

SubPro ODP: Policy Question Set #5 - Predictability Framework

Policy Question | Applications Assessed in Rounds (Application Submission Periods):

These two questions focus on the role policy development can or cannot play during future rounds of new gTLDs. Specifically it is about the interaction of Topic 3 (Applications Assessed in Rounds), specifically Recommendation 3.7, and Topic 2 (Predictability Framework), specifically Annex E.

Annex E, Sections 2 and 3 detail the SPIRT's role if a policy-level issue arises during an ongoing new gTLD round; Annex E assigns to the SPIRT the role of recommending to the GNSO Council whether to initiate a policy development process to address such a policy-level issue.

Recommendation 3.7 states: "If the outputs of any reviews and/or policy development processes has, or could reasonably have, a material impact on the manner in which application procedures are conducted, such changes must only apply to the opening of the application procedure subsequent to the adoption of the relevant recommendations by the ICANN Board."

Questions on interplay of Recommendation 3.7 and Annex E.

A. If an issue occurs that requires a policy-level solution during an ongoing round, does the Council agree with the ODP team's interpretation that even if the SPIRT recommends to the Council to initiate a policy development process and the GNSO Council decides to follow that recommendation, as a result of Recommendation 3.7, any policy recommendations that result from such a process will not apply to the ongoing but only to future rounds?

Response

Yes. The GNSO and ICANN communities have been working for over a decade on reviewing the policies, procedures and implementation of the 2012 New gTLD Round and making recommendations based on the many lessons learned from the application round that introduced more than 1200 new gTLDs. Thus, the emergence of a (a) truly new policy issue that has not already been discussed or considered with respect to the application, evaluation, objection processes, AND (b) which requires a policy-level solution during an ongoing round, should be rare (if at all).

This is a very different consideration than whether the issue is important to certain persons or groups within the ICANN community, including a Review Team which has no mandate to develop ICANN consensus policy. Rather the community must ask itself whether: (a) it is truly a new issue that was not, nor could not have been, discussed and considered over the past decade of policy development work, and (b) it is absolutely necessary to have a solution to such issue apply in the then-current round. These must

also be balanced against the potential harm to applicants that have spent tremendous amounts of time, resources and money on their applications under the premise that no new policy would emerge, between the final approval of the Applicant Guidebook and delegation of new TLDs, impacting their proposed TLD and business model.

It is also important to consider the above question with Implementation Guidance 2.6 as well that acknowledges there may be emergency circumstances which will require ICANN org to take an action that may impact the New gTLD Program. In such a case, the action should be narrowly tailored to address only the emergency situation. The ICANN Board should notify all impacted applicants (if any) and the SPIRT within 24 hours after the emergency situation. The notification should include the nature of the emergency, the action taken (or anticipated action) in response to the emergency, as well as expected impacts on the New gTLD Program. That notification will be considered a referral to the SPIRT of an issue if the SPIRT elects to address that issue.

Therefore, there are mechanisms in place in cases of true emergencies for the ICANN Board to act if absolutely necessary.

B. Does the GNSO Council agree with the ODP team's understanding that in such an instance, where a policy-level solution is required to overcome an issue during an ongoing round, and the GNSO Council decides to initiate a policy development process (the outcome of which will apply to future rounds per Question A above), ICANN org will, if needed, develop a temporary operational solution that ensures the issue is addressed for the ongoing round? In such a scenario and consistent with Annex E Section 1b and 1c, the SPIRT "will have the option to collaborate with ICANN org as a solution is developed".

As stated above, the likelihood of a policy-level solution being required to overcome a truly new issue during subsequent rounds should be rare if at all. And when read in conjunction with Implementation Guidance 2.6, ICANN Org does have the ability in emergencies to take an action that may impact the new gTLD Program provided that the action is narrowly tailored to address only that emergency situation.

However, the Council wants to also highlight Affirmation 1.2 which states that "The Working Group affirms Principle A from the 2007 policy and recommends that the New gTLD Program must continue to be administered "in an ongoing, orderly, timely and predictable way." In its rationale, the SubPro PDP Working Group also explained, "A major theme that was repeatedly raised throughout the life cycle of this PDP was the need for balanced predictability for all parties involved. It is on this basis that the desire for an "orderly, timely and predictable" New gTLD Program is universally supported."

The Council also notes Recommendation 1 from the 2007 policy that states: "The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally,

therefore, no subsequent additional selection criteria should be used in the selection process.”

Therefore, in the unlikely event that a specific issue arises that must be resolved during that then-current round, but does not amount to an emergency, ICANN should collaborate with the SPIRT on a temporary operational solution for that round. The solution must be narrowly tailored to address only that specific issue and must also allow an impacted applicant to withdraw its application (pursuant to Recommendation 2.7) and receive a refund (under Implementation Guidance 2.8).