

Community Consultation on PICs/RVCs

Introduction

When adopting the consensus policy recommendations concerning Public Interest Commitments (PICs) and Registry Voluntary Commitments (RVCs) [on 26 October 2023](#), the ICANN Board directed the ICANN Interim President and CEO or her designees to initiate and facilitate a Board level community consultation before starting the implementation process. The purpose of this consultation is to ensure that the framework for implementing these recommendations remains consistent with the ICANN Bylaws

To that end your group is asked to (a) review the proposed [implementation framework](#) document which proposes a path for implementing these commitments in the New gTLD Program: Next Round; and (b) answer the questions below Your response to these questions is requested by 23 February 2024 to support a plenary session on PICs/RVCs at ICANN79 Puerto Rico from 02-07 March 2024.

The Board understands that this timeline may be ambitious. Should your group require additional time, the Board kindly requests your submission be received no later than 31 March 2024

Should you wish to submit additional documentation to support your responses or need further assistance with the form or responses, please contact [REDACTED]

By submitting my personal data, I acknowledge that my personal data will be processed in accordance with the [ICANN Privacy Policy](#) and [ICANN Cookies Policy](#) and agree to abide by the electronic [Terms of Service](#).

The following demographic information must be included with your answers to ensure that responses to this consultation are transparent and associated with the correct community group

Email *

[REDACTED].....

Please provide your name *

[REDACTED].....

On behalf of which ICANN community group are you submitting this written input? *

Intellectual Property Constituency (IPC) ▼

Consultation Topic 1 *

1. In its [Second Clarifying Statement](#), the GNSO Council said that with respect to Registry Voluntary Commitments (RVCs) both ICANN org and the applicant must agree that a proffered commitment is clear, detailed, mutually understood, and sufficiently objective and measurable as to be enforceable.

Question: If ICANN and the applicant cannot agree on final commitment language that both ICANN and the applicant agree is enforceable under the ICANN Bylaws and as a practicable matter, should the application be permitted to move forward without that commitment, particularly in circumstances in which an applicant has proposed a commitment as a means to resolve an objection, Governmental Advisory Committee early warning, etc?

Yes

No

2. Please explain your answer to question 1 above. *

It is not really possible to answer this question with a simple Yes/No that applies to all circumstances.

Where the RVC is proposed in an effort to address a concern with the TLD application, but the application has not been rejected, then lack of agreement on the wording of the RVC should mean that the application can proceed to whatever the next step in the process is. For example, in the case of:

- An objection which has not yet been decided: the objection process would continue to a decision;
- GAC early warning: the application would continue, but might then be subject to formal GAC advice, or to an objection process;
- GAC advice: It is the responsibility of the Board to consider that GAC advice and make its own independent determination of whether to accept it.

In a case where the TLD application has otherwise already been rejected, for example where a successful objection has been brought, and the proposed RVC is an attempt to address the concerns leading to that rejection, then a failure to find an acceptable form of RVC likely would mean that the application cannot be permitted to move forward.

We do have concerns about the proposed requirement for Org and the Applicant to reach agreement on the final commitment language, given Org's extremely conservative approach to interpretation (including of the Bylaws language itself resulting in this consultation) and demonstrably low tolerance for any risk to ICANN. There must at a minimum be an obligation that Org will not unreasonably refuse to agree to such language and that negotiations will be conducted in good faith, diligently and without undue delay. The usual Bylaws-mandated accountability mechanisms would of course also be available.

3 Should all applicants that propose registry voluntary commitments and community gTLD commitments be required to designate a third party to be charged with monitoring the registry operator's compliance with those commitments, regardless of whether or not the commitments relate to the contents within an applied for gTLD? *

Yes

No

4. Please explain your answer to question 3, above. *

1. There is a need to distinguish between the approach adopted for TLDs which apply currently-existing PICs, those with RVCs and that for Community TLDs. In many cases the operator of a Community TLD will be the industry body associated with the community in question, or otherwise be the best-placed to determine whether restrictions, such as to eligibility and acceptable use, are being met.
2. This consultation arises because of perceived concerns that registry restrictions that relate to website content may be outside of ICANN's remit under the Bylaws. If a third party is to be designated to monitor for compliance, then this should apply only to RVCs that relate to content and not to RVCs that relate to matters which do not give rise to the Bylaws concern, and thus for which ICANN ought to monitor for compliance. For example, registrant eligibility criteria are not a "content" issue.
3. Under the grandfathering provisions in the ICANN Bylaws (s1.1(d)), any PICs adopted into registry agreements before 1 October 2016 may not be challenged as being in violation of ICANN's Mission. Such contracts may be renewed, and new contracts on terms which do not vary materially may be entered into. Future proposed RVCs which do not vary materially from "grandfathered" PICs can be enforced by ICANN without risk of being outside of the Bylaws, since they are specifically permitted under the Bylaws, even if these relate to "content".
4. For the avoidance of doubt, SubPro's recommendations on Topic 9, which all received full consensus or consensus from the community working group and were adopted by the GNSO Council, make it clear that the community supports and expects that these PICs (in particular the mandatory PICs in Spec 11(3) and PICs associated with GAC Category 1 and 2 Safeguards) are indeed carried forward into future rounds and enforced by ICANN.
5. To the extent that there are new RVCs, which have not been grandfathered under the Bylaws, and which do "regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry," then an independent third-party auditor may serve a role in helping to ensure compliance by the registry operator and highlighting non-compliance. We believe it may be preferable, including being more efficient and uniform, for ICANN to seek third party expertise, rather than tasking individual registries with doing so.
6. Any RVC from a registry operator must include a commitment by that RO to enforce. ICANN's role in ensuring compliance is then to hold the RO to that commitment to enforce, under general principles of contract – not to enforce against third parties itself. This is complemented by ensuring any determination resulting from a relevant dispute resolution process (DRP) is given effect. Such DRP would make the determination on whether the registry operator is in compliance with its commitments and/or propose mitigation or remediation, and ICANN's role then would be to enforce the decision. We agree that the PICDRP/RRDRP can serve this function. This is not ICANN acting to "regulate (i.e., impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry".
7. If third party auditors are required, ICANN will need to consider how this applies to an Applicant Support applicant, who may not have the resources for this.

5. Are there any changes that should be made to the proposed implementation framework? *

Yes

No

6. If your answer to question 5 is "yes," what changes should be made, and why?

Revise the requirement for independent third party auditing in Framework para B(c)(ii) to address the points made in response to Q4 above

7 Are there any specific improvements that should be made to the dispute resolution processes utilized in the 2012 round (the Public Interest Commitments Dispute Resolution Procedure and the Registry Restrictions Dispute Resolution Procedure) to ensure that these processes provide an effective mechanism for the resolution of disputes concerning the relevant commitments? *

Yes

No

8. If your answer to question 7 is "yes", please explain your answer.

A number of previous suggestions have been made by various groups, including the IPC, BC, and individual stakeholders, regarding improvements to the Public Interest Commitments Dispute Resolution Procedure (PICDRP) in particular. Some of these have been captured in the New gTLD Subsequent Procedures Final Report ("Sub Pro Final Report"):

Recommendation 33.2: For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.

Rationale for Affirmation 33.1 and Recommendation 33.2: The Working Group believes that post-delegation dispute resolution procedures continue to be appropriate mechanisms to provide those harmed by a new gTLD registry operator's conduct an avenue to complain about that conduct. The Working Group believes, however, that in support of transparency and predictability, clearer and more detailed documentation for these procedures should be published.

Recommendation 36.4: ICANN must add a contractual provision stating that the registry operator will not engage in fraudulent or deceptive practices. In the event that ICANN receives an order from a court that a registry has engaged in fraudulent or deceptive practices, ICANN may issue a notice of breach for such practices and allow the registry to cure such breach in accordance with the Registry Agreement. Further, in the event that there is a credible allegation by any third party of fraudulent or deceptive practices, other than as set forth in above, ICANN may, at its discretion, either commence dispute resolution actions under the Registry Agreement (Currently Article 5 of the Registry Agreement), or appoint a panel under the PICDRP. For the purposes of a credible claim of fraudulent or deceptive practices the reporter (as defined by the PICDRP) must only specifically state the grounds of the alleged non-compliance, but not that it personally has been harmed as a result of the registry operator's act or omission.

In formulating Recommendation 36.4, "ICANN must add a contractual provision stating that the registry operator will not engage in fraudulent or deceptive practices. . ." the Working Group discussed two options for implementing the recommendation: the addition of a PIC or a provision in the Registry Agreement. A new PIC would allow third parties to file a complaint regarding fraudulent and deceptive practices. ICANN would then have the discretion to initiate a PICDRP using the third-party complaint. If a provision regarding fraudulent and deceptive practices would be included in the RA, enforcement would take place through ICANN exclusively. The Working Group did not come to an agreement on this issue.

We continue to endorse these high-level recommendations regarding the PICDRP and related comments concerning updates to the base RA. Concerning recommendation 36.4, we believe the referenced RA provision should be incorporated into the base RA as a PIC, with enforcement by ICANN Compliance or by third parties via the PICDRP.

In addition to the above, there are a number of more specific improvements to the PICDRP that are suggested in the complaints submitted to the ICANN Complaints Office in response to the handling of the specific PICDRP case involving the .FEEDBACK registry. These are recounted in the complaints themselves, and discussed in the Complaints Office response, all available at <https://www.icann.org/complaints-report> (see Complaint Nos. C-2018-00004 - C-2018-00010 and ICANN Response). Many, if not all, of the PICDRP-

related recommendations in the Sub Pro Final Report were based on these issues and the experience of the complainant/reporter in that particular PICDRP case. And again we endorse the specific updates to the PICDRP that were identified in the course of that process.

In particular, we highlight the importance of ICANN imposing meaningful remedial measures or other consequences where violations of PICs have been found in a PICDRP decision. We question whether it is appropriate for ICANN and the registry operator to determine, solely among themselves, the nature and scope of such measures and whether they are sufficient to address the violations identified by a PICDRP panel. We suggest that the PICDRP itself should be updated to include a procedural framework affording an opportunity for input from or oversight by the PICDRP complainant and/or panel itself before ICANN issues a final determination that any such remedies are sufficient and thereby formally closes the case.

Many of these issues – particularly in terms of adequate remediation of PIC violations – were also highlighted in the subsequent PICDRP case involving the .PHARMACY TLD.

We note that some updates to the PICDRP have already been made that address some of the previous comments (as reflected in the redline PICDRP version effective February 1, 2020), but we believe additional review and updates are still warranted.

9. Please provide any further comments you wish to share concerning the proposed implementation framework.

Consultation Topic 2



1. After the launch of the 2012 round of the New gTLD Program, and as part of the 2016 [IANA Stewardship Transition](#), the ICANN Board adopted new community-developed Bylaws that specifically define the scope of ICANN's Mission. The restated Mission could impact ICANN's ability to enter into and enforce content-related registry commitments that are contemplated for inclusion in future Registry Agreements.

The ICANN Board is concerned with proceeding to permit content-related commitments to be negotiated into Registry Agreements if there is significant potential for ICANN's ability to negotiate and enforce those commitments to be challenged as beyond ICANN's Mission.

With this background, the Board seeks your input concerning the scope of content-related Registry Agreement commitments that ICANN should permit registry operators to enter into pursuant to the SubPro PDP Working Group recommendations, taking into account the scope of ICANN's Mission.

Question: Are there any types of content restrictions in gTLDs that could be proposed by new gTLD applicants that ICANN must accept for inclusion in future Registry Agreements as a matter of ICANN Consensus Policy?

To facilitate your consideration of this issue, Appendix 2 to the consultation memo includes examples of commitments from 2012 round Registry Agreements so that the community can better understand the types of commitments that could be proposed by new gTLD applicants in the future.

Yes

No

2. Please explain your answer to consultation topic 2, question 1, above. *

If your answer to question 1 is "yes", please identify with specificity the types of content-related commitments that you believe must be permitted in future Registry Agreements as a matter of ICANN Consensus Policy.

We note that the terms "content" and "content-related" are not defined and seem open to differing interpretations of what is encompassed. We also note, for example, that matters falling within the RA/RAA newly adopted definition of DNS Abuse, which are widely-viewed as not being "content" outside of ICANN's remit (e.g. phishing, pharming, and distribution of malware), are nevertheless covered within some of the examples of PIC's specifically highlighted during this consultation. We have therefore adopted a broad interpretation of what is meant by "content".

If and to the extent that such commitments actually do involve content restrictions, then the types of content-related commitments which have already been grandfathered under the Bylaws, together with comparable commitments to supplement grandfathered commitments, must be permitted in future Registry Agreements. For example:

- Prohibitions on and consequences for distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law (Spec 11(3)(a)).
- Monitoring whether domains in the TLD are being used to perpetrate security threats, such as pharming, phishing, malware, and botnets (Spec 11(3)(b)).
- Commitments addressing the GAC Category 1 Safeguards advice.
- Commitments contained in any Registry Agreement in force on 1 October 2016 (Bylaws 1.1(d)(ii)(A)(1)) and commitments which do not vary materially therefrom (Bylaws 1.1(d)(ii)(A)(2)). These include voluntary commitments relating to:
 - CSAM
 - Cyberbullying, harassment hate speech, hate crimes
 - Terrorism
 - Counterfeiting, piracy and infringement of intellectual property
- Commitments which address matters identified in Bylaws Annexes G-1 and G-2, since these are clearly identified in the Bylaws as matters within ICANN's remit.

In making its SubPro PDP recommendations and providing its rationale the community has already made its wishes and position clear: there is strong support in the community for the use of PICs and RVCs to overcome challenges, thereby allowing applications to proceed.

3. Are there any types of content restrictions that ICANN should not enter into in the New gTLD Program: Next Round, considering the scope of ICANN's Mission in relation to Registry Agreements? *

Yes

No

4. Please explain your answer to consultation topic 2, question 3, above. *

If your answer to question 3 is "yes", please identify with specificity the types of content-related commitments that you believe should not be permitted in future Registry Agreements.

The term "content restriction" is merely a non-specific label that is incorrectly relied upon to subjectively eliminate oversight over certain areas that otherwise are necessarily within the purview of ICANN Compliance. For example, some would argue that mitigation measures for DNS abuse are not "content restriction", even though abuses like phishing and malware often rely on "content" as delivery mechanisms (including intellectual property infringing content) and, even where there is no IP infringement, usually have a "content" element to them, e.g. the misleading and fraudulent content of the phishing email, a fake login page which captures the inputted data, or the offer of a download which carries malware with it. Moreover, bad faith website and email content remains at the very heart of domain name dispute mechanisms and national laws applicable to registrants, registrars and registries, like the US Anticybersquatting Consumer Protection Act). The ICANN community should continue to apply international legal norms to determine what types of content restrictions might be warranted in the DNS.

5. In order for ICANN to have the ability to enter into the content-related commitments recommended by the GNSO for the New gTLD Program: Next Round, a Bylaws amendment appears to be required. For example, an amendment could clarify the scope of future content-related commitments that ICANN may enter into and enforce in future Registry Agreements, including reliance on principles evidenced within the framework (as discussed within Consultation Topic 1). *

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

- No ICANN should not accept any content related registry voluntary commitments or community gTLD commitments in the New gTLD Program: Next Round, so no Bylaws amendment is required.
- No While ICANN must accept agree to enter into and enforce content related registry voluntary commitments and community gTLD commitments in the New gTLD Program: Next Round, no clarification to the ICANN Bylaws is required for ICANN to perform this function
- Yes. ICANN must accept, agree to, enter into, and enforce content-related registry voluntary commitments and community gTLD commitments in the New gTLD Program Next Round and ICANN must move forward with a Fundamental Bylaws change to clarify ICANN's contracting and enforcement remit regarding content related commitments

6. Please explain your answer to consultation topic 2, question 5, above. *

1. There is a distinction between ICANN regulating, i.e imposing "rules and restrictions on" services and content, versus the registry operator voluntarily proposing and submitting to such rules and restrictions. There is also a distinction between ICANN directly enforcing such rules and restrictions on third parties, i.e. registrants, versus ICANN holding a registry operator to compliance with the specifics of a contractual commitment they have made, such as to require a registrant to agree to an acceptable use policy, with mitigation expectations and penalties for failure to do so or enforcing the decision of an independent DRP such as the PICDRP.

2. Bylaws section 1.1 must be read in its entirety rather than making and socialising the assumption that contract provisions regarding all potentially content-related issues are prohibited:

- Annexes G-1 and G-2 identify various issues on which the development and implementation of policies are within the Mission
 - Bylaws section 1.1(c) is qualified by reference to section 1.1(a), and thus Annexes G-1 and G-2
 - Bylaws section 1.1(d) further qualifies, including the grandfathering provisions.
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7. Please provide any additional comments or information not addressed above that you believe are critical to inform this community dialogue concerning content-related registry commitments in future Registry Agreements.

The IPC is extremely disappointed that the Board and Org appear to be taking a narrow interpretation of the Mission, including the effect of the grandfathering provisions. We believe this is a matter on which ICANN should seek an independent legal determination, for example an advisory opinion from the California AG or declaratory ruling from a judge. This is an important matter and warrants ICANN making the funding available both to seek judicial interpretation and to enforce its contracts.

In its recommendation 9.1, the SubPro PDP recommended that Mandatory Public Interest Commitments (PICs) currently captured in Specification 11 3(a)-(d) of the Registry Agreement must continue to be included in future Registry Agreements. The Grandfathering provisions under the Bylaws specifically allow for this (Bylaws 1.1(d)(ii)(A)(1) and (2)).

In the case of Spec 11 3(a), in light of the unacceptably-narrow interpretation applied by Org, such provisions must be enhanced, to ensure that they meet the Board and GNSO Council expectations of being enforceable under the ICANN Bylaws and as a practicable matter. As interpreted by Org, Spec 11 3(a) does not impose an obligation on a registry to take action, such as terminating the registry-registrar agreement, if the registrar either (i) fails to include the required provision, or (ii) includes the required provision but fails to take action in accordance with such terms (e.g., taking no action when a Registered Name Holder engages in illegal activities). On this basis, even if the registry fails to take any action on receipt of notice and evidence from a third party (such as a rights holder who has suffered from infringement) that the registrar has violated its obligations under this clause, it will not be held liable through the PICDRP. If this is the case, then irrespective of the inclusion of Spec 11 3 (a) in future RAs, and the inclusion of the required pass-down obligations prohibiting the distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting, or otherwise engaging in activity contrary to applicable law, these will not be effective.

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