

5 December 2014

Dear Dr. Crocker and the ICANN Board:

We write in follow-up to our letter of 7 November regarding the GAC and ALAC's interest in safeguards in relation to strings that fall within Category 1 of the GAC's "safeguard" Advice. In our letter we noted the alarming potential impacts of regulation of speech, and urged the Board to recognize that policymaking for new gTLDs was concluded long ago, and many affected gTLDs have already executed their Registry Agreements with ICANN. It is unfortunate that we must once again appeal to the Board to prevent an apparent bypass of the GNSO Policy Development Process (PDP) by an Advisory Committee. We write now regarding the GAC Advice concerning Category 2 strings.

In response to this advice, the Board agreed to implement a Public Interest Commitment by all registries that they would not operate their registry as an "exclusive" access registry. This provision prevents any registry from using a generic term – used in its generic manner – from reserving all second level names for its or its defined affiliates' exclusive use. This provision allows registries to operate in a manner that still encourages innovation and diversity in registry models, while ensuring the relevant public has access to second level domains in that space.

In its Los Angeles Communique, however, the GAC now requests the Board:

Amend the PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress for discriminatory policies.

There are more questions raised by this advice, however, than it clarifies. For example, what is the scope of "Category 2 new gTLDs"? Does this advice refer only to those "exclusive access" generic strings listed under Category 2.2 of the GAC Beijing Advice? Does it extend to Category 1 strings (which are referenced in Category 2.1 of the Beijing Advice) or does it apply to all new gTLDs (the Beijing Advice's Category 1 and 2 listings are "non-exhaustive").

In addition, how would implementation of this GAC advice be achieved? Requiring an amendment to the PIC specification for any category of new gTLDs (or all new gTLDs) would entail an amendment to the RAs of all new gTLD Registry Operators (i.e., it would not be a requirement if only implemented as a voluntary PIC). To be effective, any amendment of the PICs would need to be either mutually agreed by ICANN and each Registry Operator (for each individual RA), or invoke the RA amendment procedures. How would this affect those registries that have already launched with restrictive rules around registration, such as .organic or .wed? To apply such additional restrictions only to those gTLDs which have not yet contracted would be untenable since it would result in discriminatory treatment across comparable registries.

ICANN's acceptance and implementation of this GAC advice - whether applied to a subset of new gTLDs or all new gTLDs - would have a detrimental impact for the following reasons:

- Specification 9 exempt TLDs that are not eligible for Specification 13 of the RA would be prevented from implementing the intended purpose of their TLD (this would affect a number of brand TLDs which did not strictly meet the criteria for Specification 13);

- It would pre-determine the result of outstanding work to define whether exclusive access TLDs can be in the global public interest. In its 12 October 2014 [meeting](#), the NGPC directed ICANN staff to prepare additional materials “to explore the option of consulting with the GNSO on exclusive registry access for generic strings”; and
- It would create uncertainty for a potentially large number of new gTLDs, who, like a number of legacy TLDs (e.g., .aero, .cat, .coop, .edu, and .museum), may wish to implement “discriminatory” registration policies in the sense that there are defined criteria for qualification. Discrimination exists in a legacy sponsored TLDs just as it does in new gTLDs. A non-discriminatory requirement, allowing a registrant to seek redress for discriminatory policies, is so wide in its potential scope as to cover almost all but completely open TLDs. Arguably, even in “open” TLDs, processes such as “premium” name and reserved name lists could be designated as discriminatory.

We believe the GAC’s proposal raises two overriding areas of concern.

1. This proposal will impede competition.

ICANN and all gTLD applicants have previously agreed that no generic string would be “closed.” The Public Interest Commitments and Public Interest Commitments Dispute Resolution Procedure reinforce this. Registries may place rules and restrictions on who may register a SLD and how they may use it, as long as they are transparent and non-discriminatory. Establishing additional processes for complaints, on top of the existing Public Interest Commitments Dispute Resolution Procedure, is unnecessary and would subject registries to excessive complaints from any individual who does not like a particular registry’s business model.

Adopting the GAC’s proposal for Category 2 gTLDs would limit registries to a single business model, consisting of purely of open sales. Such a restrictive requirement would stifle competition and innovation among registries. This would directly contradict ICANN’s purposes in opening new gTLDs in the first place.

2. This proposal will have a negative impact on speech.

The GAC’s proposal for Category 2 gTLDs raises problematic speech issues by putting ICANN and the GAC in the role of determining which strings are sensitive and must be restricted, and which strings are generic and should not be restricted (by rules, processes, or delegation of second level names except on a first come, first served equal price basis) and are thus subject to heightened or additional complaint processes. With the creation of a new complaint process for new gTLDs, there will likely be more complaints from individuals who dislike a certain registry’s models, and ICANN will be forced to make difficult decisions regarding content issues in new gTLDs.

For example, if this system had been in place already, would “.cat” have been open to a discrimination challenge from a website that seeks to host blogs about cats in English, but was excluded from registering? Would people who want to write a blog about their experiences with cancer be excluded from “.med” because governments believe “.med” should be highly regulated? These are difficult content determinations that ICANN should not be involved in.

Accepting the GAC Category 2 Advice allows the GAC to assign meaning over TLDs on an individual and arbitrary basis, determining not only which of these TLDs should have restrictions (something it continues to seek for highly regulated TLDs) but crucially, which TLDs should not adopt any registration policies imposing specific controls on qualification. Allowing the latter could be a permit for the GAC to pick and choose business models across the new gTLD landscape on an unprecedented scale.

We reiterate statements made in our previous correspondence regarding the ALAC and GAC interest in Category 1 strings. It is critical to recognize that policymaking for new gTLDs was concluded long ago, and many affected gTLDs have already executed their Registry Agreements with ICANN. Changing the rules in connection with how a registry may be used—specifically by regulating speech and content through either validation and verification of only a subsection of Internet users, to the exclusion of others, or by refusing a registry owner the right to reserve the space to a particular subsection of Internet users—would not only be prejudicial to registries but would be discriminatory to a broad swath of legitimate users. Policies have been finalized and other applications have been able to proceed; therefore, imposition of new rules today would result in disparate treatment of registry operators, which is both unfair on its face and a violation of ICANN’s bylaws, and would introduce inconsistencies across ICANN Registry Agreements.

Heeding the GAC’s requests, therefore, would be inappropriate at this stage of the program. If the GAC wishes to create for the future specific categories of gTLDs, including a subset of gTLDs, subject to differing standards, it can do so only through the GNSO Policy Development Process (PDP), which would appropriately involve consultation from all impacted parties. If the community, collectively, elects to more heavily regulate specific categories of strings, it is imperative to do so via this avenue. In any case, the Board must not implement policy that would lead to regulation of speech or undermine registry model innovation, whether permission-based or otherwise.

The RySG urges the ICANN Board to comply with ICANN’s Mission Statement and Core Values; to carefully consider the implications of the GAC’s recommendations both in terms of ICANN’s policy development process and end-user predictability; and to require that the GAC’s advice proceed through the PDP.