to complete the entire process and time deadlines for the various stages of the application process) and cost of the procedure (overall fees and costs). Such information, essential for non for profit, community applicants, should be easily and publicly accessible.

It should further be clear to community applicants and their members what criteria will be used in the selection process and in line with what scoring practice. The selection criteria provided in the gTLD Applicants Guidebook (AGB) seem to be too general and not always coherently interpreted, adding to the unpredictability of the outcome for the applicant.

The CPE panel's research supporting its findings or argumentation is not always adequately presented in the panel's determination.

The professional background of panellists and their affiliations should be entirely disclosed. There should also be a binding obligation to publish dispute resolution decisions with justification.

### C. Accountability

In the current procedure, CPE applications are considered by external contractors without clear affiliation to ICANN nor demonstrable commitment towards its public interest goals.

In addition, the current process does not appear to allow a substantial re-examination of the case. Even in the case of serious concerns regarding the interpretation of the Applicant Guidebook rules and ICANN Bylaws, there is no effective mechanism to appeal to an independent review board and reverse a faulty decision. There is no effective appeal mechanism. The mechanisms aimed at securing accountability within ICANN decision making such as Reconsideration Request, the Cooperative Engagement Process, the Independent Review Process or filing a complaint to the Ombudsman – cannot be regarded as substituting an appeal procedure.

The lack of responsibility of ICANN decision-makers, its staff, dispute resolution service providers (DRSP) and the DRSP's panellists for any wrongdoing is not consistent with due process rules.

The unclear attribution of responsibility for decision-making, such as in the case of CPE, based on expert determination provided by external contractors, further contributes to creation of the overall sense of insufficient accountability rules.

## **II. MORE DETAILED REMARKS AND PROPOSALS**

### **A. FAIRNESS**

Main fairness-related concerns are:

- the GPI are not adequately defined and protected within ICANN decision making processes;
- the concept of community is too broad and not connected with GPI;
- the absence of policies prioritising communities genuinely serving GPI;
- the community applicants are not provided with equality of arms and accessibility safeguards;
- the lack of sufficient safeguards against conflict of interests;<sup>4</sup>

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<sup>4</sup> For example, in case of the dispute resolution impartiality and independence requirements are to be established by relevant dispute resolution service providers, without clear criteria or oversight provided within ICANN procedures. The requirements provided in the AGB remain very general and basic. See Attachment to Module 3 -

- the applicant /objector/ respondent's lack of opportunity to present in person, and preferably in public, the arguments and responses to counter-arguments raised by competitor in the string contention, objector or respondent to objection;<sup>5</sup>
- the lack of quality requirements concerning justification of the expert determination.<sup>6</sup>

The proposed solutions include:

- (i) the identification of the Global Public Interest based on human rights law justifying specific procedures such as CPE. It is strongly recommended to clearly state which GPI ICANN intends to protect through its policies, Bylaws and their implementation. The list of GPI should include:
  - protection and empowerment of vulnerable groups or minorities based on historical, cultural or social components of identity, such as nationality, race, ethnicity, religion, belief, gender, culture, particular social origin or group, disability, age, or language;
  - promotion of pluralism, diversity and inclusion; the diversity of values, opinions, sources of information and social groups should be promoted;
  - protection of internet users and ensuring that their right to freedom of expression and freedom of peaceful assembly can be effectively enjoyed; facilitating a trusted and secure environment for all members of society;
  - promoting social cohesion, democracy and human rights standards;
- (ii) the "community" TLD category should be maintained, but reformulated. The precision of the scope of communities serving GPI that could benefit from the preferential CPE track should be narrower than it is today. The CPE procedure should be reserved for communities serving clearly defined GPI goals.

It seems appropriate that communities established around commercial enterprises or serving principally commercial goals should apply for gTLD strings under the general rules;

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*Objection Procedures of the AGB: New gTLD Dispute Resolution Procedure* art. 13 item (c) "All Experts acting under this Procedure shall be impartial and independent of the parties. The applicable DRSP Rules stipulate the manner by which each Expert shall confirm and maintain their impartiality and independence." See also sec. 3.4.4., second sentence AGB: "Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence."

Similar lack of precision concerning conflict of interest rules can be found in the other stages of examining gTLDs applications, including the evaluation or selection of the community applications; e.g. AGB, Module 2 – *Evaluation Procedures*, sec. 2.4.3.1 *Conflict of Interest Guidelines for Panelists*., The requirement (AGB, Module 2, sec. 2.4.3.1, p. 33, second bullet) that "each Evaluation Panelist to disclose all business relationships engaged in at any time during the past six months." does not secure against not immediately evident, intermediary in nature conflict of interest (see also the Council of Europe 2016 report *Applications to ICANN for Community-Based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*., op cit. pp. 41-43.

<sup>5</sup> See inter alia sec. 3.4.5. AGB "Disputes will usually be resolved without an in-person hearing. The panel may decide to hold such a hearing only in extraordinary circumstances."

<sup>6</sup> According to sec. 3.4.6. AGB refers merely to obligation to provide "The reasoning upon which the expert determination is based" that is not specified by additional quality criteria, e.g. that the reasoning should refer to all key aspects of the case and argumentation raised by the parties.

- (iii) the proposal to include a new category “not-for-profit or non-profit gTLDs” could also be considered together with the relevant procedures for gTLDs as well as specific rules on lowered application-related fees. Although it seems that not-for-profit organisations serving principally GPI could be qualified as “communities” anyway;
- (iv) the panel members examining Community Objections or dealing with CPE despite having relevant legal knowledge, understanding of ICANN Bylaws and procedures, should also have the necessary expertise concerning the broad spectrum of community and, more broadly, human rights;
- (v) ICANN rules should facilitate the application for gTLDs and post-delegation operations by communities serving GPI;
- (vi) variable fees reflecting ICANN’s recognized GPI should be strongly supported. Community Applicants should be entitled to benefit from much lowered fees, justified by their contribution to the realisation of GPI goals. Qualification as “Community Applicant” should be based on the evaluation of the contribution to achieving GPI rather than on strict definition criteria, considering ever-evolving and sometimes rapidly changing characteristics of “community” concept.  
The adequacy of such qualification might be checked within a quick look procedure. Enabling such an introductory step would allow applicant who cannot qualify as “Community Applicant” to modify the application and apply for a gTLD string under the general rules. Furthermore, the scope of contribution to a fulfilment of GPI should be a part of the selection process within the string contention CPE procedure.  
Overall fees and costs set at a level appropriate for commercial market players may prevent some communities to fill in an application for gTLD, with a detriment to promotion of human rights, access to information, knowledge sharing and attaining sustainable development goals. Not only should the application fees and costs be lowered, but also all subsequent fees and costs such as those including the cost of filing or responding to a community objection. These fees and costs should be established at the level accessible for the GPI-oriented communities;
- (vii) Applicant Support in the form of new gTLD evaluation fee reduction should continue, while other financial support such as related attorney fees or registry-level fees should be also considered (sec. 2.5.4.c.7 Initial Report). The other, non-financial support forms such as mentorship on management, operational and technical aspects of running a registry would also be of great help to many communities (sec 2.5.4.c.6 Initial Report);
- (viii) adversarial proceedings should be more widely used within string contention and dispute resolution procedures; notably enabling concerned parties to provide their arguments during a hearing (public hearing for Community and Non For Profit Applications). Parties should be provided with the possibility to respond to arguments raised by their opponents;

- (ix) justification of panel determination as well as of the final decision should be supported by more detailed reasoning fulfilling the fair process rules, explaining in detail key aspects of the case, as well as referring to the main arguments made by the Applicants;
- (x) providing stronger procedural safeguards to eliminate risk of conflict of interest with regard to evaluators, panellists and decision-makers dealing with gTLD applications, objections or other challenge procedures;
- (xi) the role of Independent Objector (IO) should be further strengthened and linked with defending GPI. The limiting of IO funding or the amount of objections filed should not be further considered (sec. 2.8.1.e.4 Initial Report). IO plays an important role in enhancing fairness of ICANN proceedings, defending interests of global Internet users. The important role of IO should not be diminished. IO is empowered to file objections against highly objectionable gTLD applications that would be contrary to interests of the public who use the Internet, to which no objection has already been filed. It seems that there is no need to enlarge the scope of grounds to file objections enumerated in the Applicant Guidebook (Limited Public Interest, Community Objection) – sec. 2.8.1.e.6 Initial Report. The proposal (sec. 2.8.1.e.5 Initial Report) to amend the rule, that absent extraordinary circumstances, the IO is not permitted to file an objection to an application where an objection has already been filed on the same ground, deserves support;
- (xii) At-Large Advisory Committee (ALAC) (sec. 2.8.1.e.10 Initial Report) should continue to be engaged in the protection of end users rights and be in the position to file a Limited Public Interest Objection (LPIO). In many cases, the end-users do not have enough resources or expertise to file a LPIO. It is important to make sure that their interests and rights are protected. The ICANN multistakeholder, participatory model of governance should take into account unequal bargaining powers of particular groups of stakeholders and offer a remedy to the observed inequalities once GPI are at stake. Thus, ALAC should be provided with necessary funds for this activity by ICANN also within subsequent procedures.  
The Work Track members made a valid point in noticing that ALAC, while being provided in 2012 with funds for filing LPIO, was not specifically tasked in the ICANN Bylaws to file LPIO.<sup>7</sup> This ALAC task follows on from ICANN Bylaws.<sup>8</sup> However, in order to avoid any doubts about ALAC being granted status to file LPIO, it would be advisable to clarify the ALAC's task in the also at the ICANN Bylaws;

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<sup>7</sup> The Initial Report on the new gTLD Subsequent Procedures Policy Development Process, pp. 177-178

<sup>8</sup> "The role of the ALAC shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate. The ALAC, which plays an important role in ICANN's accountability mechanisms, also coordinates some of ICANN's outreach to individual Internet users." - Article XII, Section. 12.2.d.(i) Bylaws For Internet Corporation For Assigned Names And Numbers, <https://www.icann.org/resources/pages/governance/bylaws-en/#article12>

- (xiii) the following mechanisms concerning objection procedures deserve support:
- Initial Report`s proposals 2.8.1.c.1-5 Enhancing transparency and access to information linked with requirement for more detailed guidance for panellists is of key importance. As regards “quick look” mechanism, frivolous objections lacking valid arguments to substantiate their submissions may constitute a considerable financial burden for Community Applicants responding to objections. Unequal access to financial resources may be a serious obstacle to some applicants. Therefore, it appears useful to enlarge the scope of use of the “quick look” initial evaluation mechanism.  
Providing applicants with the opportunity to amend an application or add public interest commitments in response to concerns raised in an objection (sec. 2.8.1.c. Initial Report) is also a valuable proposal;
  - it is legitimate to allow a concerned community to file an objection in respect to the other applicant for the same string provided that applicant has the possibility to answer to the critical comments within the Community Objection procedure (see sec. 2.8.1.e.13 Initial Report).  
It is useful to allowing direct competitors to provide ICANN community with all necessary information supporting their opinion that a given application should not be proceeded further or should not be proceeded further without accepting certain public commitments. There is a public interest in allowing all concerned parties to be heard;
  - the grounds for Limited Public Interest Objections (LPIO); it would be useful to extend the exemplary, non-exhaustive list of international law instruments (see sec. 3.5.3 AGB) to the following multilateral treaties having both regional and global impact: European Convention on Human Rights,<sup>9</sup> the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108),<sup>10</sup> Council of Europe Convention on Cybercrime (Budapest Convention),<sup>11</sup> Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention),<sup>12</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).<sup>13</sup> Increasingly these international agreements constitute a universal legal reference concerning human rights protection. Enlarging the exemplary list of international law instruments for human rights protection would facilitate decision making processes whether the application for a gTLD string is contrary to the general principles of international law for morality and public order;
- (xiv) Applicant`s Freedom of Expression: The Initial Report provides interesting considerations on the applicant`s freedom of expression that if realised (sec. 2.3.3.c.1 Initial Report) would have a positive impact on enhancing rule of law standards within ICANN. The detailed criteria for the

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<sup>9</sup> [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>10</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680078b37>

<sup>11</sup> <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561>

<sup>12</sup> <https://rm.coe.int/protection-of-children-against-sexual-exploitation-and-sexual-abuse/1680794e97>

<sup>13</sup> <https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e>

application's evaluation and string contention procedures, supported by specific implementation guidelines, would be helpful in the process of evaluation and dispute resolution. Yet it seems that the proposed framing of the subject is too narrow and does not focus on protection of the end-user's freedom of expression that which could be affected by ICANN decisions.

## **B TRANSPARENCY**

The main transparency-related concerns are:

- the lack of easily accessible information regarding the time-frame of the procedures leading to the allocation of a gTLD, as well as information regarding the overall fees and costs; the applicant submitting an application for gTLD cannot obtain information about how much time and money the overall procedure will require;<sup>14</sup>
- not sufficiently coherent interpretation of the AGB selection criteria and the scoring practice;
- the lack of sufficiently transparent presentation of the panel's research supporting its findings or argumentation;<sup>15</sup>
- the professional background of panellists and their affiliations should be entirely disclosed;
- the lack of clear obligation to publish dispute resolution decisions.<sup>16</sup>

All efforts should be made to reinforce clarity, predictability and transparency of the application process. The proposed amendments include:

- (i) introducing a clear and precise timeframe for particular phases of the application and challenge procedures, as well as informing the applicant about the expected duration of the process leading to allocation of the gTLD;
- (ii) providing interested parties, before filing the gTLD application, with a general estimation of fees and cost required by the whole procedure;

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<sup>14</sup> E.g. within objection proceedings, according to sec 3.4.7 AGB dispute resolution total costs are estimated after constituting the panel. Additional fees may be required for example, if the dispute resolution service provider receives supplemental submissions or elects to hold a hearing. The non for profit community gTLD applicant, being obliged to respond (and bear related fees and dispute resolution costs) to every objection raised separately, cannot estimate at the time of filling in the gTLD application whether the overall process will be financially feasible to bear. The same consideration remains valid within subsequent phases of the evaluation and string contention procedures.

<sup>15</sup> See inter alia FTI report to ICANN, *Compilation of the reference material relied upon by the CPE provider in connection with the evaluations which are the subject of pending reconsideration requests*, 13 December 2017 pp. 33-34: "Because the second final CPE report does not provide a citation in support of the referenced research conducted by the CPE Provider to verify and compare the referenced estimates, FTI analyzed the CPE Provider's working papers for the second .GAY evaluation to determine if the working papers reflected such research. Based on FTI's investigation, FTI observed that the CPE Provider's working papers did not reflect research undertaken in connection with the Extension sub-criterion for the second .GAY evaluation."

<sup>16</sup> According to sec. 3.4.6. AGB "Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website."



- (iii) ensuring transparency concerning qualifications of evaluators and panellists: a full disclosure in this regard should be required;
- (iv) ensuring that procedures, requirements and scoring rules are precise and detailed enough so that there is no need to provide additional interpretation guidance. AGB as “a roadmap for applicants, a guide for staff developing operational practices and procedures and a source of programme information for other interested parties” should be more precise and transparent, notably in terms of evaluation and selection criteria. The currently provided criteria are general and subject to case-by-case diverging interpretation. The AGB could be accompanied by specific implementation guidelines e.g. specifying the methodology of research aimed at verification of panel determinations and guidance concerning the scoring rules. Nevertheless, the principal criteria should be clarified within the AGB;
- (v) reinforcing access to information and documents;
- (vi) adopting a mechanism ensuring coherent and consistent interpretation of Applicant Guidebook and ICANN Bylaws,<sup>17</sup> reflecting GPI goals, unless a specific case clearly justifies a different interpretation approach;<sup>18</sup>
- (vii) the detailed justification within ICANN decision-making should be encouraged in every phase of the process. Therefore GAC Advice must clearly articulate its rationale (sec. 2.8.1.d.1 Initial Report);

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<sup>17</sup>As a complimentary measure, in order to ensure more harmonised, human rights based implementation of the ICANN rules, the introduction of the Predictability Framework and establishing a Standing Implementation Review Team for Subsequent Procedures should be welcomed. Predictability Framework should be based on human rights and rule of law framework,. The proposed changes into ICANN organization of internal operations, including tasking a Standing Implementation Review Team for Subsequent Procedures should facilitate making necessary corrections to ICANN policies and Bylaws application.

<sup>18</sup> The European Court of Human Rights (ECtHR) in its jurisprudence referred to the consistency of jurisprudence issue. The consistency of case-law is a value of high importance. One fundamental aspects of the rule of law is the principle of legal certainty which guarantees a certain stability in legal situations and contributes to public confidence in the courts – noted the Court in judgment concerning case Nejdet Şahin and Perihan Şahin v. Turkey, no. 13279/05, §57. Still, the caselaw development should not be hindered. ECtHR in a number of cases recognized need for a dynamic and evaluative interpretation approach (see e.g. Nejdet Şahin and Perihan Şahin case, ibidem, § 58; Lupeni Greek Catholic Parish and Others v. Romania, no. 76943/11, § 116). In order to establish whether divergences in case-law lead to a violation of the right to fair trial the Court develop a set of criteria (inter alia Lupeni case, ibidem, §§ 116-35:

- whether the divergences in the case-law are “profound and long-standing”;
- whether the law provides for mechanisms capable of resolving such inconsistencies (existence a law mechanism to overcome inconsistencies in the case-law);
- whether those mechanisms were applied and to what effect (use of a law mechanism to overcome inconsistencies in the case-law).

- (viii) GAC must operate in transparently; GAC Early Warnings should be issued only during the specific time period, the applicant should have an opportunity to engage in direct dialogue in response to such warnings and amend the application accordingly (see sec. 2.8.1.d.4 Initial Report);
- (ix) the impact of GAC Advice within gTLD application procedures, notably with regard to string contention should be specified (sec. 2.8.1.d-e Initial Report).

## C ACCOUNTABILITY

Main accountability-related concerns:

- the lack of responsibility of ICANN decision-makers, its staff, dispute resolution service providers (DRSP) and the DRSP's panellists for any wrongdoing;<sup>19</sup>
- the unclear attribution of responsibility for decision-making, based on expert determination provided by external contractors;
- the lack of an effective redress mechanism;
- the lack of an effective appeal mechanism.

The recommended solutions:

- (i) to eliminate the delegation of evaluation and dispute resolution tasks to external contractors in order to clearly attribute the responsibility for fair and adequate examination of each case in detail. It is highly unlikely to expect that ICANN Board members would devote the same amount of time as an evaluator or dispute resolution service provider panel members to examine each case. Therefore, it seems reasonable to entrust examination and decision power regarding raised objections to a dispute resolution entity established within ICANN's organization framework, while strengthening independency, accountability and transparency requirements. It is also strongly recommended to entrust CPE to the ICANN internal body;
- (ii) the lack of substantive appeal mechanisms in place within ICANN is a detriment to the fairness of the ICANN decision making processes. The introduction of a new, substantive appeal mechanism specific for the new gTLD Subsequent Procedures enabling the re-evaluation of would provide an important enhancement of rule of law standards within the ICANN decision making processes (sec. 2.8.2.c.1-4 Initial Report);
- (iii) a single dispute resolution centre within ICANN should be established for all processes, based on both substantive and procedural grounds (encompassing the existing accountability mechanisms). The dispute resolution should not be delegated to one of the existing arbitration centres, but built within ICANN's organisational framework. It would strengthen coherence of the dispute resolution,

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<sup>19</sup>According to sec. 3.4.4. in fine AGB "Neither the experts, the DRSP, ICANN, nor their respective employees, directors, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures."

as well as create a unique framework for any possible disputes and appeals, supported by arbiters equipped with necessary knowledge on ICANN procedures and familiar with established interpretation of Applicant Guidebook and Bylaws;

- (iv) the effective redress mechanism should enable appeal from a broad spectrum of decisions made within ICANN processes: e.g. qualification as a Community Applicant, Objections, Community Priority Evaluation. It should also embrace the post delegation dispute resolution mechanisms;
- (v) the new substantive appeal process should respect the fair trial standards, inter alia:
  - the right to adversarial proceedings, the opportunity for the parties to have knowledge of and comment on all evidence presented or observations filed, with a view to influencing a decision. A party to the proceedings must have the possibility to familiarise itself with the evidence, as well as the possibility to comment on its existence, contents and authenticity in an appropriate form and within an appropriate time-frame. The parties should have the opportunity to make known any evidence needed for their claims to succeed; it is for the parties alone to decide whether a document produced by the other party or evidence given by witnesses calls for their comments;<sup>20</sup>
  - the equality of arms implies that each party must be afforded a reasonable opportunity to present their case – including their evidence – under conditions that do not place them at a substantial disadvantage vis-à-vis the other party. It is inadmissible for one party to make submissions to a court without the knowledge of the other and on which the latter has no opportunity to comment. It is a matter for the parties alone to assess whether a submission deserves a reaction. The example of failure to follow the equality of arms principle includes the denial of legal aid to one of the parties depriving them of the opportunity to present their case effectively before the court in the face of a far wealthier opponent;<sup>21</sup>
  - the composition of the appeal panels should include experts with knowledge necessary to examine the specific case e.g. be it community rights or intellectual property rights. To encourage diversity of opinions, different perspectives and legal backgrounds, one person panels should be avoided;
  - reasoning of decisions; a reasoned decision shows the parties that their case has truly been heard. The justification should refer at least to the litigants’ main arguments and to respect the human rights and freedoms guaranteed by the international law;
  - reasonable-time requirement; right to a final decision on disputes within a reasonable time;

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<sup>20</sup> See European Court of Human Rights, *Guide on Article 6 of the European Convention on Human Rights– Right to a fair trial (civil limb)*, pp. 56-57, see inter alia points 287-292, [https://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)

<sup>21</sup> *ibidem* p. 57, see points 294-295

- independence and impartiality of the decision making within dispute resolution: strong procedural safeguards for decision makers independence and impartiality should be envisaged.<sup>22</sup>

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<sup>22</sup> See Guide on Article 6 of the European Convention on Human Rights– Right to a fair trial, *ibidem*, p. 41, point 202, European Court of Human Rights judgment in *Micallef v. Malta* case, no. 17056/06, § 93; “(...) According to the Court’s constant case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Fey v. Austria*, 24 February 1993, §§ 27, 28 and 30, Series A no. 255-A, and *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII).”