

# GNSO Small Team Report (Potential GNSO Comment): Design Phase Concept Paper

## Introduction

The GNSO Council appreciates the opportunity to comment on the [Design Phase Concept Paper](#) proposing an Operational Design Phase that is to become part of the policy and implementation life cycle. We view it as an effort to add transparency and consistency to an effort that ICANN must have already been undertaking on earlier PDPs.

As part of this GNSO effort we have sought the input of our various stakeholder and constituency groups. Some of those same groups have signaled an intention to submit their own individual comment and we have encouraged that. We think that a procedure of such long-lasting import merits a formal public comment period.

Our review started with a careful reading of the draft, resulting in a number of questions due to apparent ambiguities or gaps in the process. (This is not a surprise given the early stage of the draft.) To aid our and the community's understanding, we submitted a set of questions to ICANN. These questions were without agenda or objective other than to inform and aid in the analysis.

Generally, we found ourselves in agreement with the Principles stated in the Concept Paper and our comments go to fleshing out or amending the Paper in a way to ensure that those principles are met.

## Executive Summary & Recommendations

We begin with the understanding that: ICANN must already undertake some type of operational analysis when the Board considers PDP recommendations, the extent of that analysis varies from PDP to PDP, and that the Board finds this analysis to be adequate. As the draft indicates, all PDPs are different, from which we can deduce that PDPs require different levels of operational analysis.

Given the disparity among PDPs and their need for operational analysis, we found the published approach to be overly prescriptive or "over-engineered." We understand that there is flexibility in the penumbras of the draft, but the process as defined seems to describe the process to address the rare cases requiring the highest level of scrutiny into operational considerations. Put another way, not every set of operational analyses will require an ODA or DFG.

We also think that there will be instances where PDP working groups and IRTs would benefit from the receipt of tailored operational analyses and the Design Phase Concept Paper should anticipate that. Requests for operational analyses should be available to parties other than the

Board. We understand that the draft, as written, provides a needed tool for the Board, but we think one process / procedure could benefit the entire PDP/implementation process and not just ICANN Board requirements.

Therefore, instead of designing a prescriptive process, (from which deviations can be permitted), ***we recommend*** a generic framework that describes various methods for developing operational considerations, and enables the application of the method that suits the circumstances of each particular PDP. The framework could:

- identify the costs and risks of implementation,
- provide for transparency through specifically identified communication and feedback channels,
- describe a lightweight process for requesting analyses,
- design a “right-sized” analysis, and
- inform decision makers, whether they be the Board, the GNSO Council or the working groups at the appropriate time for that process.

Finally, we should take the time necessary to create an effective, economical, adaptable methodology.

We are facing the conclusion of two PDPs addressing GDPR and the next round of gTLD releases. Both of these require significant operational analysis but in very different ways. We recommend creating and executing those analyses in a transparent manner separately designed to meet the needs of each PDP. For future PDPs, we recommend undertaking operational analysis at a time and to a degree suitable for them.

### Specific Areas for Examination

1. ***Transparency considerations of a process ICANN is already doing.***

ICANN is or should have been undertaking a similar effort with past policy recommendations: determining operational impacts, financial implications and other effects of the new policy, and providing advice to the Board for their consideration. With that understanding, this draft is a codification of good management practice.

Those inputs should be transparent as well.<sup>1</sup> There is a question whether this work is being done “in the right place” in order to ensure transparency. I.e., does the DFG

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<sup>1</sup> The “Principles” described on pg.2 of the Concept Paper state: “The Operational Design Phase must maintain fidelity to the underlying policy recommendations.” The Principles or other text might be augmented to include: “All work during the Operational Design Phase must be narrowly tailored to understand the impact and organizational implications of a set of policy recommendations and not operate in any fashion to revisit any of the policy recommendations. To the extent that it is discovered during the ODP that any of the policy recommendations might be substantively impacted by the analysis, these recommendations must be returned to the GNSO Council and/or relevant PDP WG for further consideration.”

represent the community for the purpose of transparency or is there another mechanism anticipated?

The new process should explicitly identify transparency measures. By transparency, we mean a “right-sized” set of actions that do not add to the timeline but perhaps incorporate measures that:

- ensure that policy recommendations are not changed (either diminished or augmented)
- all reporting is public (so that the Board and community receive information simultaneously)
- the DFG is narrowly scoped to consideration of operational impacts and not empowered to create solutions or “work-arounds,” and
- other measures ICANN might take to fulfil its transparency obligations.

2. **When appropriate, move the process upstream.**

Could this process also be a tool for a PDP to use at their discretion? There are examples of PDP teams requesting and receiving operational consideration advice from ICANN staff to inform the team’s deliberations (e.g., the EPDP on Registration Data and the new gTLD Policy of 2008).

*For some PDPs, we see benefits to understanding operational implications at various points throughout the policy development process, and recommend that the next draft be amended to incorporate these ideas. On select occasions, the operational analyses could start earlier, creating a process with different insertion points and timelines. With variable starting times, the process might be a lever for improving / streamlining the PDP, rather than retarding it.*

Given that the informational requirements of each PDP are unique, such an “early implementation” should be limited in occurrence and scope, and occur at the discretion of the working group, ICANN staff, or Board.

3. **Make it flexible & discretionary.**

In our view, “more process” should be deployed only when necessary, and adding a procedure to an already lengthy PDP process should be avoided. There are risks in over-engineering and adding yet-another complex framework. Risks to the public confidence in the PDP when the Board considers independently provided information are exacerbated when that information is obtained through a complex and lengthy process.

We recommend increased flexibility and discretion, rather than requiring new procedural requirements and creating new teams. As contemplated in the current draft, the formation of the DFG is an assumption to be overcome rather than a team to be formed in extraordinary circumstances. (We understand that flexibility and discretion are hinted at in the document, but these should be brought to the forefront.)

The Concept Paper (pg.4) correctly identifies different information requests the Board might make. The ODP process might also be flexible as to how that information is collected.

The community has received competent implementation advice from ICANN staff in the past; we are sure the Board has received the same. A flexible, discretionary framework, with appropriate transparency mechanisms in place, can leave it to the discretion of the ICANN staff to marshal the necessary resources to develop operational considerations. Similarly, a flexible, discretionary process can be implemented at the best moment in the PDP process.

4. **Understand the implementation details & attendant risks.**

Concerns with the draft as written include:

- that parties not participating in the PDP (e.g., the DFG members) might end up significantly altering its conclusions,
- that the process will inevitably extend the current timelines (our review of the process as drafted indicates additional time will be required), and
- there will be additional burdens on the community.

We recommend the procedure should be clarified to explicitly describe:

- how it affects the timing of the PDP implementation,
- the roles and responsibilities of the ICANN staff, Board, working groups, and DFG.

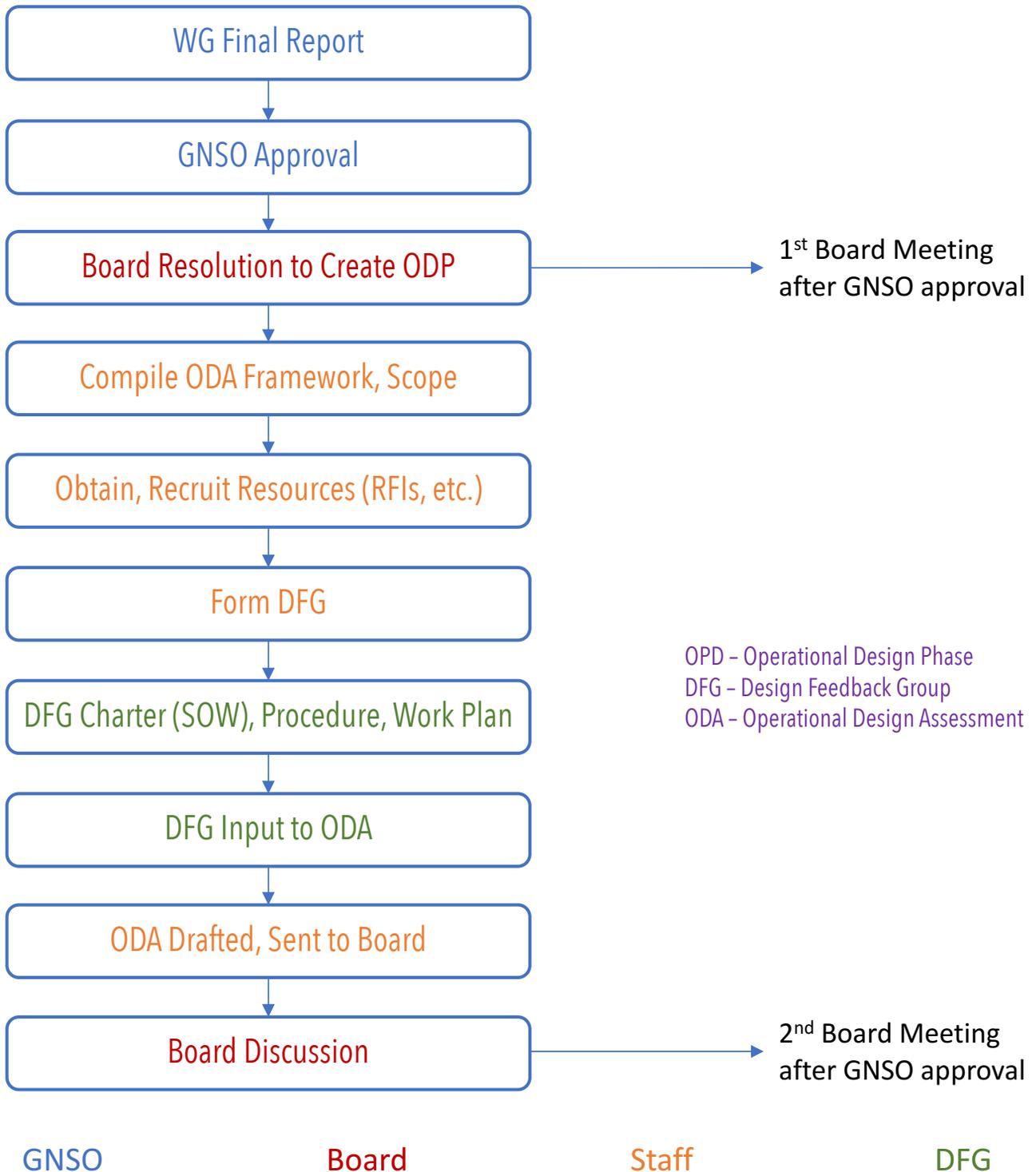
Lastly but importantly, there is a concern that additional processes will stretch the existing volunteer pool even more thinly.

APPENDIX ONE: ODP FLOW

APPENDIX TWO: ODP CLARIFYING QUESTIONS FOR ICANN

# APPENDIX 1: ODP FLOW

as described in Design Phase Concept Paper, 1 Oct 2020



## APPENDIX 2: ODP CLARIFYING QUESTIONS FOR ICANN

The GNSO ODP small team developed a set of "clarifying" questions regarding the Design Concept Paper dated 1 October 2020.

This is not feedback on the draft, which is to be published elsewhere, but rather a set of questions that arose when the GNSO small team read and found the draft to be ambiguous or uncertain. Correcting these ambiguities will help the GNSO Council tailor its review to substantive issues and, we think, will help the rest of the community better understand the proposal. The questions were developed without agenda or policy goal but merely to ensure all readers have the same understanding.

As stated above, as we are not pursuing a point of view in these questions but merely seeking clarity. Given that, we think the ICANN response could be of the form from among:

- "Yes, that is an ambiguity and we will amend the Design Phase Concept Paper to address this question, (and if possible, add), the draft will be amended to say that..."
- "The answer to the question is clear in the document, i.e., the paper states..."
- "The Design Phase Concept Paper is purposefully vague on that point because .. (e.g., that issue will be addressed at a later time, or the process is flexible on this point...)"

The questions are:

1. What occurs to cause the board to resolve to form a DFG? Is there a set of staff-developed criteria that, if met, would trigger the resolution? Does staff, in a Board paper, indicate the need for it? Could the Council or individual stakeholder groups request that the Board consider such a resolution? Could it be recommended or foreshadowed in the PDP WG Final Report? Could a PDP specifically recommend that a DFG is *not* necessary for the implementation of their recommendations?
2. How is this community-led design feedback group formed/appointed? We understand the requirements for each group to be ad hoc, topic-dependant in nature.
  - a. Will staff form the DFG; will SO/ACs to select/propose members to channel their respective inputs? Is the process intended to be completely open-ended on this issue?
  - b. The principles state that, "Affected stakeholders should have the ability to provide input to the work of the Board, ICANN org, and the community in the Operational Design Phase." Does the DFG represent the community in meeting this principle?
  - c. The paper suggests that DFG members "be selected based on defined qualifications." Who would define such qualifications? Is it envisaged they would be in disciplines such as financial costing/management, technical assessment and project management?

3. Regarding DFG work (some of these are inter-related but we ask they be answered separately):
  - . What's the output of this DFG? A report to the Board, to staff, for community review?
    - a. Is the output addressed to staff to inform the writing of the ODA, or is it addressed directly to the Board?
    - b. Can the DFG output be used by the Board to amend or reject the PDP recommendations? (Reject, as defined in the Bylaws.)
    - c. Is the DFG a QA check on the staff work (ODA) *OR* does the DFG work inform the compilation of the ODA? (Or something else?)
    - d. Are the inclusion of safeguards anticipated that would guarantee that the feedback won't be used for re-negotiation of contentious issues that are related to the substance of the policy.
4. Is it still the intention to finish this process in time for a discussion by the second Board meeting following the GNSO Council approval? We understand that the Bylaws provide flexibility but the Design Phase Concept Paper goes out of its way to state the principle that, "the Operational Design Phase should not create delays in the overall timeline to Board consideration," and the Bylaws aspire to have that discussion within two meetings of the approval. Asked another way and given the amount of work involved, do you agree that: it seems that the Board would *never* be in a position to consider GNSO recommendations within the hoped-for two-meeting timeframe if the resolution to form the DFG is undertaken after GNSO Council policy recommendation approval?
5. The paper describes an alternate timeline where the process is started earlier in the PDP consideration and approval process. Is moving the start date ahead in time suggested to save time in the overall PDP consideration *OR* is it also intended to provide the working groups or Council access to the information developed during the ODP process?
6. The Bylaws call for the Board to approve policy recommendations or send them back to the Council for reconsideration and re-vote. If the Board sends the policy recommendations back to the Council based upon the ODP (and DFG findings) does that count as the Bylaw-described Board "rejection" of the policy recommendations or is the ODP process outside of that Bylaw-defined procedure?