



# At-Large Consolidated Policy Working Group

## Supplemental Initial Report on the New gTLD Subsequent Procedures PDP (Overarching Issues & Work Tracks 1-4)

Justine Chew, APRALO | 5 November 2018

### Polycymaking in the ICANN **At-Large** Community



# CPWG: What, How & Timelines



## 1 What are we developing?

### ALAC Comments/Statement to the GNSO New gTLD Subsequent Procedures Supplemental Initial Report (Additional Topics)

Wiki workspace: <https://community.icann.org/x/Jh68BQ>

PC page: <https://www.icann.org/public-comments/new-gtld-subsequent-procedures-supp-initial-2018-10-30-en>

## 2 How and Timelines

[1] Start	[2] Deliberate	[3] Deliberate	[4] Deliberate	[5] Deliberate	[6] Finalise for ALAC Vote	[7] Submission
Review Report	Deliberate & refine identified key policy issues	Continue deliberations	Continue deliberations → Draft statement post call	Consider tabled draft statement	Settle draft statement	Submit ratified statement
5 Nov 2018	CPWG call 7 Nov	CPWG call 13 Nov (tbc)	CPWG call 21 Nov (tbc)	CPWG call 27 Nov (tbc)	CPWG call 5 Dec (tbc)	12 Dec 2018

# What are the applicable Key Policy Issues?



Following the GNSO New gTLD SubPro WG's earlier Initial Report, this Supplementary Report seeks community feedback on preliminary recommendations, options & questions on 5 additional topics:

2.1

## Auctions: Mechanism of Last Resort

- Continued use of auctions to resolve string contentions
- Consideration for Applicant Support and community applicants
- Alternatives?
- *Link to Auction Proceeds CCWG Report*

2.2

## Private Resolution of Contention Sets (incl. Private Auctions)

- For 2012 round, various means, incl. private auctions was common
- Concern about use of private auctions etc in future rounds, gaming
- Distinguish & allow other private resolution mechanisms? How?
- *Link to SubPro Initial Report s.1.4 & s.2.7.4*
- *Link to Auction Proceeds CCWG Report*

2.3

## Role of Application Comment

- Cutoff for CPE was far later than for non-CPE applications (post IE, EE, Objections)
- Concern that responses to negatively perceived CQs might impact scoring
- Time limit to respond to comments prior to evaluations?

2.4

## Change Requests

- Allowable application changes to resolve contention limited to JVs or closely related string
- Implementation Guidance for consideration & re-evaluation
- *Link to SubPro Initial Report s.1.4*

2.5

## Registrar Support for New gTLDs



- Exceptions to vertical integration
- *Link to SubPro Initial Report s. 2.10.2*

## Backgrounder

Implementation Guideline F: If there is contention for strings, applicants may:

- i) resolve contention between them within a pre-established timeframe
- ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention, and;
- iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

- ❑ Implementation Guideline F spoke to alternatives to auctions of last resort, not reference auctions specifically.
- ❑ Along with 1<sup>st</sup> draft AGB, ICANN published an Explanatory Memo examining different mechanisms of last resort that could be used: <https://archive.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf>
- ❑ That said, greater reliance paid to voluntary resolution of contention prior to forced ICANN auction based on New gTLD Auction Rules – although hindered by several obstacles: link to s.2.4 Change Requests ---

For 2012 round:-

- > 90% of contention sets resolved without forced auction
- 10 ICANN auctions completed with net proceeds of > USD233 mil: link to CCWG on New gTLD Auction Proceeds \*

*\* Cross-check with Auction Proceeds CCWG Report recommendations*

### Preliminary Recommendations, Options & Questions

- ❑ PR 2.1.c.1: ICANN auctions should remain.
  - +Q 2.1.e.1: Are auctions of last resort inherently unfair and should be modified, restricted or modified?
  - +Q 2.1.e.2: Should other aspects (eg non-financial) be introduced to make auctions of last resort more “fair”?
  - +Q 2.1.e.3: What other measures to consider to enhance “fairness”?
  - +Q 2.1.e.4: Should auctions be eliminated, replaced with a comparative evaluation process? Such as RFP process, random draw.
  - +Q 2.1.e.5: Do auctions of last resort allow deep-pocketed applicant to secure all strings within a market? Is this a concern? Should limit be placed on number of auctions per applicant? Is this anti-competitive? Difficult to enforce?
  
- ❑ PR 2.1.c.2: Additional options for voluntary contention resolution, being:
  - Option 2.1.d.1: Different Type of Auctions: Vickrey auction
    - Could eliminate contentions sets at beginning
    - Concern over value place on a string
    - Still favor deep pockets – impact on ASP and community applicants
    - Concern over ICANN securing highly proprietary info
  
  - Option 2.1.d.2: Alternatives to Auction:

2.1.d.2.1 Request for Proposals	2.1.d.2.2 Random Draw	2.1.d.2.3 System of Graduated Fees
<ul style="list-style-type: none"> <li>• Third-party evaluators</li> <li>• Criteria around diversity eg priority to first applicants, community applicants, minority-supported applicants</li> </ul>	<ul style="list-style-type: none"> <li>• Simple, effective, fair, eliminate comparative evaluations?</li> <li>• Lottery, require proper licensing</li> </ul>	<ul style="list-style-type: none"> <li>• Established for each additional application submitted by an applicant</li> <li>• Possibly limits number of applications going to auction</li> <li>• Would this favor larger entities?</li> </ul>

### Backgrounder

Implementation Guideline F: If there is contention for strings, applicants may:

- i) resolve contention between them within a pre-established timeframe
- ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention, and;
- iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

- ❑ In 2012 round, > 90% of contention sets resolved were self-resolved.
- ❑ Based on 2012 applicants' input, private resolution through various means – including private auctions – was common, although no public stats available.
- ❑ Private resolution was not a formal part of PDP for 2012 round so no PR or policy guidance; private auction process was not created until after applications were submitted.
- ❑ Unintended consequence: in private auctions, majority of proceeds collected went to losing parties in auction – concern on gaming / purposely losing in certain private auctions to collect portion of proceeds then leverage that for private auctions of other higher priority applications.
  - *Link to IR s.2.7.4.e.2 on gaming or abuse of private auction\** -- Board expressed concern, so did ALAC.
  - Legality of private auctions still in question

\* *Cross-check with SubPro Initial Report s.2.7.4*

### Options & Questions (re-ordered)

- Q 2.2.e.1 Should private resolutions continue? If yes, should funds be distributed amongst remaining applicants within auction? Charity? ICANN? What's most appropriate?
  - Option 2.2.d.1: Should AGB and T&Cs be amended to disallow private resolution where a party is paid to withdraw? Should RA provide for 'forfeiture' of TLD if RO shown to have partaken in such a private resolution?
    - +Q 2.2.e.3 Is this the best prevention method? Other effective mechanisms (eg increasing application fees)?
    - +Q 2.2.e.6: Would increasing application fees deter "gamers" and what amount or criteria to establish amount?
  - Option 2.2.d.2: Does simple "no private auction" rule work? Should all forms of private resolution be banned altogether? -> *modification to Implementation Guidance F*
    - +Q 2.2.e.2 Are issues with private resolutions equally problematic across different TLD types? Should TLD type be a factor in allowing private resolution?
  - Option 2.2.d.3: Allow some private resolutions, disallow others?  
Change request – applicable criteria: Related string, (b) Does not cause another contention set [see also SIR s.2.4]  
ICANN approval subject to: (a) Name collision risk assessment, (b) Public comment, (c) Established Objection procedures  
Consequences: (a) Application not allowed to proceed or (b) Forfeiture of registry
- Q 2.2.e.4: If private resolution overall is potentially problematic, is there practical way to prevent it?
- Q 2.2.e.5: Else, are there practical ways to allow some but disallow others (as above)? What's acceptable form of private resolution and what's not? Who determines whether party engaged in non-acceptable form(s) and how?

## Backgrounder

Implementation Guideline C: ICANN will provide frequent communications with applicants and the public including comment forums.

Implementation Guideline Q: ICANN staff will provide an automatic reply to all those who submit public comments that will explain the objection procedure.

- ❑ 2012 AGB called for 60-day Application Comment period, opening when all applications were published. Comments received considered by relevant evaluation panels. Where clarification sought, applicants were given opportunity to respond.
- ❑ Treatment of application comments:
  - Not considered formal objections, comments related to objections disregarded by IE panellists.
  - Objection-based ones could play limited role during objection proceeding.
  - Those directed at Limited Public Interest and Community objection went to the Independent Objector.
  - Those designated to CPE to be considered by CPE panellist.
  - Open to GAC, but not substitute for formal consensus GAC Advice.
- ❑ Application comment system also supported application change requests, PIC statements and complaints re panellist code of conduct violations.
- ❑ In some circumstances, public comments had deadlines in order to be considered by relevant evaluation panel / process.



## Preliminary Recommendations & Questions

- ❑ PR 2.3.c.1: Support Implementation Guideline C on provision of comment forums, but need system to:
  - Better ensure email and name of commentator verified in some manner
  - Support filtering and/or sorting mechanism & allow attachments
  
- ❑ PR 2.3.c.2: AGB to be more explicit on how public comments are to be used/taken up by evaluators, panels, etc and what extent different comment types will impact scoring. Applicants must have opportunity to respond.
  - Q 2.3.e.1: Cutoff for comments considered by evaluators for CPE was far later than those for standard applications (note IE, EE and objections), is this fair? Should period be shortened? Run parallel to IE comment period?
  - Q 2.3.e.2: 2012 round applicants could respond to CQs that might impact scoring. Does this reduce incentive for applicants to respond, including negative comments? If is problem, how to avoid it?
  - Q 2.3.e.3: If there is an application comment period prior to evaluations, should applicants be given time to respond prior to evaluations? Eg. 60-day public comment period + 7-10 days added for response?

## Backgrounder

- ❑ In 2012 round, discovered many reasons applicants may wish to change aspects of their applications during application & evaluation periods, especially where they could last several years. Some changes are more material than others, some more substantive than others.
- ❑ Requests were considered against a published set of 7 criteria (after the fact) and if approved, were published for a 30-day comment period. The 7 criteria are:
  1. Explanation: Is a reasonable explanation provided?
  2. Evidence that change is to correct error – what indicia to support this?
  3. Does change affect other third parties materially?
  4. Precedent
  5. Fairness to applicant
  6. Materiality – affecting evaluation score or re-evaluation or string contention or community priority
  7. Timing – interference with evaluation process
- ❑ Depending on nature of requested change, may require re-evaluation if received after completion of IE, eg substantive changes to technical or financial portions of application would more likely require re-evaluation than changes to contact information.
- ❑ While change request was beneficial in some cases – namely curing of deficiencies or concerns (eg. from GAC Early Warning), timing of change requests created operational challenges, redundant reviews, processing delays, and extra operational costs.
- ❑ Change request for community-based applications that could impact CPE not allowed.

### Preliminary Recommendation, Option & Questions

- PR 2.4.c.1: 2012 high-level, criteria-based change request process to continue, but operational improvements needed for ICANN Org to:
  - Seek guidance on changes likely to be approved vs not
  - Set forth types required to be posted for public comment vs not
  - Set forth in AGB the types of changes requiring re-evaluation of application vs not
  - Types of changes disallowed in 2012 should be allowed under certain circumstances
  
- Option 2.4.d.1: Application changes intended to resolve string contention – (1) creation of JVs or (2) limited ability to select different string closely related to original string, whereupon:
  - ICANN Org may determine re-evaluation criteria for JVs (applicant responsible for costs)
  - ICANN Org must perform re-evaluation of new string (DNS Stability, String Contention etc) & application still subject to string-related objections
  - New string still subject to name collision risk assessment, public comment & objection procedures (applicant responsible for costs)
  
- Q 2.4.e.1: With respect to possible changes suggested above:
  - Q 2.4.e.1.1: Do we agree with allowing types of changes? How to provide more precise guidance on what type of changes will or will not be allowed? And require re-evaluation? Would this replace or complement the 7 existing criteria?
  - Q 2.4.e.1.2: What are potential risks or possibilities for gaming? How to mitigate?
  - Q 2.4.e.1.3: Criteria for considering limited ability to change? Eg of change that should not be approved?
  
- Q 2.4.e.2: Role of public comment in granting change request?
- Q 2.4.e.3: Changes needed to above 7 identified criteria?

### Backgrounder

Recommendation 19: Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.

- Section 2.9 of RA states “All domain name registrations in the TLD must be registered through an ICANN accredited registrar; provided, that RO need not use a registrar if it registers names in its own name in order to withhold such names from delegation or use in accordance with Section 2.6”.
- Specification 9 requires Registries that are Affiliated with Registrars or vice versa, to adhere to a Code of Conduct, which among other things, requires Affiliated Registries and Registrars to maintain structural separation and separate books and records.
- Only so-called .Brand TLDs that executed Specification 13 or TLDs for which all registrations are registered to the RO and/or its Affiliates are exempt from that Code of Conduct.
- In all cases, whether exempt or not, only ICANN Accredited Registrars may be used to register names within the TLD.

*Does At-Large / ALAC wish to comment on this topic given that it predominantly relates to ROs and Rrs and Vertical Integration?  
Recall that ALAC did not offer any comments to the SubPro Initial Report s. 2.10.2 on Registrar Non-Discrimination / Registry/Registrar Standardization*

### Options & Questions

- Option 2.5.d.1 & Q 2.5.e.1: Comment on proposals being:
  - Option 2.5.d.1.1: ICANN Org to select a “last-resort” wholesale registrar that would provide resellers ability to sell TLDs that lacked market interest, or verticals lacking ICANN-Accredited registrars
  - Option 2.5.d.1.2: ICANN Org be “clearinghouse” for payments between Ry and Rr that operate in different currencies
  - Option 2.5.d.1.3: Expand number of names that can be registered without use of ICANN-Accredited Rr for smaller registries
  - Option 2.5.d.1.4: AGB could note benefits to potential applicants in communicating with ICANN-Accredited Rr before submitting application to fully understand potential market and technical integration issues
  - Option 2.5.d.1.5: Registry contract should bundle capacity of becoming an Accredited Registrar
  
- Q 2.5.e.2: Other proposals that could assist TLD Registries that have difficulty attracting ICANN-Accredited Registrars?
- Q 2.5.e.3: Should ICANN get involved in assisting Registries or is this outside scope of ICANN’s mission, by-laws or mandate?
- Q 2.5.e.4: How to identify whether a TLD with low market performance is due to lack of demand or lack of sales channels?
- Q 2.5.e.5: Does ICANN forcing Rr to carry TLDs or designating registrars as “registrars of last resort” pose challenges to compliance oversight? Should Rr be liable for compliance actions for TLDs for forced TLDs? By handpicking a few selected Rr as “last resort” does this create the possibility for compliance to go easy on them because ICANN needs them to play a specific role in the marketplace?

# Action Items



- ◉ Further questions at this point?
- ◉ Wish to provide input?
  - Start an email thread on [cpwg@icann.org](mailto:cpwg@icann.org); or
  - Post input on wiki @ <https://community.icann.org/x/Jh68BQ>
- ◉ Penholder to update slides incorporating summary of deliberations from this call, comments via mail list etc and circulate updated slides before next call

Want to join the CPWG and participate in this At-Large policy-making opportunity?

**Contact our Staff Support Leads:**

[Heidi Ullrich](mailto:Heidi.Ullrich@icann.org) <Heidi.Ullrich@icann.org> or [Evin Erdoğdu](mailto:evin.erdogdu@icann.org) <evin.erdogdu@icann.org>

## Thank you