

# Registries Stakeholder Group Statement



## Community Consultation on PICs/RVCs

Date statement submitted: 22 February 2024

### Preamble

The RySG considers that the matters covered by this community consultation are far too nuanced to be answered by what is, in effect, a multiple choice questionnaire. In depth discussion and debate is needed to develop the most appropriate way to handle the numerous different cases that may occur.

### Consultation Topic 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.*

1. *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.*

The RySG has not ticked either box for the question because, to our thinking, whether that answer would be “yes” or “no” depends in large measure on what the meaning of the phrase “permitted to move forward” is.

If, “permitted to move forward” means that the application would simply be allowed to be considered in the normal course of the evaluation process, then the RySG may answer “Yes”. The absence of the inclusion of a commitment (even to address GAC Early Warning or GAC Advice) should not prohibit the application from being fully evaluated on its merits.

If, however, “permitted to move forward” would mean some sort of free pass to ignore the GAC early warning or Advice, or any other flags raised during the full evaluation process, then the RySG may answer “No” – noting that the RySG has difficulty imagining any circumstance in which the answer would be “Yes”.

A clear understanding of the context in which the question is asked is necessary for any response to be meaningful.

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 1 above.*

We don’t understand the context of this question. We understood that the concept of requiring a ‘third party monitor’ was introduced to cover occasions where ICANN would not enforce because the commitment was deemed to cover content. Why would there be a need to designate such a monitor in all cases?

There is no policy dictating that for any of PICs, RVCs and Community gTLD Commitments to be enforceable, they must be monitored by a third party. Further, the PICDRP will apply to both PICs and RVCs (see 9.10 and 9.11 SubPro Final Report). Registry Operators should have the ability to determine how best to ensure their contractual obligations are being fulfilled, including monitoring for compliance with its commitments, and to do so by taking into account the commercial feasibility to implement an appropriate audit and monitoring mechanism whether this includes a third-party and/or internal mechanism.

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?*

Until we are clear what the overall context of this consultation is and the assumptions that are behind the questions asked it is not possible to answer question 5 with any certainty. For example, these questions refer to a third party ‘monitor’ whereas the framework refers to an auditing function which is materially different,

On the face of it, element B)c)ii) requiring a third- party ‘auditor’ for RVCs and Community gTLD Commitments should be struck. An Applicant may be allowed to include a third-party auditor as part of the enforcement process, but it should not be required in all circumstances. Moreover, excluding Element B)c)ii) does not affect ICANN’s ability to conduct contractual and operational compliance audits under Registry Agreement section 2.11.

We may well find other necessary changes once we are clear on context and assumptions.

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.*

The answer to 7 is entirely dependent on the changes made in respect to ‘monitoring’ or ‘auditing’ plus any other changes that may be agreed.

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

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## Consultation Topic 2

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.

1. *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.*

The Mission Statement included in the ICANN Bylaws is very clear that ICANN cannot regulate content (see Section 1.1, "Mission" of Article 1 of the ICANN Bylaws).

Consensus Policy cannot override ICANN's Bylaw provisions..

Any requirement for ICANN to moderate or regulate content would not be accepted into an ICANN Consensus Policy because, as stated, content is outside of ICANN's Bylaws. Given this we do not understand how there could be any content restrictions that must be accepted by ICANN as a matter of consensus policy. We would appreciate a clarification of what this question is getting at.

Additionally, the nuance concerning content issues and ICANN's remit has significantly evolved since the New gTLD Program in 2012. Since then, the ICANN community has consistently formulated the distinction between content, and security and stability issues as

well as their challenges. Supporting Organizations and Advisory Committees, including the GAC, have publically reiterated that content is absolutely outside of ICANN’s remit. The Next Round will be another avenue to reinforce that content related issues are not within the purview of ICANN as established by the current ICANN Bylaw Section 1.1.

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.*

This question appears to imply that there are different types of content restrictions, some of which it would be OK for ICANN to enter into and others not. On the face of it this makes no sense to us.

As stated in response to question 2 above, we do not believe that ICANN should be able to regulate any content. To be clear, this comment should not be interpreted to mean that any commitments in existing registry agreements are not enforceable, and this comment does not relate to ICANN’s ability to accept public interest commitments or registry voluntary commitments that do not bear upon content. To the extent a proposed public interest commitment or registry voluntary commitment per SubPro Recommendation 9.9 does not bear upon content, then ICANN’s acceptance of such commitment would not constitute ICANN acting outside of its Mission as outlined in Bylaw 1.1.(c). For instance, registries should still be allowed to have Acceptable Use policies as they are not a content issue.

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.*

The RySG believes it would be a violation of ICANN's mission to enter into content-related commitments via its contracts with gTLD operators, **if doing so would put ICANN in the position of regulating or enforcing restrictions on content**. This Mission is vital to ICANN and specifically prohibiting the regulation of content as part of that Mission was a key aspect of the IANA Transition. We do not believe that it will be possible to amend the Bylaws to expand ICANN's contracting and enforcement remit to include regulating certain types of content and not others without violating its existing Mission and constituting a dangerous overreach and "mission creep" for the organization.

Content related commitments and any bylaw amendment to provide for them create a future category problem for the ICANN community. It risks the tension of having to arbitrate between what types of content issues need to be addressed by ICANN and what types of content are outside ICANN's remit. This is infinitely complex and is not straightforward and results in many specificities and challenges. It would be best for the Next Round to reiterate the technical neutrality of the DNS Layer, especially in an environment where increased attention is being placed on content issues and the DNS, outside ICANN.

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.*

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