

ALAC Statement to the Subsequent Procedures PDP Final Report

The At-Large Advisory Committee (ALAC), on behalf of the At-Large Community, offers its congratulations to the GNSO Subsequent Procedures Policy Development Process Working Group (“WG”) on the completion and delivery of its Final Report of 22 December 2020 (“WG Final Report”), and wishes to extend its gratitude for the all the work undertaken by members of the Subsequent Procedures PDP Working (“WG Members”) since 2016.

It is heartening to note that after close to 5 years of policy development work, the WG Members were successful in arriving at consensus on many recommendations and implementation guidance which are expected to steer implementation of Subsequent Procedures for an improved New gTLD Program. However, we are equally disappointed that the WG Members were unable to do the same for what we believe to be several key aspects of Subsequent Procedures.

On this basis, we are pleased to indicate our support for or have no objections to the recommendations and implementation guidance contained in the WG Final Report unless otherwise stated or qualified as set out below, noting however that the ALAC is not expressing any opinion on the WG’s recommendations or implementation guidance in respect of the topics of 6. RSP Pre-Evaluation, 10. Applicant Freedom of Expression, 16. Application Submission Period, 18. Terms and Conditions, 37. Registrar Non-Discrimination, 38. Registrar Support for New gTLDs and 39. Registry System Testing.

(1) DNS Abuse Mitigation

In respect of Recommendation 9.15, the ALAC maintains its position that new policy on DNS abuse mitigation must be put in place prior to the initiation of a new round of New gTLDs. While we agree in principle that the topic of DNS abuse should be dealt with in a comprehensive and holistic manner, and which addresses both existing/legacy TLDs and the new gTLDs to be delegated in the new/subsequent rounds, we disagree with the practice of pushing it off to another forum/PDP/etc.

We have seen periodic changes to the Base Registry Agreement through singular party-ICANN Org contract negotiations that incorporate incremental obligations as well as an incremental level of permissions which in general are beneficial to both sides, if not to everyone. We opine that these incremental obligations and permissions in the Base Registry Agreement for the operation of new gTLDs have been instrumental in inspiring registry operators of legacy TLDs to also adopt and take on similar (if not all) such obligations and/or permissions during negotiations for their Registry Agreement renewal.

Therefore, we opine that in declining to make any recommendations on DNS abuse mitigation for subsequent procedures, the WG is foregoing a valuable opportunity to incentivize existing registry operators in voluntarily adopting desirable changes to their Registry Agreements (including any provisions that affect their registrars) in order to bring about ultimate beneficial consequences to individual end-users.

The ALAC is also wary of a need for ICANN to not only gain more data, but the correct data, to be collected by registries and registrars in order to monitor and detect changes in not only the level of the DNS abuse but the types of DNS abuse (i.e. a changing DNS abuse landscape) and that the obligation to collect such data may evolve in scope and/or breadth over time. In this respect we should be exploiting every opportunity to introduce desirable changes in contracted parties’ obligations to do with DNS abuse mitigation.

(2) Enforceability of Public Interest Commitments (PICs) and Registry Voluntary Commitments (RVCs)

This comment applies to Affirmation 9.3, Recommendations 9.1, 9.4, 9.8, and Implementation Guidance 9.5, 9.6 and 9.7 (in respect of PICs), as well as Recommendations 9.9, 9.10, 9.11 and 9.12 (in respect of RVCs).

The ICANN Board has expressed concern that ICANN may end up enforcing contractual provisions that lie outside its remit. While the ALAC appreciates the need to minimize ICANN regulation that falls outside its remit, it should go without saying that all provisions in contract with ICANN must be enforced by ICANN Contract Compliance. Any provision ICANN does not intend to enforce should be removed from the contract.

The significance of PICs and RVCs, in particular, is that they are often added to the contract to address public interest concerns, whether expressed by the GAC, ALAC or SSAC. Absent enforcement of such provisions, these “commitments” are merely window dressing. Whatever the mechanism, contracted parties need a mechanism to make commitments to which they will be held. Such commitments should be expressed as explicitly and clearly as possible with ICANN Contract Compliance and ICANN Legal reviewing each of these provisions for enforceability, prior to any contract finalization for approval by the ICANN Board. If ICANN Contract Compliance or ICANN Legal finds any provision of a contract to be unenforceable, that provision needs to be rewritten for greater clarity and specificity to facilitate its enforceability.

The ALAC acknowledges that parties contracting with ICANN may rely on available or pre-arranged dispute resolution mechanisms should they wish to dispute the enforceability of a PIC or RVC provision in their contract, and that use of such mechanisms may result in a determination or ruling that a provision is indeed unenforceable by ICANN. In the event that such a determination or ruling of unenforceability (on whatever grounds) is served on ICANN, the ICANN Board must take action to remedy such unenforceability in 2 ways: (1) where feasible, to preserve the original intention of a PIC or RVC which led to that provision in the first place, and (2) if that provision that has been rendered unenforceable matches or is similar to provisions in other contracts, to enter into negotiations with relevant contracted parties to preserve that the original intention of such a provision in an agreeable manner.

(3) Closed Generics

With reference to No Agreement 23.1 and the absence of consensus policy recommendations by the WG on how to address Closed Generics – recommendations which the ICANN Board had asked for – the ALAC believes that ICANN Org has to suspend any processing or acceptance of any applications for Closed Generics until such time the GNSO provides consensus policy recommendations on how to address applications for Closed Generics which serve a global public interest. This is consistent with GAC advice to the ICANN Board, *"For strings representing generic terms, exclusive registry access should serve a public interest goal"* as contained in its ICANN46 Beijing Communique.

The ALAC strongly agrees that any future policy work on Closed Generics should involve experts in the areas of competition law, public policy, and economics and that it be performed by those in the community that are not associated with any past, present, or expectations of future work in connection with new gTLD applications or objections to new gTLD applications, because the absence such independence would prevent future work from producing an outcome different to the one which resulted from the WG.

(4) Applicant Support

While the ALAC does not object to the WG's recommendations for the Applicant Support Program (ASP), we do have grave concerns over omissions in the WG's recommendations.

The ALAC opines that all ICANN initiatives, and the ASP is no exception, require continuous evaluation, refinement and improvement. The only practical way to accomplish this is by setting measurable goals for each program. Evaluation of the ASP, by the Competition, Consumer Choice and Consumer Trust Review Team (CCTRT), after the 2012 round, judged it to be a failure because there were few candidates and no mentoring took place. The WG has made some recommendations to improve the program but absent specific goals for these efforts, there is no basis to judge their success. For example, a goal could be to have a minimum number of successful candidates for support that, in fact, delegate a new string. Another objective could be indigenous ownership of a certain percentage of new strings. While the actual details of the program might be considered "implementation," the objectives for the program are certainly a question of policy.

Despite availability of resources such as the 2011 Final Report of Joint Applicant Support WG, and the 2012 implementation of the ASP, the ALAC is extremely concerned that the insufficiency of fresh policy guidance by the WG on the ASP will impact the implementation work of a Dedicated IRT and the community's ability to influence necessary action by ICANN Org.

Our concern stems from the lack of guidance (or even direction) to address a risk of gaming, assessment of wilful gaming and penalties to deter the gaming, and development of the Bid Credit for Applicant Support qualifiers to support their participation in any auction (where this contention set resolution mechanism of last resort were to apply). In the case of ICANN Org, Recommendation 17.1 merely provides for ICANN Org to (yet again) facilitate the pro bono assistance program, while Implementation Guidance 17.14 does not compel ICANN Org to secure a larger ASP fund to meaningfully support a reasonable number of ASP qualifiers in the next round.

In light of this wide scope of work remitted to it, assurances for community participation in or input to this Dedicated IRT becomes more essential. In this respect, we would call for a priority for ALAC membership in the Dedicated IRT given that the ALAC was co-charterer of the Joint SO/AC Working Group on New gTLD Applicant Support (JAS WG).

(5) Auctions and Private Resolution of Contention Sets

The ALAC maintains its strong opposition to private auctions being allowed in Recommendations 35.2 and 35.5. We remain concerned about attempts to "game" the application process through use of private auction and share the ICANN Board's concerns on the consequences of shuffling of funds between private auctions. The ability for a loser to apply proceeds from one private auction to fund their other private auctions only really benefits incumbent registry operators or multiple-string applicants and clearly disadvantages single-TLD/niche applicants. We believe there should be a ban on private auctions, and that by mandating ICANN only auctions, the proceeds of ICANN auction can be directed for uses in public interest, as was determined through the CCWG on Auction Proceeds.

Recommendation 35.3 implies that use of a bona fide intent affirmation is limited to applicants who participate in auctions or private resolution mechanisms. If at all, this affirmation should apply to all applications, not just those that fall into contention sets. In any case, the factors for establishing a lack of bona fide intent are too subjective, and without deterrence through penalty, are ultimately just a mere attempt at "window dressing".

We also oppose the use of a second-price, sealed bid auction per Recommendation 35.4. In our opinion, this second-price, sealed bid auction compromise, while superior to status quo, remains inferior to the Vickrey auction solution in deterring speculative applications.

In respect of Recommendation 35.5, (apart from opposing private auctions) we do not agree with the protections for disclosing applicants under the Contention Resolution Transparency Requirements framework. We believe that full transparency of terms of any private resolution is absolutely necessary to gain data for program evaluation. All terms ought to be disclosed to ICANN Org but some may be subject to a non-disclosure commitment by ICANN Org where necessary, in order for all data to be captured to inform future policy work (through aggregate, anonymized data).

(6) Community Priority Evaluation (CPE)

The ALAC applauds the acceptance of many of the At-Large suggestions to reform and improve the CPE process, evaluation criteria procedures and guidelines through the inclusion in the WG Final Report of Affirmation with Modification 34.1, Recommendations 34.12, 34.13, 34.16, 34.17, 34.18, 34.19, 34.21, and Implementation Guidance 34.2, 34.3, 34.4, 34.5, 34.6, 34.7, 34.8, 34.9, 34.10, 34.11, 34.14, 34.15, 34.20 and 34.22. However, we believe that two of the Implementation Guidance still fall short in some respects.

Implementation Guidance 34.4 fails to address an unreasonable impediment to proving both “awareness and recognition of the community members” for CPE Criterion 1-A. While allowance has been made in respect of “recognition” to compel consideration the views of the relevant community-related experts, especially in cases where recognition of the community is not measurable, no similar allowance has been made in respect of measuring “awareness” where such measurement could also be prevented or impaired.

Implementation Guidance 34.12 falls short by not also stipulating that the shortlisting and selection of CPE provider(s) by ICANN Org be subject to community input as a proactive measure for the community to help ICANN Org select the most suitable CPE Provider for subsequent procedures.

(7) Geographic Names at the Top Level

While the ALAC are in general supportive of the WG’s Work Track 5 recommendations (particularly to adopt the 2012 AGB implementation relating to Geographic Name at the Top Level as new consensus policy), we remain concerned over the insufficient support within the community for the need to respect and take into consideration the voice of stakeholders beyond the ones who regularly participate in ICANN PDPs to future applications for strings matching many names with geographical meaning.

In particular, the ALAC reiterates its call for stronger preventive protection of Non-Capital City Names strings by requiring letters of support/non-objection irrespective of applicant’s declared use of the TLD, where the non-capital city meets specified criteria (eg. has 100k inhabitants, hosts an international airport per IATA list). Such preventive protection should also extend to such criteria-meeting non-capital city names, in ASCII, native script, in current and historical forms (eg. Kolkata/Calcutta).

The ALAC also reiterates its call for ICANN Org to provide a Notification Tool exclusively to participating GAC Members to inform them of any applications for strings matching names with geographical meaning submitted under specific conditions for matching.

Further, we are disappointed to note the lack of community-wide support for the provision by ICANN Org of an opt-in update system for interested parties to automatically keep them informed on application(s) for specified string(s).

(8) ALAC Standing in Community Objection

The ALAC reiterates its grave concern to the real possibility of being effectively excluded from filing Community Objections on the ground of a 'lack of standing' to file such objections. The ALAC strongly believes that any Community Objection that it files in future should be determined on the merits of the objection and not be subjected to procedural dismissal for 'lack of standing'.

The ALAC filed Community Objections in the 2012 application round against two applications for the <dot>HEALTH TLD. While the Dispute Resolution panellist who heard and determined those objections did not explicitly dismiss them for a lack of standing, the 2012 Applicant Guidebook (the 2012 AGB) contains confusingly contradictory provision which could render any Community Objection filed by the ALAC in future to be dismissed for lack of standing.

On the one hand, section 3.2.2 'Standing to Object' of the 2012 AGB provides that an established institution associated with a clearly delineated community has standing to object. On the other hand, section 3.2.2.4 provides that an established institution associated with a clearly delineated community is eligible to file a community objection but must still prove two elements to qualify for standing for a community objection. Thus, these two sections arguably conflict with each other when applied to the ALAC.

It is incomprehensible that the ALAC, while on the one hand, funded by ICANN Org to file objections, should have its Community Objections, which would be derived through a bottom-up participative process, be dismissed on the ground of a 'lack of standing' to file such objections. Having any of its Community Objections be dismissed on a 'lack of standing' would clearly not only constitute a waste of resources but a procedural impediment to the ALAC carrying out the task of voicing concerns through filing Community Objections. To enable any Community Objection that the ALAC files in future to be determined on the merits of the objection, the ALAC strongly recommends being given automatic standing to file Community Objections to avoid any risk of being procedurally dismissed for 'lack of standing'.

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