

Non-Commercial Stakeholders Group

Representing the interests and concerns of non-commercial Internet users in domain name policy

14 April 2022

To :Philippe Fouquart, Chair of the Generic Names Supporting Organisation
c/c: Sebastien Ducos, Vice-Chair of the Generic Names Supporting Organisation
Tomslin Samme Nlar, Vice-Chair of the Generic Names Supporting Organisation

Re: Response to the Board's Proposal for a GNSO Council & GAC dialogue on Closed Generics

Dear GNSO Chair,

We are writing to you with regard to a recent proposal from the ICANN Board regarding a 'facilitated dialogue' between the GNSO Council and GAC on closed generics. We intend to provide some of the NCSGs concerns on this matter and formally oppose the idea of setting a dialogue that would further the current imbalances between SOs and ACs.

The 'facilitated dialogue', as proposed by the Board, is an invented process that is nowhere to be found in any documented ICANN procedures. While we acknowledge the Board's effort to explore different ways of navigating difficult policy issues, it is important we honor and respect the established procedure when attempting such opportunities.

Moreover, we find it difficult to justify the Board's instruction to limit this dialogue to only between GAC and GNSO Council. It gives the impression that GAC has authority over this issue, which is not the case, and gives GAC a more pronounced role in the policy development process, which risks crippling the legitimacy and accountability of ICANN's multistakeholder model.

1. GAC has exhausted its ability and opportunity to provide advice on Closed Generics

The Advisory Committee was very clear in its deep concerns about Closed Generics listed on the [Beijing Communiqué of ICANN46](#), issued in April 2013. Where, under the section "Advice to the Board," the GAC set out "safeguard advice for new gTLDs" with Annex I, setting out a "non-exhaustive list of strings" that it - as a body - "considers to be generic terms," and for which "the applicant is currently proposing to provide exclusive registry access."¹

The Board, after requesting and receiving extensive public comment, including from small and independent book publishers and sellers around the world with objections to a

¹ .antivirus, .app, .autoinsurance, .baby, .beauty, .blog, .book, .broker, .carinsurance, .cars, .cloud, .courses, .cpa, .cruise, .data, .dvr, .financialaid, .flowers, .food, .game, .grocery, .hair, .hotel, .hotels, .insurance, .jewelry, .mail, .makeup, .map, .mobile, .motorcycles, .movie, .music, .news, .phone, .salon, .search, .shop, .show, .skin, .song, .store, .tennis, .theater, .theatre, .tires, .tunes, .video, .watches, .weather, .yachts, .クラウド [cloud], .ストア [store], .セール [sale], .ファッション [fashion], .家電 [consumer electronics], .手表 [watches], .書籍 [book], .珠宝 [jewelry], .通販 [online shopping], .食品 [food]

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closed generic of .BOOK, required all of the above applicants to modify their applications from "closed" to "open" if they wanted to proceed with their applications in the 2012 round.

Despite requests, including the ones issued by individuals participating actively in the GNSO's New gTLD Subsequent Procedures (SubPro) PDP Working Group, GAC has not been able to provide any elaborated and/or convincing rationale aside from the vague comment from the same Communique, "For strings representing generic terms, exclusive registry access should serve a public interest goal."

We note that the silence/lack of position from the GAC at the time may reflect the understanding that "open generic" gTLDs themselves serve the public interest, and that the action of the Advisory Committee (as inaction is itself a very effective action) can be guiding and determinative to the Board and GNSO of the GAC's support for actions of the Board in 2012 to allow Brand gTLDs - corporations using their corporate name as their top-level identifier - to be "closed" gTLDs with all domain names owned by the Registry itself, but that "Generic Term" gTLDs - for strings representing the generic words of entire industries, businesses and non-profit sectors - serve the public interest by being open, at least open to all in the category of the gTLDs, such as .CLOUD providers and related services².

It seems to us that the GAC, in its advisory role in the ICANN community's policy development process, has made itself clear on the matter of Closed Generics. Had the GAC had any clearer and more specific guidance, we trust that it would have been provided in the nine (9) years since its Beijing Communique, and while the GNSO Working Group was doing its work per ICANN policy development processes.

2. Closed Generics is not a GAC-specific issue

In the framing paper, references were made to the Red Cross discussions as a precedent of such 'Board facilitated dialogue'. However, protection of Red Cross/IGO names is distinct from closed generics in nature.

Red Cross/IGO protection is inarguably a GAC issue as IGOs could potentially be members of the Advisory Committee and GAC has the obligations and responsibility to guard their interest. Moreover, there were international law backings for protection of Red Cross names and trademarks at the time³.

With regards to the topic of Closed Generics, as explained above, GAC has not been able to provide any specific guidance aside from the 2-sentence comment in its Beijing Communique: 'For strings representing generic terms, exclusive registry access should

² We note in the first round that gTLDs "opened" from their prior "closed generic" application status included .blog, .beauty, .baby, .book and .cloud, among dozens of others.

³ According to the Problem Statement Relating to the Protection of Certain Red Cross Names and Acronyms at the Second Level in Generic Top Level Domains:

<https://community.icann.org/download/attachments/64062340/CLEAN%20RC%20Problem%20Statement%20-%20updated%208%20March%202017.docx?version=1&modificationDate=1488984005000&api=v2>

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serve a public interest goal.' It is also important to note that the Committee has been quiet during the 5 years of SubPro PDP despite numerous requests for further comments/guidance.

Public interest should not be a concept monopolised by the GAC. It is set out in the ICANN Bylaws and has guided the Board's resolutions and community discussions for many years. The Org's recent effort of developing the Global Public Interest Framework and implementing it in the SSAD ODP reinforce the fact that public interest has to be taken into account in all aspects of ICANN's work. As such, no specific stakeholder group within the ICANN community holds more authority in its definition and pursuit of public interest.

As above, we fail to see how this issue is 'GAC-specific' in any sense and has to be dealt with only between GAC and GNSO.

3. Such 'facilitated dialogue' is giving GAC a more pronounced role in policy making than its advisory role as mandated in ICANN Bylaw.

GAC is welcome to engage in the policy development process in the early stage as any other SO/ACs in order to ensure a policy outcome that takes the multistakeholder perspective into account.

That said, it is important and critical that we honour the distinct responsibilities and roles between the GNSO as the policy-making body and GAC as an advisory committee.

And for that, it is critical that we make sure the multistakeholder model is fair and balanced. Current practice of ACs participating in consensus vote in PDPs while still enjoying the privilege of having their advice as carrying some kind of different weight than the policy recommendations is creating an asymmetrical power relation among AC and SO. This uneven balance can negatively impact the legitimacy and accountability of ICANN's multistakeholder model.

In light of the above mentioned, it remains unclear how a facilitated dialogue as proposed can create any other outcome than what the SubPro couldn't have achieved with 5 years of hard work. On that note, the Noncommercial Stakeholder Group would also like to note that this 'facilitated dialogue' can create a dangerous precedent of re-opening issues. The community should learn to accept the product of difficult compromise. And we should all learn to draw the line of when policy recommendations are made and resolved by Council/Board, they are regarded and respected as Consensus Policy.

The NCSG understands that the issue of Closed Generics remains without an explicit GNSO recommendation as reported in the SubPro Final Report. However, rather than inventing processes and setting a dangerous precedent, we propose using a more balanced multi stakeholder approach in seeking input on this topic. Therefore, we urge the GNSO to reconsider its support to the proposed dialogue.

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Therefore, instead of pursuing a 'closed dialogue' with the GAC where the scope and interlocutors are dictated by the ICANN Board, the NCSG encourages the GNSO to seek community comments and perspectives on how to proceed with Closed Generics throughout the already established participatory mechanisms used by the ICANN community (i.e. public comments and PDPs). We trust that a broader conversation can serve as a good experience to collect the main issues and concerns around this topic, as well as guidance to the GNSO Council members responsible for leading this debate internally - should it occur despite our deep concerns for the ICANN Multistakeholder model and precedent. How else will this small team - some with very long-held personal views on the subject - be bound to a discussion on behalf of the entire GNSO Community?

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The Non-Commercial Stakeholders Group (NCSG) represents the interests of non-commercial users in the formulation of Domain Name System policy within the auspices of the Generic Names Supporting Organisation (GNSO). Since our inception, we have facilitated global academic and civil society engagement in support of ICANN's mission, stimulating an informed citizenry and building their understanding of relevant DNS policy issues while raising awareness of the need for ICANN to comply with applicable privacy and data protection legislation.

We thank you very much for the attention and look forward to receiving a written response to these questions along with any additional documents that could be used to clarify our questions. Last but not least, the Noncommercial Stakeholder Group will be happy to further engage with you on finding a way forward that would satisfy the Generic Names Supporting Organisation's interests.

Yours sincerely,

Bruna Martins dos Santos

Chair, Non-Commercial Stakeholders Group