<div align="right">November 27th, 2018.</div>

Statement of the Non-Commercial Stakeholders Group on the
Final Report and Recommendations of the Competition, Consumer Trust,
and Consumer Choice Review Team (CCT)

The Non-Commercial Stakeholders Group (NCSG) welcomes the opportunity to comment on the final report and recommendations of the Competition, Consumer Trust, and Consumer Choice Review Team (CCT) dated 8 September 2018.

We understand that the purpose of this call for input is to gather community feedback to the recommendations that have been built into the final report by the CCT Review Team. The NCSG has carefully reviewed these recommendations and, before putting forward our comments, would like to recall the history of our long journey associated with this important work. In fact, this call for input follows and wishes to finalize the draft report[1] of the CCT Review Team that was opened for public comment back in March 2017. However, to reflect the results from the "Statistical Analysis of DNS Abuse in gTLDs" (SADAG report[2]) and to address costs to trademark holders (a flawed survey commissioned by a special interest group, the International Trademark Association[3]), the CCT-RT issued a new call[4] for public comments to seek feedback on updates made to its parking and consumer choice sections. Those two calls were intended to help build this final version we are honored to comment on.

The NCSG has consistently, and in good faith, put forward numerous evidence-informed contributions to that process. For ease of reference, our previous comments are listed here:

- NCSG document dated 15 January 2018 which commented on the new sections to the draft recommendations published in November 2017.[5] Our comments focused primarily on the recommendations in Section 2 (Safeguards), Section 4 (Consumer Choice) and Section 5.2 (Rights protection Mechanisms);
- NCSG statement submitted in October 2017 that offered input on the SADAG report[6] ; and

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[1] https://www.icann.org/public-comments/cct-rt-draft-report-2017-03-07-en
[2] https://www.icann.org/public-comments/sadag-final-2017-08-09-en
[3] https://community.icann.org/download/attachments/56135378/INTA%20Cost%20Impact%20Report%20revised%204-13-17%20v2.1.pdf?version=1&modificationDate=1494419285000&api=v2
[4] https://www.icann.org/public-comments/cct-recs-2017-11-27-en
[5] https://docs.google.com/document/d/1zvwTtxa4GGMll-OwAAqnuYYahxtff5qrOeMpUYPiuYQ/edit
[6] https://mm.icann.org/pipermail/comments-sadag-final-09aug17/attachments/20171005/f9a4dc6b/StatisticalAnalysisofDNSAbuseingTLDsSADAGReportNCSGComment-0001.pdf

- NCSG statement dated 20 May 2017 that provided detailed comments in response to the draft report published in March 2017.[7] Our comments focused on recommendations 6, 8, 9, 10, 13 to 21, and 23 to 42.

The NCSG is pleased to participate in this Public Comment, as it is another opportunity for us to check to what extent our concerns have been taken into consideration.

I.   About Us

The NCSG represents the interests of non-commercial domain name registrants and end-users in the formulation of Domain Name System policy within the Generic Names Supporting Organisation (GNSO). We are proud to have individual and organisational members in over 160 countries, and a network of academics, Internet end-users, and civil society actors, we represent a broad cross-section of the global Internet community. Since our predecessor's inception in 1999, we have facilitated global academic and civil society engagement in support of ICANN's mission, stimulating an informed citizenry and building their understanding of relevant DNS policy issues.

II.   General comments

The Final Report puts forward 35 recommendations to the community for its review, which is significantly less than the 50 that were in the initial draft. Although we salute the efforts by the team to reduce the number of recommendations, there is still room for improvement
The table below summarises the changes in the number of recommendations between the initial and final report, section by section.

Section	# Recs in the initial report	# Recs in the final report	Remarks
V: Data-Driven Analysis	1	1	No change / **No comment**
VI: Competition	7	6	Changes in number but not in substance: our comments on recs 6, 8, and 9 of the initial report still hold.
VII: Consumer	4	3	Changes in number but not in

Choice			substance: our comments on rec 10 of the initial report still hold
VIII: Consumer Trust	4	3	Changes in number but in substance: our comments on recs 13 to 16 of the initial report still hold
IX: Safeguards	26	15	Changes in number but not in substance: our comments on recs 17 to 21, and 23 to 42 of the initial report still, hold.
X: Applications and Evaluation Process	8	7	Changes in number but not in substance. **No comment**

Table 1: NCSG analysis of report recommendations

As our analysis reveals, almost all of the recommendations from the initial draft report remain, despite our multiple warnings on different aspects of the recommendations in 6, 8, 9, 10, 13 to 21, and 23 to 42 of the initial draft (in addition to the new findings A, C, and D regarding the safeguards mechanisms). Those recommendations match with recommendations 5, 6, 8, 9, 11 to 13, and 14 to 28 of the final report and our following comments will discuss them again.

Our concerns can be grouped into three categories:

1. the enormous and largely unwarranted data gathering recommendations that are presented with the report;
2. the fear that many recommendations push ICANN far beyond its limited scope and into the content-regulation arena;
3. the frustration that many Consumer Choice recommendations disproportionately favour one stakeholder, specifically the Intellectual Property Constituency, at the expense of the other Stakeholder Groups and Constituencies.

III.   Specific Comments

1.   Burdensome issues associated with data gathering

With regard to the issues and limitations surrounding data collection and analysis, we find the report's proposal to further delay additional market entry until systemic, costly, and potentially intrusive changes are made to data collection procedures to be unwarranted. In

particular, **we would like to question the "prerequisite" status of recommendations 9, 11, and 12**. As we understand the report, prerequisite means that these recommendations must be implemented before any new round of gTLD additions is conducted. Looking carefully at those recommendations and the substance of the report, we fail to see any logical or empirical justification for holding upmarket entry based on those recommendations.

Specifically:

> **Recommendation 5** makes the collection of secondary market data a "high" priority. While we understand the way in which secondary market prices can indicate the pricing power of incumbent TLD registries, we see no convincing explanation for how or why this should affect future rounds. Is the CCT-RT asserting that it needs to regulate the supply of new gTLDs based on secondary market price movements? The NCSG sees no reason for this unless ICANN thinks of itself as a cartel manager that needs to regulate supply in order to maintain the profits of incumbents at a certain level. Aside from this, the secondary market consists of private transactions amongst domain registrants and such data will be inherently difficult to collect unless intrusive regulatory requirements are placed on all registrants.

> **Recommendation 9** proposes to hold up further rounds until we "study" whether the costs of defensive registrations can be reduced. The NCSG does not understand the justification for this. Page 70 of the report already contains a perfectly adequate factual and quantitative analysis of the defensive registration problem. It shows that the cost, "f*or most trademark holders related to defensive registrations appears to be lower than some had feared prior to the inception of the program*." The report also describes the blocking services maintained by many new TLDs and states that "*we expect to obtain more information [about the use of new blocking services] prior to the publication of our final report*." There is no support in the data for halting new rounds. Nevertheless, following its longstanding habit of bending over backward for trademark interests while ignoring all other interests, the ICANN report goes on to say that "*a small fraction of trademark holders are likely incurring significant costs*.". We think that such costs are not really significant, otherwise; a survey or study is required to confirm that fact. In response, we would note that defensive registration across all gTLDs is not forced upon trademark holders by the mere existence of new gTLDs. The UDRP and other RPMs already (over)protect trademark holders from actual misuse of domains. Widespread defensive registration is a pre-emptive choice that certain large and wealthy trademark holders have made on their own. **The NCSG firmly rejects the idea that the entire domain name market needs to think of ways to lower the costs of this tiny special interest group before any new market entry is allowed**.

Recommendation 11 is another inexplicable call for ICANN to perform market research about what gTLDs are visited. Even if this data would be useful, we see less reason to hold up all new gTLDs applications until this kind of research is performed.

Recommendation 12 calls for ICANN to, "*create incentives to encourage gTLD registries to meet user expectations regarding the relationship of the content of a gTLD to its name; restrictions as to who can register a domain name based on implied messages of trust... and 3) the safety and security and users personal and sensitive information…*" The NCSG believes that the first two parts of this recommendation border on violating ICANN's mission and core values, as it starts pushing the organization over the line of domain name coordination and into content regulation. Furthermore, there are already sufficient legal and policy safeguards in place against misleading or fraudulent domains or privacy, such as data protection and data breach notification laws. The NCSG has always rejected the idea that ICANN should become an all-purpose regulator of the Internet; it can and should leave most consumer protection, competition policy, and content regulation problems to other more specialized agencies, and focus on its primary mission of coordinating the DNS.

Some of these prerequisite implications seem to imply that ICANN wants to set itself up as a central planner who will decide on the market which new gTLDs are needed and which are not. We do not believe that this is ICANN's proper role. ICANN should provide a stable coordination and regulatory platform for suppliers and consumers and should not try to pick winners and losers. Nor should ICANN try to dictate the kind of content that gTLD registries provide unless the registry makes specific contractual commitments as part of its registry agreement. In sum, we reject the "prerequisite" status of all of the recommendations in 9, 11, and 12 and warn about the substance of recommendations 5, 6 and 8.

2. Issues outside the scope of ICANN's mission

Recommendation 13 should be modified to be a question solely about whether registration restrictions are enforced by registries and registrars. To dig deeper into the term of "DNS abuse" – undefined in this question – could bring ICANN into an evaluation of copyright, trademark, hate speech, photographs of women without veils, and many other speeches and content-oriented material. The purpose of the question is whether the restrictions are enforced; limiting the recommendation to that should be fine.

Recommendation 14: We oppose this recommendation. The NCSG does not support this recommendation and strongly calls for its rejection. As we commented in earlier materials, and as the Review Team has heard many times before: it is beyond dispute that ICANN has the narrow and intentionally limited technical scope and mission "to ensure the stable and secure operation of the Internet's unique identifier systems." (Bylaws Article 1, Section 1.1.)

It is emblazoned in our new bylaws and extraordinarily clear in our post-transition mission that we absolutely will not -- as an ICANN Community, ICANN Board of Directors and/or ICANN Staff -- do what this recommendation demands and seeks.

We must not direct ICANN org to negotiate anti-abuse measures with new registries as such acts will bring ICANN directly into the heart of the very content issues we are mandated to avoid. Providing guidance, negotiation and worse yet, financial incentives to ICANN-contracted registries for anti-abuse measures are completely outside of our competence, goals, and mandates. Such acts would make ICANN the policeman of the Internet, not the guardian of the infrastructure. A role beyond our technical expertise; and a recommendation we must not accept.

Recommendation 15: We oppose this recommendation. In fact, while we understand the desire to integrate a new service, we are not certain why:

- ICANN does not have the power to act under its existing contracts and accreditation, and
- Whether we should be formally instituting a new, required Dispute Resolution Policy that relies for its primary input and trigger on private, non-transparent services that both registrars and registrants have alleged to be unfair.

We are also reluctant to engage the ICANN Community, with its increasingly overburdened volunteers, into the difficult, lengthy and time-consuming process of **defining another (unneeded) Dispute Resolution Policy**. These take enormous amounts of time and complicate its implementation.

Recommendations 17 and 18 are beyond the scope of this Review Team. The Whois 2 Review Team is currently finalizing its work; the GNSO Next Generation Registration Directory Service PDP Working Group has been terminated after more than two long years of discussions that led nowhere, and the Expedited Policy Development Process team is already working hard to review and revise the Temporary Specification. Adding another call for a review and study is an undue burden on the ICANN Community. We urge that this recommendation be dropped.

Recommendation 19: The word "abuse" seems to be a systemic response to security threats. If so, we have no objection, but this needs to be clarified.

Recommendation 20: Here, the term "abuse" appears to be used differently than in the prior recommendation. This "abuse" runs to content, speech, and expression – "the volume of reports of illegal conduct in connection with the use of the TLD that registries receive from governmental and quasi-governmental agencies … and from the public." Certainly, registries

should be working with law enforcement within their jurisdiction, and law enforcement should be working, as appropriate, across jurisdictions. But this recommendation puts ICANN squarely in the "content seat" as a monitor of content and speech. China seeking registries to take down pro-democracy websites as a violation of their criminal laws is not a complaint area for ICANN to enter. The same limits apply to complaints about websites involving hate speech laws which European governments may want taking down and the United States may expressly protect. ICANN is a technical policy organization; that is its expertise and the limits thereof. This recommendation highlights a perfect place for national governments to be involved, and international cooperation to be fostered. But for ICANN, this is an "abuse" recommendation outside the scope of ICANN and must therefore be deleted.

In general, the question "What is abuse"? should be clarified. Throughout many Review Team recommendations, we find this word without definition and the meaning is not clear.

Recommendation 21: Here, we would like to insist on the fact that detailed information on the subject matter of complaints shouldn't go beyond ICANN limited scope and mission.

Recommendation 22: As above, the question of what the Review Team seeks is key. Is the Review Team urging ICANN to investigate data and information gathered on individual websites, e.g., what information a doctor's office seeks from a patient submitting a medical question to her physician? Or how online retailers protect the credit card data they gather? Or how schools and universities protect the student data they make available to students and parents? If so, how does this recommendation fall within the scope and mission of ICANN which expressly is not involved in online content? If so, we strongly recommend deletion, If not, how can this be clarified to remove doubt?

Recommendation 24: Once more, this recommendation is beyond the scope and mission, limits, and competence of ICANN and the ICANN community. It must be deleted or modified to the scope and mission of ICANN. It deals with "cyberbullying" and we are afraid that it pushes again ICANN into content regulation area.

3.   **Issues associated with favouring more the Intellectual Property Interests.**

Some recommendations seem biased and do not take into account the interests of the whole community.

> **Recommendation 26** calls on ICANN to conduct, and regularly repeat, a "full impact study to ascertain the impact of the New gTLD Program on the cost and effort required to protect trademarks in the DNS - not once by regularly." If, as the Review

Team reports, "*Early indications are that the new rights protection mechanisms have succeeded in minimizing the level of defensive registration*" and "*preliminary indications are that increases in defensive investment by trademark holders have been less than feared by some prior to the launch of the program,*" how is this recommendation justified? Given the extensive work of the NCSG on the balance of trademark rights and fair use protections, free expression and legitimate parody, criticism and the rights of all to use basic dictionary words, geographic places, and common names, how is such a limited study in favor of one interest even fair? If this Recommendation remains,t, we ask that ICANN also conduct, and regularly repeat, a full impact study on trademark owners' abuse of rights protection mechanisms in ICANN policies to restrict free expression rights, and another full impact study to quantify the costs of these measures on domain name suppliers and consumers.

Furthermore, we echo again our response and concerns to Recommendation 9 above.

Recommendation 28 must be deleted. We suggest that such work and associated decisions be dealt with separately by the RPM WG

IV.   Conclusion

The NCSG thanks again for this opportunity to share its concerns regarding the recommendations for ICANN board review. We hope that our considerations would be taken into account in the interest of all the community. We salute all the efforts of the Review Team members towards this work and will be glad to collaborate with them again in the future.