REPORT OF THE GNSO COUNCIL SMALL TEAM ON CLOSED GENERICS

From assignment form[1]:

This assignment is narrowly focused on two elements:

1. Proposing to Council next steps in responding to the Board proposal (i.e., whether or not the Council is open to working with the GAC on developing a framework for closed generics). [COMPLETE]
2. Suggestions to Council about how the proposed dialogue could be carried out, namely the conditions, parameters, and methodology for the dialogue, including potential desired attributes for a facilitator.

The substance of the potential framework is NOT in scope for this small team, nor are any subsequent Council steps that would be needed if agreement is reached on the framework.

For task 2, the Council suggests additional guidance to support efficient work:
• Keep in mind that 1) the small team is merely preparing non-binding guidance for the Council's discussion with the GAC and 2) any priorities of the small team and Council as a whole are still subject to mutual agreement with the GAC. As such, the Council encourages the small team to avoid protracted discussions where there may be disagreement; in such cases, it may be preferable to simply capture varying viewpoints and report them back to the Council.
• The ICANN Org Framing Paper (available below in Documents) is intended to provide a possible path forward for the GAC and GNSO Council to mutually agree on conditions, parameters, and methodology for the dialogue. The Council suggests that the small team uses the Framing Paper as a starting point and where there is disagreement with the suggested approach, provide an alternative with accompanying rationale. This suggestion also applies to any gaps identified in the Framing Paper.
• Review the 22 April 2022 GAC response (available below in Documents), which may help identify elements that are important to the GAC, and thus aid in preparation for the discussion with the GAC.

Introduction

The small team was originally convened to consider the singular question of whether the GNSO Council was willing to pursue next steps related to the ICANN Board's suggested path of a facilitated dialogue to establish a framework for closed generics in the immediate next round of

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[1] See assignment form here:
https://community.icann.org/download/attachments/178587048/Small%20Team%20Assignment%20-%20Next%20Steps%20in%20Response%20to%20Framing%20Paper%20on%20Closed%20Generics%20-%20Upd%2028%20Apr%202022.docx?version=1&modificationDate=1651705897000&api=v2

the New gTLD Program. The Council responded[2] affirmatively on 27 April 2022, thus completing the first task.

The small team was further tasked with developing recommendations for the conditions, parameters, and methodology for the facilitated dialogue. The small team reconvened on 11 May 2022 for these additional tasks. In conducting its work, the small team took account of the GAC's response[3] about the parameters and methodology, and as suggested by the assignment form, leveraged the Framing Paper[4] as a starting point.

To further streamline the small team's work, it broke its work into three discrete tasks:

1. Provide input on the criteria for identifying a facilitator.
2. Consider whether the Council is amenable to the ALAC taking part in the facilitated dialogue.
3. Provide guidance on the conditions, parameters, and methodology for the dialogue, which will be subject to mutual agreement with the GAC.

The small team conducted its work by meeting over the course of four weeks, and agreed over its email list on the recommendations below. The small team sought to complete its work in an expeditious manner, so as to allow the next steps to commence. In some instances, there were points of divergence amongst the small team members, which are identified below when applicable.

The small team would like to emphasize a point identified in the Framing Paper: "Should the dialogue result in an agreed framework between the GAC and the GNSO Council, the next step would be for the GNSO Council to move the framework through an appropriate policy development process, to result in approved recommendations that the Board could consider and, if appropriate, adopt in accordance with the Bylaws." The facilitated dialogue must not circumvent GNSO process and procedure.

Lastly, the small team understands that conditions, parameters, and methodology for the dialogue are subject to mutual agreement with the GAC. Therefore, the small team suggests that, once the Council agrees with or does not object to the recommendations below, they be communicated to the GAC directly, as well as to the ICANN Board.

Recommendations

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[2] See GNSO Council response here:
https://gnso.icann.org/sites/default/files/policy/2022/correspondence/fouquart-to-botterman-27apr22-closed-generics.pdf
[3] See GAC response here:
https://gac.icann.org/contentMigrated/gac-response-to-icann-org-framing-paper-on-the-board-facilitated-process-for-a-gac-and-gnso-council-dialogue-on-closed-generics
[4] See Framing Paper here:
https://gnso.icann.org/sites/default/files/policy/2022/correspondence/gnso-council-et-al-to-fouqaurt-08mar22-en.pdf

Task 1: Provide input on the criteria for identifying a facilitator.

Recommendation 1: The small team recommends that the criteria below be used by the ICANN Board in identifying a facilitator for the dialogue:

> The facilitator should be well-respected, independent, have a track-record of respectfully and tactfully building consensus, and is someone who does not stand to financially benefit from the outcome of the discussions. Ideally, the facilitator should have a good understanding of the closed generics issue and its history, but not having been directly involved in SubPro PDP WG discussions to bring a fresh perspective to the process. Finally, the facilitator should be willing and able to proactively help different parties find a mutually acceptable solution.

Rationale: The small team first reviewed the criteria identified by the GAC and determined that it does indeed serve as a good starting point for the GNSO Council. However, the GAC criteria included a statement that the facilitator should be "independent from commercial interest" which the small team thought could be more appropriately and specifically described as ensuring that the facilitator is not in a position to benefit from the outcome of the facilitated dialogue. After making that adjustment, the group agreed to the text above.

Additional Considerations: The small team believes that this criteria should be shared with the ICANN Board as soon as the Council agrees to it. In other words, the criteria should be sent with priority, even if Council consideration for tasks 2,and 3 were to take additional time.

In addition, the small team gave some thought as to who might meet the criteria and some believe that the most effective way to do so is to contract a professional facilitator, on the premise that a professional facilitator will bring both independence and skill in facilitation. While a professional facilitator would likely not have direct knowledge of the closed generics topic, it is generally a requirement of their job to be able to gain an understanding of a topic quickly.

Task 2: Consider whether the Council is amenable to the ALAC taking part in the facilitated dialogue.

Recommendation 2: The small team recommends that the ALAC should be given the opportunity to assign a single member to the facilitated dialogue, along with an alternate if the primary member is unavailable.

Rationale: The small team recognizes the ALAC's interest in the closed generics topic and, accordingly, its interest in the facilitated dialogue. However, there is concern about the size of the group taking part in the facilitated dialogue, as well as having participants in the facilitated dialogue serve in a representative manner; as such, the concerns were general in nature and not in any way specific to the ALAC. The small team determined that providing for ALAC participation, without the requirements of equal representation, would both accommodate the

wishes of the ALAC and address concerns of the small team. For context, task 3 below expands upon the concerns the small team had about a representative structure, in which facilitated dialogue members would serve as representatives rather than as individuals, working towards a common goal.

Task 3: Provide guidance on the conditions, parameters, and methodology for the dialogue, which will be subject to mutual agreement with the GAC.

Recommendation 3: The small team believes that, in large part, the parameters and methodology in the ICANN org Framing Paper are a good basis for the facilitated dialogue, with the following adjustments:

- 3.1 - Under *Proposed Parameters for Dialogue*, definitional work around "closed", "exclusive", and/or "generic" should not necessarily be a given. The small team suggests that the Briefing Paper (which the Framing Paper suggested be developed by the facilitator in consultation with supporting staff) should include relevant references (i.e., Registry Agreement, SubPro Final Report), without necessarily being prescriptive/definitional. In other words, existing definitions in the RA (Spec 11, 3(d) and Section 2.9(c)) can serve as the basis for definitions and only be discarded or adjusted if the dialogue participants agree that they are not fit for purpose. However, these terms should be considered in the context of the Beijing Communiqué (i.e., "For strings representing generic terms, exclusive registry access should serve a public interest goal"), which may suggest that understanding what "strings representing generic terms" and "serving a public interest goal" means are contextual and potentially criteria based.
- 3.2 - Under *What are the baseline principles that the outcomes should adhere to,* the small team believes that any potential outcomes of the facilitated dialogue should be considered and tested against the principles as outlined in the relevant section of the Framing Paper (i.e., SubPro's Affirmations 1.2 and 1.3). In addition, this test may serve as a gating factor before allowing the outcome to proceed further. Specifically, SubPro's Affirmation 1.2 states that the program must be administered in a "an ongoing, orderly, timely and predictable way" and Affirmation 1.3 states that the primary purposes of new gTLDs are to "foster diversity, encourage competition, and enhance the utility of the DNS." The small team interprets these principles to mean that the framework and criteria should be objective and predictable enough such that potential applicants are able to reasonably assess their application against the criteria, in advance of applying.
- 3.3 - Under the *Procedural Overview,* section 5, the small team agrees with the aspect of the Red Cross topic, in which the facilitated discussion was not dependent upon a representative model.Further, the small team recommends that:
  - Both the GNSO and GAC groups should be limited to no more than 6-8 individuals.
  - Participants should contribute as independent individuals, bringing their individual experiences and expertise, and not serve as representatives of their respective community organization(s). The participants must commit to focusing on successfully developing a framework for closed generics, even if the end product

is inconsistent with the goals or priorities of the participant or the participant's SO/AC/SG/C.
- ○ The group should include or be able to temporarily add consultative expertise in competition law, public policy, and economics.

Rationale: The small team carefully considered the parameters and methodology laid out in the Framing Paper and considered it to be generally suitable for the facilitated dialogue. However, through deliberations, the team discovered that it wished to add certain points of emphasis or additional specificity to various aspects of the Framing Paper. The small team believes that these additions improve the structure identified in the Framing Paper and, generally speaking, do not contradict the paper.

Rationale for 3.1 - Some on the small team had concerns about discarding existing definitions used in the Registry Agreement and leveraged by the SubPro Final Report. As such, the team felt that it would be helpful if these definitions serve as a starting point and only be changed if they are determined to not be fit for purpose. The small team believes that this will contribute to process efficiency. However, the relevant terms should be considered in the context of the Beijing Communiqué, as the framework is presumably intended to satisfy the expectations of the GAC Advice; as such, that context could be cause for reconsidering the definitions.

Rationale for 3.2 - The small team thought that it would be helpful to connect the principles identified in the Framing Paper with any potential outcomes of the facilitated dialogue. The principles could serve as a form of requirements, allowing the outcome to be tested against them accordingly.

Rationale for 3.3 - The small team is concerned that the facilitated dialogue will devolve into participants making the same arguments made in the SubPro WG. While a representative structure is often sensible for developing solutions, it is clear from the SubPro PDP that there are entrenched positions within the various SO/AC/SG/Cs. As such, the small team believes that the participants need the latitude and independence to be able to work towards a common goal, and not be beholden by the goals and expectations of their respective groups. In addition, the team believes that the suggestion from the SubPro Final Report to ensure proper expertise on the team is extremely important, even if that expertise comes from outside the GAC and GNSO.

Additional Considerations: While most members believe that the parameter in the Framing Paper that seeks to disallow the "edge outcomes" (i.e., of allowing closed generics without restrictions or limitations or prohibiting closed generics under any circumstance) will promote a more efficient process and hopefully a different outcome than the SubPro WG, there is notable opposition from the NCSG members of the small team. They believe that the parameter may impose unwanted restrictions on the facilitated dialogue and if any such limitations are introduced, they should be merely suggested parameters.