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ALAC Input on the Closed Generics Draft Framework

The ALAC appreciates the opportunity to comment on the Facilitated Dialogue on Closed Generic gTLDs Draft Framework. The ALAC further appreciates the extensive discussions, held as part of the Facilitated Dialogue as well as the experiment in “unpressured” consensus building. Unfortunately, it is the view of the ALAC that the resulting framework lacks sufficient intent and clarity to be operationally useful. While it is possible that a follow on PDP would add sufficient clarity, it is the view of the ALAC that more direction is needed from the framework to facilitate a useful discussion around implementation.

In the absence of such changes, the ALAC believes that a resultant policy may well allow and encourage just the type of closed generic applications that caused the concern during the 2012 round.

System Bias

Every system, or “framework,” has a built-in bias or default, to resolve “close calls” within the system. The ALAC believes that the bias, with regards to so-called “Closed Generics” should be against the monopolization of common terms by a single entity, particularly a commercial or commercially-led entity. The requirement that the applicant justify their proposal with a public interest is not an invitation to creativity but rather the expression that it should be the *exception* when such a string is granted. The ALAC believes that the risks, associated with such a gTLD, will outweigh the benefits in most cases. While the framework rightly points to language in the Subsequent Procedures Working Group Final Report, supporting the notion of predictability for applicants, it is the view of the ALAC that, all things being equal, the award of a generic string, for the exclusive use of one entity, should be denied. Such a system bias, if agreed to by the community, should be made explicit *and* predictable.

Burdensome Complexity

Ironically, the implicit bias of the proposed framework is towards large entities, with sizable legal budgets, ready to traverse the gauntlet of complex procedures, over applicants whose intention might actually be the advancement of the public interest. Any system, to be workable, needs to be sufficiently simple to be available to applicants of all types but in particular to communities and not for profit entities with long standing public interest missions. In its current form, the number of tests suggests that only the wealthy will attempt, much less succeed, in applying for a closed generic, which is quite the opposite of the intention of a public interest requirement. The proposed gauntlet provides, at best, only the *appearance* of public interest preservation.

Insufficient Clarity

While the notion of scenarios is discussed, the proposed framework would benefit from their more explicit use to highlight the intentions of the drafters. Instead, the framework often relies on vague, abstract or possibly overly legal definitions that simply postpone the discussion about validity. In particular, the distinction between representative organizations and those with no anti-competitive intent should be made clearer. One tool to express intent would be the use of specific hypotheticals. For example, a commercial entity that produces “safety” products should probably *not* be allowed to monopolize the generic term “.safety,” for its own use. While a public interest case could be made for a series of websites, focused on, for example, fire.safety, water.safety and traffic.safety, if such a series was ultimately a kind of advertising platform, for a single vendor, the ALAC would consider such a public interest benefit outweighed by the potential for unfair competition. This argument equally applies to other 2012 examples such as .book run by a specific large book seller, .carinsurance run by a specific car insurance company or .cruise run by a specific cruise ship line. On the other hand, a .disaster run by a consortium of disaster-relief organizations might well be considered in the public interest. A series of explicit hypotheticals would add more clarity to the framework, facilitate implementation *and* predictability of eventual applications.

Instead, in the absence of clear hypotheticals, the proposed framework would seem to imply a lack of clarity in the work of the facilitated dialog itself. Ultimately, it is likely that criticisms of the proposed framework are merely reflections of a convoluted consensus by the small team, rather than actual errors in the document. In the absence of clear intent, by the small team, a PDP would be challenged to propose a workable system that reflected those intentions.

Process Failings

The Facilitated Dialogue process was clearly challenged by the deadline imposed by the GNSO and Board. ICANN's Consensus Playbook encourages strategic deadlines but cautions using a deadline to force agreement when the group is not yet ready. Moreover, the Consensus Playbook strongly supports striving for full consensus, but makes it very clear that it must not be required. The process that the Facilitated Dialogue used evidently required full consensus. That, and the timeline, resulted in a long list of issues that were never fully discussed. This included issues which were summarily dropped despite strong support due to the proposal not being acceptable to some group members.

Conclusion

While the ALAC appreciates the intentions of the board and the efforts of the small team, a framework comprised of complex, yet vague evaluation criteria represents a kind of Pyrrhic victory, that has the potential to inspire results that are the opposite of the intentions of the majority of the community. The ALAC believes that the proposed framework is both too complex to be useful to a "typical" public interest organization and too vague to disallow the very kinds of anticompetitive outcomes that drove opposition to closed generics in the previous round.

In short, the small team should clarify its intentions, express a conscious bias, and clarify those intentions through the inclusion of explicit hypotheticals. Only then will it be possible to construct an exception-based framework which is open to the entire global interest community.