

Next Round of New gTLDs

ICANN Board Community Consultation on Implementation Framework for Content-Related Registry Commitments

Fifth Discussion with the At-Large CPWG - Finalizing the ALAC Comment

Justine Chew

ALAC Rep to the SubPro IRT

Former At-Large Liaison for SubPro

21 February 2024

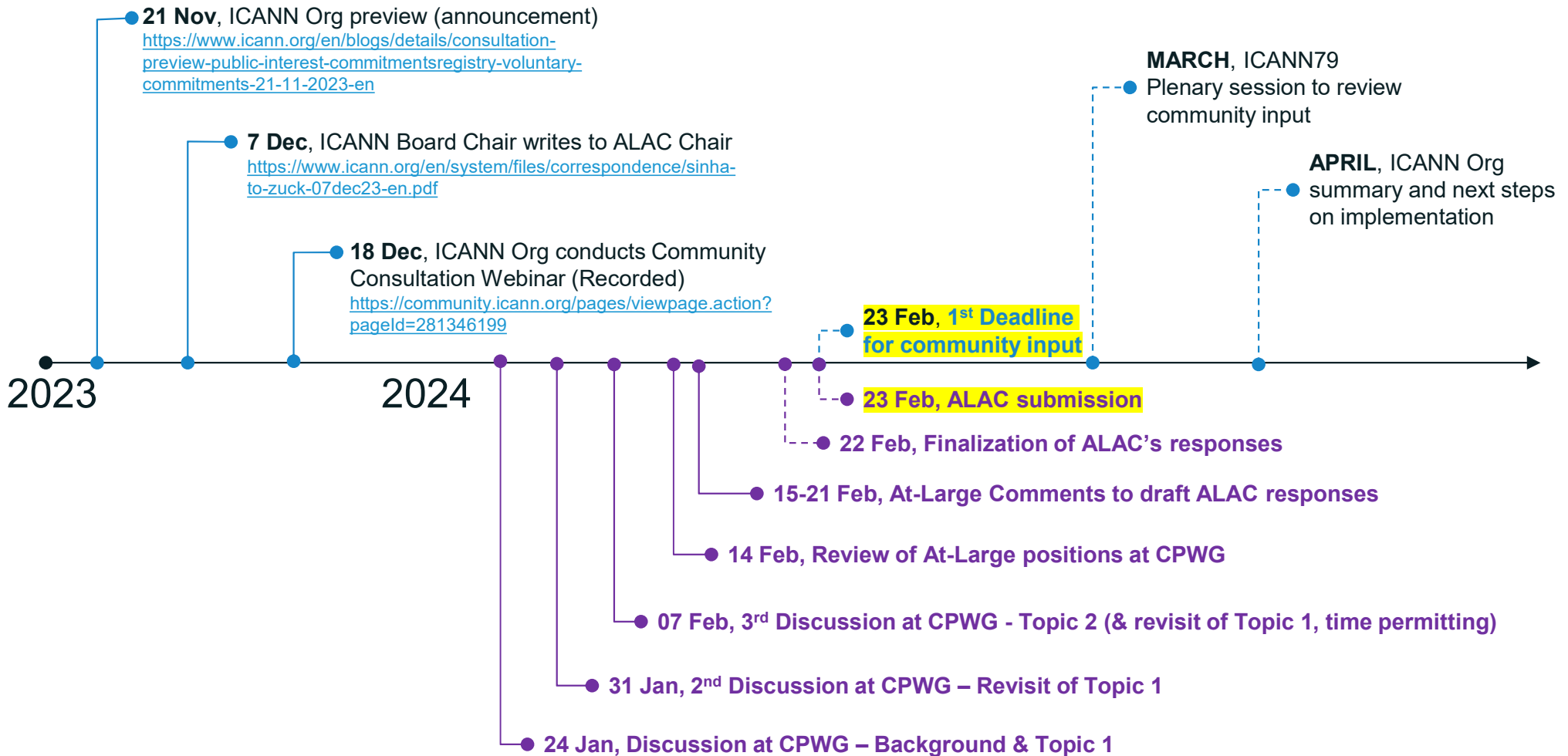


Agenda

- Timetable for Consultation & Input
- Preparing ALAC's input to the ICANN Board
 - **Consultation Topic 1 – Proposed Implementation Framework for Content-Related Registry Commitments**
 - **Consultation Topic 2 – Scope of Content-Related Registry Commitments in light of ICANN's Mission**
- Draft ALAC input
 - Board-given Googleform
https://docs.google.com/document/d/11SCDjxo9rWh5Lj7sPg_pqpqm8Sm-T6XZZsln9aZYUTE/edit?usp=sharing

Timetable for Consultation & Input

ICANN Board & ICANN Org



ALAC & CPWG

CONSULTATION TOPIC 1

Proposed Implementation Framework for Content-Related Registry Commitments

SUMMARY of ICANN Board's Consultation Topic 1

○ Highlights of Proposed Implementation Framework for Content-Related Registry Commitments

PUBLIC INTEREST COMMITMENTS	REGISTRY VOLUNTARY COMMITMENTS	COMMUNITY gTLD COMMITMENTS
<p>[1] 2012 Round Mandatory PICs, applicable to all gTLDs → RA</p>	<p>[3] RVCs in response to comments, objections, early warnings possible (i) during community comment period or (ii) up to contracting; may trigger Application Change Request procedure.</p>	<p>[4] Community gTLD Commitments</p> <ul style="list-style-type: none"> • Likely, includes possible restrictions on use and content • Will be evaluated • If does not pass evaluation, cannot be counted for scoring as part of CPE, and cannot be included in RA even if application succeeds
<p>[2] 2012 Round Safeguard PICs assessed after community comment to determine whether needed for RA</p>	<p>Requirements for RVCs:</p> <p>i) clear, objective, process-oriented approach for implementing & administering specific restrictions or requirements</p> <p>ii) independent third party approved by ICANN to periodically audit compliance and certify such compliance to ICANN.</p> <p>iii) If limited in time, duration and/or scope – must be clearly set out, using objective criteria for transparency and enforcement</p>	
<p>Enforcement: Contractual Compliance</p>	<p>Applicant-ICANN must agree on RVC language, else not approved</p>	<p>Enforcement: RRDRP, Contractual Compliance</p>
	<p>Enforcement: PICDRP, Contractual Compliance</p>	

At-Large Position Development

Q1. If ICANN and applicant cannot agree on final RVC language that is enforceable under the ICANN Bylaws and as a practicable matter, should the application be allowed to move forward without that RVC, even though the RVC was proposed as means to resolve an objection, GAC Early Warning etc?

- Yes or no?

Q2. Why yes or why no?

NO for Objection

1. Application **CANNOT** move forward without *satisfactorily* addressing an **Objection**.
2. Why? Objection is a formal process requiring substantiation / reason(s) for disapproval, so unlikely to be menial / frivolous
3. If RVC does not address Objection to ICANN's satisfaction in consultation with objector, then Objection procedure acts as "final arbiter"

But, YES for others ...

4. Application **CAN** move forward without RVC if rejected RVC language aimed at **a comment or a GAC Early Warning**.
5. Why? A comment does not have weight of an objection, could be menial / frivolous; could still lead to Objection if meritorious
6. Why? GAC Early Warning (unlike GAC Consensus Advice) serves as mere warning; could be resolved inter-partes, or if not, there's scope for an Objection

NOTES

ICANN must agree to RVC language – irrelevant whether applicant has good intentions – contract law practice – ICANN won't include things it does not intend to enforce.

Final arbiter of RVC acceptability & "practicable" – Board, ICANN Legal, Compliance

At-Large Position Development

Q3. Should all applicants that propose RVCs and Community gTLD commitments be required to designate a third party to monitor compliance, regardless of whether or not the commitments relate to the contents within an applied-gTLD?

○ Yes or no?

Q4. Why yes or why no?

YES

1. Too subjective to determine if something is content-related or not, hence easier to have **blanket practice for requiring** applicant proposing RVC to also “designate” third party compliance monitor

2. **Needed for Community gTLD commitments** – these will invariably have “content use and restriction” as part of application anyway

3. Blanket practice may still preserve not forcing ICANN to monitor compliance or regulate content. How?

BUT ...

4. Subjectivity ... too general to conclude every RVC requires a third party monitor, ... possibly unfair, too demanding.

5. Too hard to establish community-wide standard as arbiter

6. So, propose that:

- (a) All applicants be required to **identify (and possibly designate) third party monitor** for any RVC; and
- (b) **Contractual Compliance be asked to say whether monitoring of an RVC is beyond them, with ICANN Board as final arbiter on use of designated third party monitor**

7. Some concerns on “reliability” of applicant-proposed third party, even though ICANN-approved, since paid by applicant; *an alternative: appoint well regarded, non-ICANN paid community members for role?*

At-Large Position Development

Q5. Are there changes that should be made to proposed implementation framework?

- Yes or no?

Q6. If yes, what changes should be made, and why?

YES, 1st CHANGE: FLEXIBILITY

1. Require applicants to **identify (and possibly designate)** third party monitor for any proposed RVC

2. But retain flexibility for ICANN to determine whether a third party monitor is required by examining the RVC and deciding whether Contractual Compliance has capacity and capability to monitor so long as not regulating content and minimizing risk of losing an IRP etc.

YES, 2nd CHANGE: CREDIBILITY

3. How would ICANN org assess and approve a third party monitor – credibility, reliability?

YES, 3rd CHANGE: PRESERVATION

4. Must be a way to disallow / prevent an RVC which gets into RA from being changed / eroded by applicant, RO or successor, to disregard “issue” it sought to address, esp. if “issue” is still live eg a moratorium

5. Application Change Request procedures, RA amendment public comment proceedings are community-resource intensive – is there a better way?

6. Ultimately, ability to change RVC has to make sense - balancing public interest vs commercial feasibility.

At-Large Position Development

Q7. Are there specific improvements to be made to the PICDRP and RRDRP to ensure their effectiveness as dispute resolution mechanism for PICs and Community gTLD Commitments?

- Yes or no?

Q8. If yes, why?

YES TO PICDRP	YES TO RRDRP?	QUESTIONS
1. Currently, PICDRP requires that the person filing the dispute must show they have been measurably harmed . That may render a PIC/RVC effectively unenforceable / rather useless.	3. More clarity in certain terms used in RRDRP would be beneficial – consider references or hyperlinks. <ul style="list-style-type: none">• “Established institutions”• “Defined community”	Awareness
2. PICDRP should be modified to also allow complaints against any alleged PIC/RVC violation on the ground of foreseeable harm to complainant or to third parties .	4. Should RRDRP be modified to also allow complaints against any alleged RR violation on the ground of foreseeable harm to complainant or to communities?	Reviews – how, when?

Q9. Any further comments on the proposed implementation framework?

CONSULTATION TOPIC 2

Scope of Content-Related Registry Commitments in light of ICANN's Mission

ICANN Board's Consultation Topic 2 ^{1/2}

Q1. Are there types of content restrictions in gTLDs that could be proposed by applicants that ICANN must accept as a matter of ICANN Consensus Policy?

○ Yes or no

Q2. Why yes or why no? If yes, identify with specificity, types of content-related commitments that we believe must be permitted.

YES

1. Where applicable content restrictions are formulated to implement the **Category 1 Safeguards for strings deemed to be applicable to highly sensitive or regulated industries** per NGPC Framework and SubPro Recommendation 9.4.

2. Where ICANN org and an applicant agrees on language of a commitment as being enforceable and as a practicable matter, **provided that ICANN is not required to adjudicate whether the applicant / registry operator is in compliance or not.**

3. Community gTLD commitments will naturally involve possible restrictions on use and content since that is an inherent nature of community management, and the **practice of having appropriate third party monitors for compliance should continue.**

4. ICANN does not exist in vacuum – global nature means still impacted by extra-territorial laws; court orders; laws trumps Bylaws.

5. In all, as long as these content restrictions **do not require ICANN to adjudicate compliance and ICANN is in a position to enforce the outcome of any arms length third party adjudication.**

ICANN Board's Consultation Topic 2 ^{1/2}

Q3. Are there any types of content restrictions that ICANN should not enter into, considering scope of ICANN's Mission?

○ Yes or no

Q4. Why yes or why no? If yes, identify with specificity, types of content-related commitments that we believe should not be permitted.

YES

1. Any type of content restrictions that the ICANN Board deems as requiring ICANN to adjudicate whether the applicant / registry operator is in compliance or not.

ICANN Board's Consultation Topic 2 _{2/2}

Q5. Do we agree that ICANN must move forward with a Fundamental Bylaws change to clarify ICANN's contracting remit regarding content-related commitments?

- a. **No.** ICANN should not accept any content-related RVCs or Community gTLD commitments, so no Bylaws amendments required
- b. **No.** While ICANN must accept, agree to, enter into and enforce content-related RVCs or Community gTLD commitments, no clarification to the Bylaws is required for ICANN to perform this
- c. **Yes.** ICANN must accept, agree to, enter into and enforce RVCs or Community gTLD commitments, and ICANN must move forward with a Fundamental Bylaws change to clarify its contracting and enforcement remit regarding content-related commitments

Q6. Explain choice of answer in Q5.

Choose **option c** with crucial proviso

1. Qualify selection of option c:

- (a) **Some opted for option b** on basis that as long as ICANN Board deems a content-related commitment as NOT requiring ICANN to adjudicate whether the applicant / registry operator is in compliance or not, then that's keeping ICANN Bylaws, so, no Fundamental Bylaws change needed.
- (b) **Others opted for option c** in the event ICANN org obtains legal advice which counsels the need for a limited Fundamental Bylaw change to make patently clear that such change would protect ICANN from challenges in enforcing content-related commitment violations not adjudicated by ICANN. Difference in interpretation across Community necessitate clarification by way of legal advice.

Q7. Any additional comments or info that's critical to inform this community dialogue concerning content-related commitments?