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1.3 Deliberations and Recommendations: Foundational Issues

Foundational Issues		
1.3.1	Competition, Consumer Trust and Consumer Choice	
1.3.2	Global Public Interest	
1.3.3	Applicant Freedom of Expression	
1.3.4	Universal Acceptance	

1.3.1 Competition, Consumer Trust and Consumer Choice

a. What is the relevant policy and/or implementation guidance (if any)?

Principle C: “The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity.”

b. How was it implemented in the 2012 round of the New gTLD Program?

The New gTLD Program as a whole was intended to “foster diversity, encourage competition, and enhance the utility of the DNS.”¹

c. What are the preliminary recommendations and/or implementation guidelines?

None being considered at this time.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

¹ See Preamble in the 2012 Applicant Guidebook here:
<https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

e. What specific questions are the PDP WG seeking feedback on?

None being proposed at this time.

f. Deliberations

Work Track 1 has not yet considered this topic as it awaits the Final Report of the Competition, Consumer Trust & Consumer Choice Review Team.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

- Final Report of the Competition, Consumer Trust & Consumer Choice Review Team (CCT-RT)

1.3.2 Global Public Interest

a. What is the relevant policy and/or implementation guidance (if any)?

Recommendation 6: “Strings must not be contrary to generally accepted legal norms relating to morality and public order that are enforceable under generally accepted and internationally recognized principles of law. Examples of such limitations that are internationally recognized include, but are not limited to, restrictions defined in the Paris Convention for the Protection of Industrial Property (in particular restrictions on the use of some strings as trademarks), and the Universal Declaration of Human Rights (in particular, limitations to freedom of speech rights).”²

The Global Public Interest is also referenced in ICANN’s Core Values under Article 1 Section 1.2 (b)(ii): “Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multi stakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.”³

b. How was it implemented in the 2012 round of the New gTLD Program?

Public Interest Commitments were not anticipated by the 2007 recommendations or the 2012 Applicant Guidebook. In October 2012, the Governmental Advisory Committee (GAC) provided advice to the ICANN Board of Directors of ICANN that it should come up with a mechanism to incorporate certain commitments, business plans, registration restrictions, additional rights protection mechanisms and other objectives in the Base Registry Agreement

² <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

³ <https://www.icann.org/resources/pages/governance/bylaws-en>

such that they could be overseen by ICANN's compliance department. In response to the GAC, the New gTLD Program Committee of the Board proposed a new Specification 11 to the Base Registry Agreement to transform application statements into binding contractual commitments, as well as to give applicants the opportunity to voluntarily submit to heightened public interest commitments. ⁴ More specifically Specification 11:

- required operators of new gTLDs to use only registrars that are party to the 2013 Registrar Accreditation Agreement.
- allowed registry operators to commit to certain statements made in the application, as well as to specify additional voluntary public interest commitments that became binding contractual obligations that could be enforced by ICANN.
- included additional obligations that were mandatory for all registry operators, such as:
 - the ban on Closed Generics (See Section [1.7.3] of this Report),
 - including language in its Registry-Registrar Agreements with respect to the protection against domain name abuse, and
 - ensuring Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies .⁵

In addition, in 2014, the ICANN Board's New gTLD Program Committee adopted⁶ an implementation framework for GAC Category 1 Safeguard Advice⁷, which required safeguards to be added as Public Interest Commitments to Specification 11 of the Registry Agreement for certain categories of strings:

- Regulated Sectors/Open Entry Requirements in Multiple Jurisdictions
- Highly Regulated Sectors/Closed Entry Requirements in Multiple Jurisdictions
- Special Safeguards Required

c. What are the preliminary recommendations and/or implementation guidelines?

- Work Track 2 discussed the concept of Public Interest Commitments, how they were added after the 2012 New gTLD Round Commenced, its effectiveness in addressing concerns expressed by the GAC during the Early Warning Process, and as a mechanism to allow Applicants to respond to issues brought up by the community after an application has been submitted. To this end:
 - Mandatory PICs: The WT is considering a recommendation to codify the current implementation of mandatory PICs as policy recommendations.⁸ In addition, such mandatory PICs should be revisited to reflect the ongoing discussions between

⁴ See Specification 11 of the Base Registry Agreement (updated 31 July 2017):

<https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf>

⁵ For discussion regarding Specification 11, Section 3 d, please see the section of this report on Closed Generics.

⁶ <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>

⁷ <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>

⁸ See Specification 11, Section 1 and 3 a-d:

<https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf>

- the GAC Public Safety Working Group and Registries as appropriate.
 - Voluntary PICs: The Work Track recommends continuing the concept of Voluntary Public Interest Commitments and asking Applicants to state any voluntary PICs in their application. In addition, the Working Group supports the ability of applicants to commit to additional voluntary PICs in response to public comments, GAC Early Warnings and/or GAC Advice. The Work Track acknowledges that Changes to voluntary PICs may result in changing the nature of the application except where expressly otherwise prohibited in the Applicant Guidebook and that this needs further discussion.
- At the time a Voluntary PIC is made, the Applicant must set forth whether such PIC is limited in time, duration and/or scope such that the PIC can adequately be reviewed by ICANN, an existing objector (if applicable) and/or the GAC (if the voluntary PIC was in response to a GAC Early Warning or GAC Advice).
- To the extent that a Voluntary PIC is accepted, such PIC must be reflected in the Applicant's Registry Agreement. A process to change PICs should be established to allow for changes to that PIC to be made but only after being subject to public comment by the ICANN community. To the extent that the PIC was made in response to an objection, GAC Early Warning and/or GAC Advice, any proposed material changes to that PIC must take into account comments made by the applicable objector and/or the applicable GAC member(s) that issued the Early Warning, or in the case of GAC Advice, the GAC itself.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time..

e. What specific questions are the PDP WG seeking feedback on?

- Does the community believe that there are additional Public Interest Commitments that should be mandatory for all Registry Operators to implement? If so, please specify these commitments in detail?
- Should there be any exemptions and/or waivers granted to Registry Operators of any of the mandatory Public Interest Commitments? Please explain.
- For any voluntary PICs submitted either in response to GAC Early Warnings, Public Comments, or any other concerns expressed by the Community, is the inclusion of those PICs the appropriate way to address those issues?
- To what extent should the inclusion of voluntary PICs after an application has been submitted be allowed, even if such inclusion results in a change to the nature of the original application?
- If a voluntary PIC does change the nature of an application, to what extent (if any) should there be a reopening of public comments periods, objection periods, etc. offered to the community to address those changes?
- The Work Track seeks to solicit input in regards to comments raised by the Verified TLD Consortium and National Association of Boards of Pharmacy that recommended a registry should be required to operate as a verified TLD if it 1) is linked to regulated or

professional sectors; 2) is likely to invoke a level of implied trust from consumers; or 3) has implications for consumer safety and well-being.⁹ In order to fully consider the impact and nature of this recommendation, the WG is asking the following questions.

- How would such a registry be recognized to be in line with these three criteria and who would make such a judgement?
- What types of conditions should be placed upon a registry if it is required to operate as a verified TLD?

f. Deliberations

In early discussions, the Work Track reviewed the ICANN Board suggestion¹⁰ that additional policy work may be appropriate on the topic of the Global Public Interest and considered other relevant documentation, including ALAC statements on related topics¹¹ and GAC Advice on New gTLD Safeguards.¹² The Work Track sought input through Community Comment 2 (CC2) on whether PICs served their intended purpose, and whether there are alternate mechanisms that could be employed to serve the public interest.¹³

The Work Track requested and received input from the ICANN Organization on complaints filed with ICANN Contractual Compliance about registry operators' Public Interest Commitments.¹⁴ In reviewing the information provided, the Work Track did not identify any specific issues to address.

The Work Track discussed whether Public Interest Commitments are sufficient to protect the public interest and appropriate for use in subsequent procedures. Work Track members noted that it is important to have a mechanism that ensures that applicants follow through on their commitments. The preliminary conclusion is that PICs serve this purpose and allow commitments to be included in the contract and become binding. Several CC2 comments¹⁵ further supported that PICs have served their purpose and that no other mechanism is needed in this regard.

The Work Track also noted, however, that some concerns were raised regarding PICs. For

⁹ See CC2 comments in response to question 2.9.1:

<https://docs.google.com/spreadsheets/d/1tcWZt1bdoYH7vJl2Yi9G0jah7QzyhqU99tXnl3qV0rc/edit?usp=sharing>

¹⁰ See ICANN Board resolution on Planning for Future gTLD Application Rounds - Annex A (17

November 2014): <https://www.icann.org/en/system/files/files/resolutions-annex-a-17nov14-en.pdf>

¹¹ <https://docs.google.com/spreadsheets/d/1BoDtmXT5GYpeuk5UoSKCQ3MvWIdSbh4X86mbCMR4JhA/edit#gid=305222389>

¹² <https://gacweb.icann.org/display/GACADV/New+gTLD+Safeguards>

¹³ See responses at

<https://docs.google.com/spreadsheets/d/1tcWZt1bdoYH7vJl2Yi9G0jah7QzyhqU99tXnl3qV0rc/edit?usp=sharing>

¹⁴ See questions and responses here:

<https://community.icann.org/download/attachments/58735937/New%20gTLD%20Subsequent%20Procedures%20Request%20for%20Data%20%28PIC%29.docx?version=1&modificationDate=1502819042000&api=v2>

¹⁵ <https://docs.google.com/spreadsheets/d/1tcWZt1bdoYH7vJl2Yi9G0jah7QzyhqU99tXnl3qV0rc/edit?usp=sharing>

example, the Work Track considered a CC2 comment from ALAC raising issues including “the lack of public oversight, the temporary and arbitrary nature of the ‘optional’ PICs, and an unsure and adversarial enforcement process that created significant obstacles for reporting of breaches.”¹⁶ The Work Track welcomes proposals for specific improvements to address concerns with the mechanism.

Voluntary PICs

While acknowledging that the mechanism of voluntary PICs may not be perfect, the Work Track generally supported giving applicants the option to designate voluntary PICs in subsequent procedures. The Work Track discussed possible measures that could make voluntary PICs more flexible and allow them to better support both applicants and parties raising concern about an application. Recommendations stemming from these discussions emerged relatively recently, but initial discussions appear to support extending them to the broader community for comment.

Work Track members discussed the timing of submission for voluntary PICs and generally supported the idea that applicants should have more than one opportunity in the process to state those PICs. The Work Track noted that whenever possible, applicants should state voluntary PICs in the application itself. It was also discussed that voluntary PICs can be a valuable means to address concerns raised in public comments, GAC Early Warnings, and/or GAC Advice. Some Work Track supported allowing applicants to commit to additional voluntary PICs or modify those PICs stated in the application in response to community or GAC input.

Work Track members also discussed whether voluntary PICs may be limited in time, duration and/or scope. Some Work Track members stated that registries should not be allowed to commit to PICs and then simply withdraw them later at their own discretion. Some support was expressed for allowing limitations to PICs, provided that the applicant states any conditions when the PIC is made, in order to provide a level of transparency and accountability around any future changes.

The Work Track discussed amending voluntary PICs and there was, in early discussions, some support for the idea that a rigorous, carefully vetted, and publicly visible process would be needed if such changes are allowed. One suggestion is that once incorporated into the Registry Agreement, a PIC may not change without community comment first taking place. If a voluntary PIC was made in response to an objection, GAC Early Warning or GAC Advice, any proposed changes must take into account comments by the relevant party or parties. The Work Track welcomes feedback on these proposals or suggestions for alternate proposals.

Mandatory PICs

There was some support expressed for the idea that mandatory PICs served the public interest and should be maintained in subsequent procedures. The current mandatory PICs are not reflected in policy and the Work Track is considering a recommendation to codify the implementation of mandatory PICs from the 2012 round¹⁷ as a policy recommendation. The

¹⁶ Ibid

¹⁷ See Specification 11, Section 1 and 3 a-d:

<https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf>

Work Track notes that the GAC Public Safety Working Group and Registries are conducting ongoing discussions on this issue, and future work should be coordinated with these efforts.

Highly Sensitive Strings/ Strings in Highly Regulated Industries

The Work Track discussed highly sensitive strings and strings corresponding to highly regulated industries and noted divergent views on this issue:

- The GAC has provided Advice¹⁸ supporting stronger safeguards for certain types of strings. In its CC2 comments¹⁹, the GAC specifically referenced the following Advice:
 - Category 1 Safeguards (Beijing Communique 2013)²⁰
 - PIC Dispute Resolution – Modify the dispute resolution process to ensure that non-compliance for PIC strings is effectively and promptly addressed (Los Angeles Communique 2014)²¹
 - Reconsider the [Board’s] determination not to require the verification and validation of credentials of registrants for the Category 1 new gTLDs or to conduct periodic post-registration checks to ensure that Registrants continue to possess valid credentials. (Los Angeles Communique 2014)²²
 - Amend the PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress. (Los Angeles Communique 2014)²³
 - NGPC to publicly recognise the commitments of some Registries and applicants to voluntarily adopt GAC advice regarding the verification and validation of credentials as best practice. (Singapore Communique 2015)²⁴
 - Reconsider the PICDRP and develop a ‘fast track’ process for regulatory authorities, government agencies and law enforcement to work with ICANN contract compliance to effectively respond to issues involving serious risks of harm to the public. (Singapore Communique 2015)²⁵
- In CC2 comments, the Verified TLD Consortium and National Association of Boards of Pharmacy recommended that a registry should be required to operate as a verified TLD if it 1. is linked to regulated or professional sectors; 2. is likely to invoke a level of implied trust from consumers; or 3. has implications for consumer safety and wellbeing.²⁶ This perspective was reiterated, elaborated on, and discussed in the Work Track. In support of this position, a concern was raised that if an applicant sets up a TLD that does not require registrant verification (for example .chemist) that is similar to a verified TLD (such

¹⁸ <https://gacweb.icann.org/display/GACADV/New+gTLD+Safeguards>

¹⁹ <https://docs.google.com/spreadsheets/d/1tcWZt1bdoYH7vJl2Yi9G0jah7QzyhqU99tXnl3qV0rc/edit?usp=sharing>

²⁰ https://gacweb.icann.org/download/attachments/28278854/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1367607354000&api=v2

²¹ https://gacweb.icann.org/download/attachments/28278854/Los%20Angeles_GAC%20Communique_Final.pdf?version=1&modificationDate=1414680955000&api=v2

²² Ibid

²³ Ibid

²⁴ https://gacweb.icann.org/download/attachments/28278854/GAC_SINGAPORE52_COMMUNIQUE_FINAL2.pdf?version=1&modificationDate=1436284274000&api=v2

²⁵ Ibid

²⁶ <https://docs.google.com/spreadsheets/d/1tcWZt1bdoYH7vJl2Yi9G0jah7QzyhqU99tXnl3qV0rc/edit?usp=sharing>

as .pharmacy), the situation may cause consumer confusion. There was no agreement in support of these recommendations at the time, however the Work Track will solicit input on how such a TLD should be recognized.

- Some Work Track members have stated that in the absence of data demonstrating that PICs associated with GAC Category 1 Safeguard Advice have effectively prevented potential abusive behavior, such mandatory PICs may not be appropriate.
- Other Work Track members have recommended maintaining the existing provisions as they are, emphasizing the importance of predictability for applicants.

The Work Track has not agreed at this time on any additional conditions to impose on applicants other than those already required of applicable registries during the 2012 round.

The Work Track acknowledges the work of the CCT-RT on the issue of sensitive strings and will engage in future discussions to provide feedback on Recommendation 14.²⁷

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

- CCT-RT
- Global Public Interest Framework under ICANN's Strategic Plan
- GAC Public Safety Working Group and Registries discussion on mandatory PICs

1.3.3 Applicant Freedom of Expression

a. What is the relevant policy and/or implementation guidance (if any)?

Principle G: "The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law."²⁸

Recommendation 3: "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law. Examples of these legal rights that are internationally recognized include, but are not limited to, rights defined in the Paris Convention for the Protection of Industrial Property (in particular trademark rights), the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (in particular freedom of speech rights)."²⁹

b. How was it implemented in the 2012 round of the New gTLD Program?

Specific guidance regarding the implementation of Principle G and Recommendation 3 was not included in the Applicant Guidebook. As a result, it was up to evaluators and dispute resolution providers to interpret these provisions.

²⁷ <https://www.icann.org/en/system/files/files/cct-rt-draft-report-07mar17-en.pdf>

²⁸ <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

²⁹ Ibid

That said, some guidance regarding the implementation of Principle G was contained in the GNSO's final New gTLD Policy report, which stated, "an applicant would be bound by the laws of the country where they are located and an applicant may be bound by another country that has jurisdiction over them."³⁰

It is also worth noting that Module 3 of the Applicant Guidebook³¹, which discussed Recommendation 3 (protecting the legal rights of others), dealt only with the legal rights related to trademarks, but not with other legal rights, such as freedom of expression.

c. What are the preliminary recommendations and/or implementation guidelines?

Work Track 3 discussed the protection of an Applicant's Freedom of Expression rights and how to ensure that evaluators and dispute resolution providers performed their roles in such a manner so as to protect these fundamental rights. The Work Track generally believes that the implementation guidelines should be clarified to ensure that dispute resolution panelists and evaluators are aware that freedom of expression rights are considered throughout the evaluation and dispute resolution processes. To do this, each policy principle should not be evaluated in isolation from the other policy principles, but rather should involve a balancing of legitimate interests where approved policy goals are not completely congruent or otherwise seem in conflict. Applicant freedom of expression is an important policy goal in the new gTLD process and should be fully implemented in accordance with the applicant's freedom of expression rights that exist under law.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

e. What specific questions are the PDP WG seeking feedback on?

- What specific advice or other guidance should dispute resolution panelists and other evaluators be given to ensure that the policy principle of protecting applicant freedom of expression can be effectively implemented in the overall program?
- When considering Legal Rights Objections, what are some concrete guidelines that can be provided to dispute resolution providers to consider "fair use", "parody", and other forms of Freedom of Expression" rights in its evaluation as to whether an applied for string infringes on the legal rights of others?
- In the evaluation of a string, what criteria can ICANN and/or its evaluators apply to ensure that the a refusal of the delegation of a particular string will not infringe an Applicant's Freedom of Expression rights?

³⁰ Ibid

³¹ <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>

f. *Deliberations*

The Work Track discussed that the final 2007 New gTLD Policy³² was a tapestry that consisted of many different policy goals and recommendations, which sometimes can conflict with each other and pull in seemingly different directions. The Work Track noted that evaluators were tasked with weighing the different policy values, goals, and recommendations, and finding an appropriate balance between competing legitimate interests in their evaluations. In addressing this topic, the Work Track considered the extent to which the policy goal of protecting applicant's freedom of expression rights was impacted by other processes, such as the treatment of GAC Advice, Community evaluations, and processes related to Reserved Names.

The Work Track discussed that freedom of expression rights, as with any legal right, are not absolute, but must be balanced with other legal rights when they come into conflict, and through that weighing process the law creates a coherent framework that accounts for discrepancies between individual policy goals left alone in the abstract. Some noted that other New gTLD Policy principles are no different in that a balancing must occur between conflicting legitimate rights for an appropriate outcome to be reached.

Work Track members noted that the lack of specific implementation guidance provided with respect to the policy principle of protecting freedom of expression, in contrast to very specific "modules" and rules provided for evaluators to follow when addressing other policy goals (such as protection for "Communities", trademarks, the treatment of GAC Advice, etc.) has left a gap in the implementation of protection for applicant freedom of expression rights. This left evaluators to follow the only "rules" provided, which are tailored for these other processes, and which are not designed to take into account the policy goal of protection for free expression. As a result, there was a discrepancy between the approved policy goal of protecting freedom of expression and the evaluation process that was ultimately implemented.

While there was some support expressed for more clearly including the policy goal of respecting freedom of expression into the implementation framework for the New gTLD Policy, the Work Track has not agreed on specific implementation guidance in this regard.

g. *Are there other activities in the community that may serve as a dependency or future input to this topic?*

- CCWG Accountability Work Stream 2 - SubGroup on Human Rights

1.3.4 Universal Acceptance

a. *What is the relevant policy and/or implementation guidance (if any)?*

³² <https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

Principle B: “Some new generic top-level domains should be internationalised domain names (IDNs) subject to the approval of IDNs being available in the root.”

b. How was it implemented in the 2012 round of the New gTLD Program?

- By requiring applicants to answer Question 16 (“Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.”)
- By including clause 1.2 of the Registry Agreement (“**1.2 Technical Feasibility of String.** While ICANN has encouraged and will continue to encourage universal acceptance of all top-level domain strings across the Internet, certain top-level domain strings may encounter difficulty in acceptance by ISPs and web hosts and/or validation by web applications. Registry Operator shall be responsible for ensuring to its satisfaction the technical feasibility of the TLD string prior to entering into this Agreement.”)

c. What are the preliminary recommendations and/or implementation guidelines?

Amended Principle B:

- Some new generic top-level domains should be internationalised domain names (IDNs), although applicants should be made aware of universal acceptance challenges in ASCII and IDN TLDs and given access to all applicable information about Universal Acceptance currently maintained on ICANN’s [Universal Acceptance Initiative](#) page as well as through the [Universal Acceptance Steering Group](#).

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

e. What specific questions are the PDP WG seeking feedback on?

None being proposed at this time.

f. Deliberations

The Work Track acknowledges that Universal Acceptance is a challenge for registries in New gTLDs, but is declining to create additional requirements. To that end, the Work Track supports the work of the Universal Acceptance Steering Group (UASG)³³ towards a future where “Internet applications and systems must treat all TLDs in a consistent manner, including new gTLDs and

³³ See the work of the Universal Acceptance Steering Group here: <https://uasg.tech>

internationalized TLDs.” The WG recognizes that this work will be ongoing and therefore believes that future applicants should be made aware of the potential challenges they may face.

While Universal Acceptance is not limited to IDNs, it is a particular challenge for those types of TLDs. In recognition of those current difficulties, and that IDNs have already been approved for availability in the root, there is general agreement to amend current Principle B.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

- Work of the UASG