

A hand holding a magnifying glass over a network diagram. The diagram consists of a central node connected to several other nodes, forming a web-like structure. Five people in business attire are standing on the nodes. The background is a blurred image of a hand holding a magnifying glass. The text is overlaid on the right side of the image.

**APPLICATIONS  
TO ICANN FOR  
COMMUNITY-BASED  
NEW GENERIC TOP  
LEVEL DOMAINS  
(gTLDs):**

**Opportunities  
and challenges  
from a human rights  
perspective**

Council of Europe report  
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Report by **Eve Salomon  
& Kinanya Pijl**

# **Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective**

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<sup>1</sup> The opinions expressed in this document are personal and do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of member states, the Council of Europe's statutory organs or the European Court of Human Rights.



## Foreword

This report aims to contribute to ICANN's discussions. Top-level domain names enable people across borders to communicate and access information and ideas in new ways. Domain names make an important contribution to the enjoyment of freedom of expression and freedom of assembly and association, and the prohibition of discrimination which is especially important for minorities and vulnerable groups. Ensuring that public policy for the Internet respects the core values of human rights, the rule of law, and democracy, is the key objective of the Council of Europe's Internet Governance Strategy 2016-2019<sup>2</sup>.

The ICANN Board's commitment to a new bylaw on human rights recognises that the Internet's infrastructure and functioning is important for pluralism and diversity in the digital age, Internet freedom, and the wider goal of ensuring that the Internet continues to develop as a global resource which should be managed in the public interest.

As a follow-up to the Declarations' of the Committee of Ministers of 20103 and 20154, the Steering Committee on Media and Information Society (CDMSI) commissioned this report to serve as an input into the work of the Governmental Advisory Committee (GAC) including its working group on human rights and international law.

The report focuses on ICANN's policies and procedures concerning community-based applications for top level domains. It considers the human rights at stake and takes account of the original vision of communities as put forward by the Generic Name Supporting Organisation (GNSO). In this context, particular attention is given to ICANN's decision-making which should be as fair, reasonable, transparent and proportionate as possible.

I would like to thank the authors, Eve Salomon and Kinanya Pijl, for preparing this report which is intended to prompt constructive dialogue and reflection in ICANN. The Council of Europe will remain actively involved in ICANN's work.

Jan Kleijssen  
Director of Information Society and Action against Crime

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<sup>2</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016805c1b60](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805c1b60)

<sup>3</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cee51](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cee51)

<sup>4</sup> [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true)



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## Executive summary

This report provides an in-depth analysis of ICANN's policies and procedures with regard to community-based applications from a human rights perspective. In 2012 ICANN embarked on a wide-ranging opening of the New generic Top Level Domains (gTLDs) name space. The governing rules, developed in a multistakeholder process, included provision for special priority to be given to qualifying community applications. This was a commendable endeavour, but one which we recommend be treated as a "first attempt". As we will show, much can be learned from this initial round to improve on processes applicable to such community applications and assist ICANN's development as a multistakeholder body working in the public interest.

This report grounds its examination from a human rights angle, with particular regard to the rights to freedom of expression, freedom of association, non-discrimination and due process. These rights are all interrelated, interdependent and indivisible. Any failure to follow a decision-making process which is fair, reasonable, transparent and proportionate endangers freedom of expression and association, and risks being discriminatory. We have therefore paid particular attention to the key processes affecting community based applications, e.g. the community objection and community priority evaluation (CPE) processes, to assess whether they are fair and reasonable. We conclude that there are well-founded concerns that weaknesses in those processes may affect the human rights of community applicants.

### *Chapter 2: Human rights*

Chapter 2 provides an overview of which universal human rights apply to communities and ICANN gTLDs and how ICANN should have regard to human rights when assessing applications. Human rights law does not as a general matter directly govern the activities or responsibilities of private business. ICANN is a private corporation under Californian law and as such not the direct subject of human rights law. However, ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN functions as a global governance body that develops Internet policy and has the capacity to impact on human rights such as the right to freedom of expression, the right to freedom of association, the right not to be discriminated against and due process.

A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression as well as freedom of association and assembly.

### *Chapter 3 and 4: The notion of 'community' and the public interest*

Chapter 3 provides an analysis of the definition of "community" as set out in the different ICANN policy documents that form the basis for assessing whether a community deserves priority over standard applicants. Chapter 4 goes deeper into the concept of priority for community-based applicants and explores the concept of public interest. We found that there



is no clear definition of “community” for the purpose of community-based applications: the initially broad definition of community as formulated by the GNSO has been severely restricted in the Applicant Guidebook (AGB) and the Community Priority Evaluation (CPE) Guidelines. In addition, many constituents of the ICANN community consider that the Economist Intelligence Unit (EIU) – which is in charge of evaluating whether communities deserve priority in the CPE procedure – set an even more narrow interpretation of such a narrowed definition without due regard for context and circumstances.

There is consensus that community-based applications ought to serve the public interest, but without agreement about what “public interest” might be. We consider that this concept could be linked, for example, to the protection of vulnerable groups or minorities; the protection of pluralism, diversity and inclusion; and consumer or internet user protection. Before any new gTLD round, we recommend ICANN to reconsider the definition of “community” and provide clarity on the public interest values community TLDs are intended to serve.

## **Recommendations:**

### *The definition of ‘community’*

- Define a clear and consistent definition of “community”.
- Re-assess the criteria and guidance as formulated in the AGB and CPE Guidelines in the light of the spirit of the GNSO Policy Recommendations.
- Instruct and train delegated decision-makers, such as the experts and panels deciding on Community Objections and CPE, to interpret the cases before them in light of the purpose for which community-based applications were enacted.

### *The concepts of priority and public interest*

- Provide clarity on the public interest values community TLDs are intended to serve.

### *Chapter 5: Community Objections*

Chapter 5 provides an evaluation of the process of Community Objections, particularly based on input provided by community-based applicants. The process of Community Objection refers to an objection by a community representative because of substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted. We found apparent inconsistency in the determinations of whether entities had standing to object. The International Center of Expertise of the International Chamber of Commerce administers disputes brought pursuant to Community Objections. Maximum predictability of the behaviour of these delegated decision-makers need to be guaranteed by ICANN. Moreover, the first round of applications and Community Objections suggests that these experts and panels have applied implicit standards when making their decisions. Such implicit standards ought to be made explicit to guarantee the community-based application with all its procedures and processes is aligned with the intended goal of the programme. Additionally, there are no appeal mechanisms in place with respect to the Community Objection procedure. There ought to be availability of an appeal on the substance of the argument and on the representativeness and eligibility of the objectors.

## **Recommendations:**

- Assess whether it is desirable and feasible to open up the possibility to collectively file a Community Objection.
- Assess whether it is feasible and desirable for certain organisations within ICANN, such as ALAC and GAC, to be able to file Community Objections.
- Provide clarity on the expected costs for Community Objection.
- Lower the costs for Community Objection.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability.
- Expose implicit standards that have influenced the delegated decision-makers in their decision-making and assess to what extent these standards correspond to the goal of community-based applications.
- Incorporate a proper appeal mechanism that has the capacity to re-evaluate the entire case, including the fairness of the process as well as the substance of the argument.
- Reconsider the standards on disclosure in the light of due process for both ICANN as well as delegated decision-makers.
- Guarantee that both delegated decision-makers and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board.
- Guarantee that adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.
- Reconsider the mandate of delegated decision-makers in the light of the UN Guiding Principles on Business and Human Rights and its requirements concerning the provision of an effective remedy.
- Provide clarity about the required community-specific expertise of panel members of delegated decision-makers.
- Provide the fullest disclosure when it comes to the qualifications and background of Panel members of delegated decision-makers as well as into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN in the light of due process.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability and ensure consistency of decisions taken along the whole process: from objection to evaluation.

### *Chapter 6: Community Priority Evaluation*

Chapter 6 considers the range of complaints that have been levied at the Community Priority Evaluation process – which is the process established to determine whether an application would have community priority status – and assesses them in the light of human rights. During our research we came across a number of areas of concern about the CPE process, including the cost of applications, the time taken to assess them, and conflicts of interest, as well as a number of areas of inconsistency and lack of transparency, leading to accusations of unfairness and of discrimination. According to ICANN's own published review of the new gTLD round, only ICANN staff reviewed the CPE results for consistency without any evidence of any external quality control on the EIU's procedures (despite this being a term of

the contract between the EIU and ICANN). Furthermore, there is no appeal of substance or on merits available of the EIU's evaluation. These shortcomings should all be rectified for any future gTLD round.

### **Recommendations:**

- Consider reducing the costs for CBAs for future gTLD rounds. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.
- Establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and any appeal mechanisms for future gTLD rounds in order to further due process, manage expectations and enable a degree of accountability. These deadlines can be framed in bands, to take account of variances in the number of applications received.
- Take care to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.
- Consider whether ICANN should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms' length from ICANN, then there should be staff support for community applicants.
- Take greater care to keep CBAs informed about anything which affects the progress of their application. To facilitate due process, they should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.
- Have a clear set of definitions and/or guidance that works across different but related ICANN processes to reduce apparent inconsistency. Furthermore, the application of a comprehensive quality control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.
- In any future new gTLD rounds ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.
- Either re-evaluate the scoring system and points to lower the bar or develop a new process altogether for assessing community applicants.
- Full registry conditions, including key elements of the application and any additional Public Interest Commitments, should be published to enable on-going monitoring by stakeholders to ensure compliance by the applicant to the community to which it is accountable.

### *Chapter 7: Accountability mechanisms*

Chapter 7 looks briefly at the so-called accountability mechanisms that community-based applicants and their competitors can resort to throughout their application process. These

include reconsideration requests, the Independent Review Process, the ICANN Ombudsman, and recourse to the court.

We have found that ICANN's accountability mechanisms have been of very limited value to community applicants. In particular in the case of CPE decisions ICANN has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN's own accountability mechanisms are unable to hold ICANN (or the EIU) to account. Ultimately, greater responsibility than delegation to an external third party is called for, as is endorsed by the majority decision in the recent Independent Review Panel dated 29 July 2016.

#### **Recommendations:**

- Institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeal mechanism could effectively replace the other existing ICANN accountability mechanisms.

#### *Chapter 8: Concepts for the next gTLD application rounds*

Chapter 8 provides a series of specific suggestions for improving or changing the application process for community-based applicants in any future gTLD expansion in order to tackle the shortcomings mentioned above.

In particular, we believe ICANN should explore a revised system of fair, reasonable and non-discriminatory restrictions/incentives on community TLDs to seriously deter potential “gaming” and thus facilitate a *de facto* assumption that any CBA is, in fact, working to serve a community rather than a purely commercial interest. In effect, this could make the practical application of GNSO Guideline IG H – one of the implementation guidelines as set out in the Generic Names Supporting Organization's (GNSO) policy recommendations on which the implementation of the New gTLD Program is based – much simpler: claims that an application is in support of a community would be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application”.

For instance, a tighter set of restrictions could be envisaged on how a community string can be used and on the use of profits, or on the existence of transparent internal processes to resolve conflicts. This would mean that ordinary commercial applicants would have no interest in pretending to be communities. ICANN already sets more stringent registry conditions for strings delegated to community-based applicants, so there is a precedent for treating community applicants differently. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community.

#### **Recommendations:**

- Consider community applications first. ICANN staff who have been involved with the current new gTLD round have suggested that in any new round, community applications should be considered first. If, after evaluation, an applicant is deemed to be “community” (in ICANN terms), then no other applications for the applied-for string should be considered.
- Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs. In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).
- Consider whether the model applied for geo-names TLDs could offer possibilities for CBAs. In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).
- Have applications in staggered batches. ICANN could invite “expressions of interest” in applying, asking potential applicants to submit an interest in a string of their choice. ICANN could then advertise the strings in batches, requiring all competing applications to be submitted simultaneously. At the same time, they could ask for any community objections. This would help ICANN manage the workload and make keeping to deadlines feasible. Publishing a timetable for future string batches would also help potential applicants manage their application workload and business expectations. This would also comply neatly with GNSO Principle 9: “There must be a clear and pre-published application process using objective and measurable criteria. “
- Beauty parade for all applications. Rather than having a high bar for priority, ICANN could consider all applications for a particular string together. Retaining the principle of preference for bona fide communities, all applications from self-declared CBAs should be looked at together to determine which one best meets the selection criteria. The criteria would be similar to those in the AGB for CPE.

Given that many ICANN stakeholders seem troubled with the notion of a “beauty parade” involving subjective judgement, it is important that any competitive assessment be based on transparent and clear criteria and that the assessment Panel be truly accountable (unlike the EIU Panel). It may be appropriate to construct a Panel consisting of members appointed by the ICANN multi-stakeholder community.

- Have a different community track. Most countries around the world have systems in place for the licensing and regulation of community media.<sup>5</sup> Useful precedents can be borrowed from these existing regimes. For example, in the UK the telecoms and broadcasting regulator Ofcom requires community media, “Not be provided in order to make a financial profit, and uses any profit produced wholly and exclusively to secure or improve the future provision of the service or for the delivery of social gain to members of the public or the target community.”<sup>6</sup> Furthermore, community media must be accountable to the target community.

ICANN already sets more stringent registry conditions for strings delegated to CBAs, so there is a precedent for treating community applicants differently. Setting tougher criteria which would effectively deter any commercial applicant from ‘gaming’ by pretending to be a CBA would make it much easier to assume that a self-declared CBA actually is one. In effect, it could make the practical application of GNSO Guideline IG H much simpler: claims that an application is in support of a community will be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application”<sup>7</sup>

A tighter set of restrictions on how a community string can be used and on the use of profits would mean that generic commercial applicants would have no interest in pretending to be communities. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community. Certain mandatory registry requirements could be set in advance, such as having an effective appeals mechanism.

At the moment, accountability to the community is merely a background factor only taken into account by the EIU when considering Enforceability under Criterion 3, Guidelines: “The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.” It is not a determining factor in itself, whereas it could be a major determinant in identifying bona fide CBAs.

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles<sup>8</sup> refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the

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<sup>5</sup>In the US, the FCC licenses non-profit stations but these are meant to be exclusively granted to “educational organizations”, so not of particular relevance to ICANN. In fact, most are licenced to either NPR or religious organisations.

<sup>6</sup>See Para 2.2 at <http://licensing.ofcom.org.uk/binaries/radio/community/thirdround/notesofguidance.pdf>

<sup>7</sup> GNSO 2007 Principles and Recommendations

<sup>8</sup> GNSO Principles E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN’s Registry agreement.” Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.” Principle 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to could lead to contract termination. “

CBA applicant and its community – and ensuring they can be enforced going forward – will strengthen compliance with the GNSO principles.

### *Chapter 9: Conclusion*

This report concludes in chapter 9, with an overview of findings intended to catalyse multistakeholder discussion on community-based applications and human rights and to contribute to the on-going GNSO Policy Development Process (PDP) addressing this issue.

## 1. Introduction

This study is conducted by two independent experts with expertise in the field of Internet governance, human rights, corporate social responsibility and better regulation. The findings of the study stem from in-depth analysis of ICANN's policies and procedures, international human rights law and interviews with community-based applicants, ICANN staff and other relevant actors within the ICANN community. This report is commissioned by the Council of Europe. The Council of Europe is an observer in the ICANN Governmental Advisory Committee (GAC), and is there to assist its member states, inter alia in the framework of its mandate as set out in the Declaration of the Committee of Ministers on ICANN, Human Rights and Rule of Law, adopted on 3 June 2015. This report builds upon the Council of Europe Report on 'ICANN's procedures and policies in the light of human rights, fundamental freedoms and democratic values, prepared by Dr Monika Zalnieriute & Thomas Schneider (2014) and the Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with regard to New Generic Top Level Domains, as prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, and Mr Nico van Eijk (2012).

ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. By means of its multistakeholder, private sector led, bottom-up policy development model for Domain Name System (DNS) technical coordination the ICANN community agreed to a major expansion of new generic top level domains (gTLDs). The New gTLD Program is a program to add an unlimited number of new gTLDs to the root zone. The program's goal is to foster diversity, encourage competition, and enhance the utility of the DNS.<sup>9</sup> The first application round started in January 2012 and ended in April 2012, during which time applicants applied to run the registry for the TLD that they choose. The ICANN community agreed that there should be "community TLDs", for communities that are interested in operating their own TLD registry. Such communities are given precedence for TLDs in contention. Hence, if there are multiple applicants for a given string, and one of the applicants passes the Community Priority Evaluation (CPE), then that applicant is automatically given precedence to the TLD.

1,268 applicants applied for the first round of the ICANN New gTLD Program. In total there were 1,930 applications of which 84 were [community applications](#) (4.4%). 46 of these community applications remained uncontested. These uncontested community applications concerned brand names, Internationalized Domain Names (IDNs, these permit the global community to use a domain name in their native language or script), and geographic names. 22 out of 84 community applications were in contention. These community applications in contention concern generic, brand, IDN and geographic names. At least 27 community-based applicants went into Community Priority Evaluation of which at least for six gTLDs there were two different community-based applicants. Until this point (July 2016), only five community applicants prevailed in the CPE.<sup>10</sup> This low success rate warrants in-depth analysis of the policies and procedures relating to community-based applications (CBAs).

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<sup>9</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

<sup>10</sup> These are: .OSAKA; .RADIO; .HOTEL; .ECO; AND .SPA.



The definition of community, the concept of priority for community-based applicants, the process for awarding such priority and the criteria and scoring threshold to determine priority have been severely criticised over the last few years. It was estimated that 75% of the community-based applications failed and CBAs perceive a bias in the system against them.<sup>11</sup> These applicants indicate that the process as well as other practical and procedural barriers has become an insurmountable hurdle to pass the Community Priority Evaluation. These communities argue that the intended prioritisation of CBAs has had completely the opposite effect and become a barrier to be awarded a gTLD.

This study pays particular attention to the definition of community, the concept of priority for community-based applicants, the process for awarding such priority and the criteria and scoring threshold to determine priority. This report reviews the range of problems encountered by community applicants and identifies how such problems might be avoided in future gTLD application rounds. In particular, we have found that the intended goal of the concept of prioritising communities is insufficiently developed. It is insufficiently clear which public interest values are served by CBAs and which types of individuals or groups should be regarded as communities to fulfil this goal. This has led to the development of a process which has not delivered on the GNSO's original policy intentions. Instead, we have found that priority is given to some groups and not to others, with no coherent definition of "community" applied, through a process which lacks transparency and accountability. ICANN itself has devolved itself of all responsibility for determining priority, despite the delegated third party (the Economist Intelligence Unit – EIU) insisting that it has merely an advisory role with no decision-making authority. As a result, there is no effective appeal process and ICANN's own accountability mechanisms are unable to hold ICANN (or the EIU) to account.

This work is structured as follows. Chapter 2 provides an overview of which universal human rights apply to communities and ICANN gTLDs. Chapter 3 provides an analysis of the definition of "community" as set out in different policy documents that function as the basis for assessing whether a community deserves priority over standard applicants. Chapter 4 goes deeper into the concept of priority for community-based applicants and explores the concept of public interest. Thereafter this report will go further into the process for awarding such priority and the criteria and scoring threshold to determine priority. Chapter 5 therefore provides an evaluation of the process of Community Objections, particularly based on input provided by community-based applicants. Chapter 6 considers the range of complaints that have been levied at the Community Priority Evaluation process and assesses them in light of human rights. Chapter 7 looks briefly at the so-called accountability mechanisms that (alleged) communities can resort to throughout their application process. Chapter 8 provides some ideas for improving or changing the application process for community-based applicants in any future gTLD round. This study concludes, in chapter 9, by an overview of findings and recommendations intended to catalyse discussion on community-based applications and human rights and to contribute to the GNSO Policy Development Process (PDP) on this issue.

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<sup>11</sup> This estimation is based on the overview of gTLD application results as provided by ICANN. See: <https://gtdresult.icann.org/>.

## 2. A human rights perspective on community-based applications for gTLDs

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.<sup>12</sup>

Human rights law does not as a general matter directly govern the activities or responsibilities of private business.<sup>13</sup> ICANN is a private corporation under Californian law and as such not the direct subject of human rights law. However, ICANN's remit is to take care of the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN functions as a global governance body that develops Internet policy and has the capacity to impact on human rights such as the right to freedom of expression, freedom of association, and non-discrimination. For this reason, ICANN adopted a new Bylaw in May 2016 that explicitly commits ICANN to respect internationally recognized human rights.<sup>14</sup> ICANN's human rights policy will be further developed through a framework of interpretation that will set out how human rights should be interpreted in the ICANN context. Moreover, when states participate in specialised bodies with a primarily technical mandate such as GAC does in ICANN – states do not divest themselves of their human rights obligations.<sup>15</sup>

The Universal Declaration of Human Rights (UDHR) was developed after the Second World War to end barbarous acts and to help create a world in which human beings enjoy freedom of speech and belief and freedom from fear and want. The UDHR is the primary source of the global consensus on human rights. Human rights treaties place an obligation on public

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<sup>12</sup> OHCHR, 'What are human rights?' <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>> (accessed 13 July 2016).

<sup>13</sup> See: Human Rights Council, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression', A/HRC/32/38, 11 May 2016.

<sup>14</sup> ICANN sets out in its Bylaws under "Core Values" that in performing its mission its decisions and actions should respect internationally recognized human rights as required by applicable law and within the scope of its Mission and other Core Values. The phrase "as required by applicable law" makes the commitment to some extent ambiguous, since human rights law does not as a general matter directly govern the activities or responsibilities of private business. Nevertheless, the Bylaws set out that this specific Core Value will have force when a framework of interpretation for human rights is approved (Bylaws, section 27.2), which demonstrates that ICANN is taking its commitment to human rights seriously.

<sup>15</sup> See: Council of Europe Report on 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014)

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048f14f>; Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association With Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

authorities to act at all times in a way that is compatible with these rights. Since 1948, when the UDHR was formulated, much has changed. Due to privatisation and economic globalisation the public role of private actors has increased tremendously. Technology changes fast and key information and communication resources are owned and managed by private actors. The capacity of these private actors to impact on the human rights of people around the world has led to global acceptance that corporate actors need to respect human rights.<sup>16</sup> Despite the fact that human rights treaties have not been designed to address private actors directly and have also not been formulated with an eye on the digital age, the norms and values enshrined in these treaties are nevertheless considered as what ought to be protected at all times. Rights that people have offline must also be protected online.<sup>17</sup> Today, the challenge is therefore to collectively distil the meaning of human rights law and its concrete implications in digital environments and with regard to private actors, such as ICANN.<sup>18</sup>

Below, we will set out which universal human rights apply to communities and ICANN gTLDs. First, we will set out these human rights in the abstract and how and whether these have already been interpreted with regard to private actors and/or with regard to the digital environment and domain names in particular. Thereafter, we will apply this human rights perspective to the following aspects of community-based applications in the gTLD Program:

- The definition of community;
- The concept of priority for community-based applicants; and
- The process for awarding such priority and the criteria and scoring threshold to determine priority.

### *Freedom of expression*

Article 19 of the UDHR states that: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.” This freedom is not absolute; it can only be subject to restrictions made necessary by the respect of rights of others.<sup>19</sup> As Article 10 of the European Convention on Human Rights (ECHR) states: “The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Any interference with the exercise of these rights and freedoms must (1) be prescribed by law, (2) be pursued for one of the legitimate aims

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<sup>16</sup> The Human Rights Council endorsed the Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework (see [A/HRC/17/4](#) and [A/HRC/17/31](#)).

<sup>17</sup> See: NETmundial, ‘NETmundial Multistakeholder Statement’ (24 April 2014), <<http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>> (accessed 17 August 2016).

<sup>18</sup> See: Human Rights Council, ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’, A/HRC/32/38, 11 May 2016.

<sup>19</sup> See: Article 29(2) UDHR; Article 19 ICCPR; Article 10 ECHR.

listed in an exhaustive way in the ECHR and (3) be necessary in a democratic society (proportional to the aims pursued).

In determining whether a member state's action or failure to act is compatible with the conditions laid down in the ECHR, the European Court of Human Rights (ECtHR) acknowledges that national authorities have a certain degree of discretion to assess whether there is a pressing social need which makes a restriction on fundamental rights and freedoms necessary according to conditions laid down in the ECHR. In the ECtHR's jurisprudence this is known as the margin of appreciation doctrine. The degree of discretion allowed to member states varies according to the circumstances, the subject matter and other factors.<sup>20</sup> There is no international agreed framework on how to balance and interpret these legitimate aims for restricting the right to freedom of expression; different approaches prevail in different domestic legal orders. Local cultural values determine the scope of national security, public order and moral.

How does this right to freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas through any media and regardless of frontiers relate to communities and ICANN gTLDs? A key feature of the Internet is transmission of content. For Internet users at large, domain names represent an important way to find and access information on the Internet. Domain names have both an addressing function and an expressive dimension and play an important role in the transmission of an individual's ideas. They are key elements for Internet information indexing and selection systems especially those enabled by search engines.<sup>21</sup> As set out in the Council of Europe Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (2011), "The addressing function of domain names and name strings and the forms of expressions that they comprise, as well as the content that they relate to, are inextricably intertwined. More specifically, individuals or operators of websites may choose to use a particular domain name or name string to identify and describe content hosted in their websites, to disseminate a particular point of view or to create spaces for communication, interaction, assembly and association for various societal groups or communities."

A community TLD enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community's standards and values. A community TLD could help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members.<sup>22</sup> Community TLDs create spaces for communication, interaction, assembly and association for various societal groups or communities. As such, community TLDs facilitate freedom of opinion and expression without interference including the right to seek, receive and impart information and ideas.

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<sup>20</sup> Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

<sup>21</sup> Ibid.

<sup>22</sup> See: ICANNwiki, 'Community TLD' <[https://icannwiki.com/Community\\_TLD](https://icannwiki.com/Community_TLD)> (accessed 20 July 2016).

At the same time, a community TLD could impact on the freedom of expression of those third parties who would seek to use the TLD. The concept of community entails that some are included and some are excluded. Those that are excluded might have a legitimate interest to be part of the community to express and seek opinions and ideas, while falling outside the scope of the community. As such, the community TLD has the capacity to be a barrier to freedom of opinion and expression. This can be a legitimate restriction to serve, for example, the right of community members to not be discriminated against. If such clashes of rights of those that are included and those that are excluded from the community can be foreseen, ICANN could require gTLD applicants to specify in their rules and policies how they intend to balance these rights.

Those who manage Community TLDs have editorial-like responsibilities. Their choices and policies may result in decisions on the availability of information on the Internet, similar to editorial judgments made by media routinely in respect of what content is relevant for purposes of the public interest and what content to project in the public domain. Editorial activities may entail special guarantees and responsibilities in the light of freedom of expression and access to information, including serving the public interest in accessing diverse information.<sup>23</sup>

To illustrate this balancing act, let us set out the freedom of expression consideration with regard to the community-based application for .MUSIC. DotMusic wants to operate the community TLD .MUSIC to safeguard intellectual property and prevent illegal activity for the benefit of the music community. They argue that many of the music websites are unlicensed and filled with malicious activities. When one searches for music online, the first few search results are likely to be from unlicensed pirate sites. When one downloads from one of those sites, one risks credit card information to be stolen, identity to be compromised, your device to be hacked and valuable files to be stolen. This harms the music community. Piracy and illegal music sites create material economic harm. The community-based .MUSIC domain intends to create a safe haven for legal music consumption. By means of enhanced safeguards, tailored policies, legal music, enforcement policies they intend to prevent cybersquatting and piracy. Only legal, licenced and music related content can then be posted on .MUSIC sites. Registrants must therefore have a clear membership with the community.

While these arguments appear to be legitimate to protect the intellectual property rights of the music industry as well as the consumer against crime, others have argued that this .MUSIC application ends up undermining free expression and restricting numerous lawful and legitimate uses of domain names. Robin Gross argues that: "ICANN's "community" designation has been used in practice principally by applicants seeking to assert exclusive rights over discussion subjects and means of expression that appeal to a broader public, to whom the so-called "community" applicant would effectively deny or artificially limit access to expression".<sup>24</sup> Whilst the rights of the community need to be balanced with the rights of third

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<sup>23</sup> Council of Europe Report on Comments Relating to Freedom of Expression and Freedom of Association with Regard to New Generic Top Level Domains, prepared by Mr Wolfgang Benedek, Ms Joy Liddicoat, Mr Nico van Eijk, <<http://www.ivir.nl/publicaties/download/1000>> (2012).

<sup>24</sup>Robin Gross, Letter to Dr. Steve Crocker, Chairman of the ICANN Board and Fadi Chehadé, ICANN President and CEO concerning Opposition to .MUSIC "Community" Application Based on Freedom of Expression and

parties that are affected by their potential exclusion from the community TLD, in balancing those rights ICANN has a margin of appreciation analogous to the European Court of Human Rights. In so doing, ICANN must have regard to other means of expression that are available to third parties who may be excluded from a community TLD as against the rights to safe association and assembly for the community members.

### *Freedom of association and assembly*

Freedom of association and assembly is also considered one of the classic fundamental rights laid down in many constitutions and international treaties, including Article 20 UDHR, Article 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 11 ECHR. Article 11 ECHR provides: “1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

The European Court of Human Rights reiterates that the protection of personal opinions, secured by Article 10 ECHR is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 ECHR.<sup>25</sup> Freedom of thought and opinion and freedom of expression would be of very limited scope if they were not accompanied by a guarantee of being able to share one’s beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests.<sup>26</sup>

The UN Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, indicated that the right of peaceful assembly covers not only the right to hold and to participate in a peaceful assembly but also the right to be protected from undue interference.<sup>27</sup> He concludes that the rights to freedom of peaceful assembly and of association play a decisive role in the emergence and existence of effective democratic systems as they are a channel allowing for dialogue, pluralism, tolerance and broadmindedness, where minority or dissenting views or beliefs are respected. Restrictions

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Innovation Policy Concerns (12 August 2015) <<https://www.icann.org/en/system/files/correspondence/gross-to-crocker-chahad%C3%A9-12aug15-en.pdf>> (accessed 20 July 2016).

<sup>25</sup> See: Schwabe and M.G. v Germany, Judgment of the European Court of Human Rights (Fifth Section) of 1 December 2011, § 98; Ezelin v. France, Judgment of the European Court of Human Rights (Chamber) of 26 April 1991, App. No 11800/85, § 37; Djavit An v. Turkey, Judgment of the European Court of Human Rights (Third Section) of 20 February 2003, App. No 20652/92, § 39; Barraco v. France, Judgment of the European Court of Human Rights (Fifth Section) of 5 March 2009, App. no. 31684/05, § 27; Palomo Sánchez and Others v. Spain, Judgment of the European Court of Human Rights (Grand Chamber) of 12 September 2011, App. nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 52.

<sup>26</sup> Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014), p. 22.

<sup>27</sup> UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27.

on this right ought to be prescribed by law, necessary in a democratic society, and proportionate to the aim pursued, and ought not to harm the principles of pluralism, tolerance and broadmindedness.<sup>28</sup> The right to freedom of association and assembly is closely connected to the right to freedom of expression as well as the right to freedom of thought, conscience and religion.<sup>29</sup>

The rights to freedom of peaceful assembly and of association can be exercised through new technologies, including through the Internet.<sup>30</sup> As the Declaration by the Committee of Ministers on the protection of freedom of expression and information and freedom of assembly and association with regard to Internet domain names and name strings (2011) states: “Individuals or operators of websites may choose to use a particular domain name or name string to identify and describe content hosted in their websites, to disseminate a particular point of view or to create spaces for communication, interaction, assembly and association for various societal groups or communities”.<sup>31</sup> In pursuing its commitment to act in the general public interest, ICANN should ensure that, when defining access to the use of TLDs, an appropriate balance is struck between economic interests and other objectives of common interest, such as pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.<sup>32</sup>

A community-based gTLD application may raise specific issues concerning freedom of association and assembly. *Community-based TLDs could take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They could also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.*<sup>33</sup> Community TLDs create space to collectively act, express, promote, pursue or defend a field of common interests.<sup>34</sup> As a voluntary grouping for a common goal, community TLDs facilitate freedom of expression and association and has the potential to strengthen pluralism, cultural and linguistic diversity and respect for the special needs of vulnerable groups and communities.

As with the right to freedom of expression, community TLDs have an impact on the rights of third parties. Those that are left out of the community could perceive their human rights to be negatively impacted by the community. For that reason, the rights of the community need to

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<sup>28</sup> Ibid.

<sup>29</sup> Article 18 UDHR, Article 18 ICCPR and Article 9 of the ECHR.

<sup>30</sup> UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27.

<sup>31</sup> See: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805b1059](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805b1059) (accessed 26 July 2016).

<sup>32</sup> Declaration of the Committee of Ministers on ICANN, human rights and the rule of law (3 June 2015), [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl\(03.06.2015\)2&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Decl(03.06.2015)2&direct=true) (accessed 26 July 2016).

<sup>33</sup> See: Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014).

<sup>34</sup> UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27; UN GA, ‘Report of the Special Representative of the Secretary-General on human rights defenders’ (1 October 2004), A/59/401, para. 46.

be balanced against the rights of the third parties. Restrictions on the right to freedom of association and assembly of the community by means of a community TLD shall be subject to limitations if these are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. As part of this balancing act, it can be relevant whether alternative means of expression – another gTLD or something other than a gTLD – were available to the concerned party.<sup>35</sup>

### *Due process*

The concept of due process refers to the idea that no one should be deprived of his rights without due process of law. It has been common in the international debate to discuss due process in terms of a set of procedural rights, including (1) the right to notice; (2) the right to a hearing; (3) the right to a reasoned decision; (4) the right of appeal to an independent tribunal; (5) the right of public access to information; and (6) the right to a judicial remedy.<sup>36</sup> The most traditional and popularly known context of due process is criminal trials, but due process requirements concern civil cases as well. Usually due process is seen as a set of criteria that protect a private person in relation to the State and authorities. Due process requirements are considered to be a part of constitutional protection of an individual.<sup>37</sup> Due process rights are recognised by most legal systems, but this does not make its principles “universal” nor do they take the same shape in every legal system.<sup>38</sup>

Due process rights are traditionally known among human right experts to centre on the right to a fair trial and the right to an effective remedy. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within Article 14(1) of the ICCPR and is applicable to both criminal and non-criminal proceedings.<sup>39</sup> The various elements of the right to a fair trial codified in the ICCPR are also to be found in Article 10 UDHR, Article 6 ECHR and customary international law norms.<sup>40</sup>

The right to an effective remedy is set out in many human rights treaties, declarations, resolutions and other non-treaty texts. Article 8 of the UDHR states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental

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<sup>35</sup> See the case law of the ECHR: *Appleby and others v. the United Kingdom* (no. 44306/98), 06.05.2003, para.48; *Wabl v. Austria*, (no. 24773/94), 21.03.2000, para. 44; *Rekvényi v. Hungary* (25390/94) 20.05.1999, para. 49. Via: W. Benedek, Joy Liddicoat and Nico van Eijk, ‘Comments relating to freedom of expression and freedom of association with regard to new generic top level domains’, Council of Europe DG-I (2012) 4, 12 October 2012, para 62-66.

<sup>36</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>37</sup> Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010).

<sup>38</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016); Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010).

<sup>39</sup> See also: Article 13 and 15 ICCPR.

<sup>40</sup> The UN Human Rights Committee’s General Comment 32 on the right to a fair trial stands as an authoritative interpretation of the meaning and application of article 14 of the ICCPR.



rights granted by the constitution or by law”.<sup>41</sup> Except for Article 25 of the American Convention on Human Rights, which guarantees a right to recourse to “courts and tribunals”, other human rights conventions do not require that the remedy be “judicial”.

The UN Guiding Principles on Business and Human Rights, unanimously adopted by the United Nations Human Rights Council in June 2011, provide an authoritative global standard on the respective roles of businesses and governments in helping ensure that companies respect human rights in their own operations and through their business relationships. These guiding principles prescribe the duty on governments to provide for greater access by victims to effective remedy, both judicial and non-judicial as well as a responsibility on corporate actors to provide for effective remedy if they have caused or contributed to adverse impacts. The Guiding Principles prescribe that non-judicial grievance mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning, and based on engagement and dialogue.<sup>42</sup>

The procedural due process standards set out above have been developed to protect the individual against state authorities and to enhance the legitimacy of the state’s decision-making.<sup>43</sup> Due to economic globalisation and privatisation the public role of private actors in the transnational arena increased. Consequently, it is increasingly recognized that private actors that fulfil a public role ought to base their decision-making on similar procedural due process standards.<sup>44</sup>

Several approaches have been developed as to how to develop appropriate procedural due process standards for non-state actors such as ICANN, arbitration tribunals or the United Nations.<sup>45</sup> On the one hand, international lawyers have drawn due process standards binding on states based on international and regional human rights sources and customary international law and applied these to private actors that fulfill a public role. An important movement in this respect is the Global Administrative Law movement. These scholars put emphasis on the enhancement of the transparency and accountability of diffuse transnational regulatory regimes and focus their attention on the improvement of the reasonableness and procedural fairness of decisions made under transnational regulatory frameworks.<sup>46</sup> Although there are various interpretations of Global Administrative Law, in general it can be understood to encompass “the legal mechanisms, principles and practices,

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<sup>41</sup> Article 2 (3) ICCPR; Article 13, 5 (4) and Article 2 Protocol No. 7 ECHR; Article 7, 21, 26 of the African Charter on Human and Peoples’ Rights and Article 27 of the Protocol to the African Charter on the establishment of an African Court on Human and Peoples’ Rights; and Article 25 of the American Convention on Human Rights.

<sup>42</sup> OHCHR, Guiding Principles on Business and Human Rights, Implementing the United Nations “Protect, Respect and Remedy” Framework (2011), [http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (accessed 26 July 2016).

<sup>43</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, American Journal of International Law, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>44</sup> See also: Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

<sup>45</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, American Journal of International Law, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>46</sup> Ming-Sung Kuo, ‘Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism’ (2011) 44 New York University Journal of International Law and Politics 55, 58.

along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make”.<sup>47</sup>

In contrast with this state-oriented approach, contextual approaches can be distinguished. Within these approaches due process is regarded to be contextual: “different legal contexts legitimately require different procedural standards and operate according to different principles and values”.<sup>48</sup> As such, due process principles can be developed based on the values of the community that is affected by the decisions of the organisation. Hovell states: “Safeguards associated with due process aim collectively to open up a structured dialogue between decision-making authority and those affected by decisions. Broadly, the aim of this dialogue is to enhance legitimacy”.<sup>49</sup> She continues: “The concept of legitimacy envisages a connection between decision-making authority and community values sufficient to ground acceptance of that authority in the relevant community. Due process acts in the service of legitimacy by shoring up the connection that acts as legitimacy’s source, providing legal standards that serve to establish a dialogue between decision-makers and the community affected by decisions to ensure decision-making takes place in accordance with relevant community values”.<sup>50</sup>

ICANN’s gTLD program, including community-based applications, needs to be based on procedural due process. The exclusive nature of ICANN’s gTLD application process results in a need and justification for certain minimum procedural standards.<sup>51</sup> ICANN’s mission and mandate to manage the DNS in the public interest warrants it to take into account due process standards. Furthermore, all new gTLD applicants effectively waived the right to sue ICANN over the new gTLD program when they applied for a new gTLD as per the “*Top-Level Domain Application – Terms and Conditions*” as set out in the Applicant Guidebook. Thus, the agreement one signs when one applies for a gTLD with ICANN in principle prevents a party from bringing a procedure in a general court. Clause 6 of the Terms and Conditions sets out that applicants may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application. As such, the agreement limits access to court and thus access to justice, which is generally considered a human right or at least a right at the constitutional level. The ECtHR has decided that right of access to court and a public trial in a court of law can be waived in favour of arbitration via an agreement.<sup>52</sup> However, such a waiver should not necessarily be considered to amount to a waiver of all the rights under Article 6 ECHR on fair trial; a distinction may have to be made between different rights guaranteed by Article 6

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<sup>47</sup> Nico Krisch and Benedict Kingsbury, ‘Introduction: Global Governance and Global Administrative Law in the International Legal Order’ (2006) 17-1 *European Journal of International Law* 1.

<sup>48</sup> D Hovell, ‘Due Process in the United Nations’ (2016) Forthcoming, *American Journal of International Law*, [https://www.lse.ac.uk/collections/law/wps/WPS2016-02\\_Hovell.pdf](https://www.lse.ac.uk/collections/law/wps/WPS2016-02_Hovell.pdf) (accessed 26 July 2016).

<sup>49</sup> *Ibid.*, p. 5/6.

<sup>50</sup> *Ibid.*

<sup>51</sup> See also: Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

<sup>52</sup> EComHR, 5 March 1962, *X. – Germany* (appl. no. 1197/61, as published in *Yearbook of the ECHR* vol. 5 (1962), pp. 94-96); ECHR, 23 February 1999, *Suovaniemi a.o. - Finland* (appl. no. 31737/96).

ECHR.<sup>53</sup> As arbitration is a kind of surrogate for normal court procedure, some procedural standards need to be upheld to compensate for loss of access to court.<sup>54</sup> This logic equally applies to ICANN's policies and procedures with regard to the gTLD application process.

### *Discrimination*

The general principle of equality and non-discrimination is a fundamental element of international human rights law.<sup>55</sup> Article 14 of the ECHR, similarly to the UDHR and ICCPR, provides: "The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."<sup>56</sup> The Court has established in its case law that discrimination means "treating differently, without an objective and reasonable justification, persons in analogous, or relevantly similar, situations."<sup>57</sup> However, Article 14 ECHR does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them. In certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of Article 14 ECHR.<sup>58</sup>

When it comes to communities and ICANN top-level domains the general principle of equality and non-discrimination is highly relevant. Although the exact reasons are unclear, ICANN positively discriminates in favour of community-based applicants, by giving them priority for a gTLD if they fulfil certain criteria. The objective and reasonable justification to do so are unclear, but community priority has been discussed extensively by the ICANN community and was decided upon by the community as a whole. However, ICANN has been plagued with allegations that its procedures and mechanisms for CBAs that could prioritise their applications over standard applicants have an inherent bias against communities. Allegedly, the standard has been set so high that practically almost no community is able to be awarded priority: out of 27 string applications in CPE only 5 passed through but none with the maximum score of 16 points, 2 passed with 15 points (93%) and 3 with 14 points (87.5%). The criteria and scoring threshold to determine priority as set out in the Applicant Guidebook as well as the restrictive interpretation by the EIU of the concept of "community" have particularly been put forward to obstruct a fair, equal and non-discriminatory procedure.

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<sup>53</sup> ECHR, 23 February 1999, *Suovaniemi a.o. - Finland* (appl. no. 31737/96).

<sup>54</sup> Matti S. Kurkela and Santtu Turunen, *Due Process in International Commercial Arbitration* (2nd ed., Oxford University Press 2010), p.2.

<sup>55</sup> The right to equality and non-discrimination is recognized in Article 14 ECHR, as well as in Article 2 and 7 UDHR and is a cross-cutting issue of concern in different UN human rights instruments, such as Articles 2 and 26 ICCPR, Article 2(2) ICESCR, Article 2 CRC, Article 7 CMW and Article 5 CRPD.

<sup>56</sup> Council of Europe Report on 'ICANN's Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnierute and Thomas Schneider (2014).

<sup>57</sup> See: *D.H. and Others v. the Czech Republic* [GC], App no. 57325/00, § 175, ECHR 2007, and *Burden v. the United Kingdom*, App no. 13378/05 § 60, EHRR 2008.

<sup>58</sup> See *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, § 10; *Thlimmenos v Greece*, (2000) 31 EHRR 411, § 44). *Horváth and Kiss v. Hungary*, Judgment of the European Court of Human Rights (Second Section) of 29 January 2013, App. no. 11146/11, § 101.

Moreover, in most cases where multiple applicants apply for a single new gTLD it is expected that contention will be resolved by the CPE, or through voluntary agreement among the involved applicants. If that is not the case, auctions will take place to determine the winner of each contention set.<sup>59</sup> The mechanism of last resort to determine who wins string contention has been extensively discussed within ICANN. In principle, CPE is there to determine whether there is a community-based applicant that ought to have priority and if that is not the case, all applicants can go to auction. An auction is likely to award the gTLD to the financially richer entity. As such, its discriminatory nature can be criticised from a human rights perspective. This mechanism in theory does not discriminate against communities, since they have had the opportunity to prove their community status in CPE. However, in practical terms the auction procedure is discriminatory against communities if the process that ought to determine their community status – CPE – is unfair and discriminatory and does not live up to due process standards.

In the following, this report examines ICANN's policy on community-based applications, and the implementation of that policy, with particular regard to the rights to freedom of expression, freedom of association, non-discrimination and due process. Any failure to follow a decision-making process which is fair, reasonable, transparent and proportionate endangers freedom of expression and association, and risks being discriminatory. We have therefore paid particular attention in this report to ICANN's Community Objection and Community Priority Evaluation processes to assess whether they are fair and reasonable, and are concerned that weaknesses in those processes may affect the human rights of community applicants.

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<sup>59</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-13.

### 3. The definition of community

No clear definition of “community” for the purpose of community-based applications has been formulated by ICANN. Instead, scoring criteria were formulated that set requirements that the alleged community needs to fulfil to be considered a community in order to satisfy the Community Objection and the Community Priority Evaluation. It was decided to not formulate a clear-cut definition, because many different types of communities should be eligible. It was also decided not to explicitly preclude particular groups or scenarios, because the definition should not pre-judge applications without consideration of the circumstances.<sup>60</sup> Throughout these discussions on communities and community priority, the discussants mostly had natural communities in mind, such as First Nation or Native American tribal communities.<sup>61</sup>

Within ICANN there is frequent reference to the “ICANN community”, which is a complex matrix of intersecting organisations.<sup>62</sup> This “community” should not be confused with the notion of community in community-based applications, Community Objection and Community Priority Evaluation. The concept of community-based applications stems from the Generic Names Supporting Organization’s (GNSO) policy recommendations on which the implementation of the New gTLD Program is based. The Applicant Guidebook was formulated from the GNSO policy recommendations and the CPE Guidelines are an accompanying document to the AGB meant to provide additional clarity around the process and scoring principles outlined in the AGB.

#### *The GNSO policy recommendations*

With regard to Community Objections, the GNSO policy recommendations conceptualise “communities”. Principle 20 determines that an application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted. **It continues:** “Community should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community”.<sup>63</sup> The standard for “community” is entirely subjective and was based on the personal beliefs of the objector.<sup>64</sup>

#### *The Applicant Guidebook*

The Applicant Guidebook was formulated based on the GNSO policy recommendations. It sets out in more detail the criteria a community applicant needs to fulfil. The AGB prescribes

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<sup>60</sup> ICANN, New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf> (accessed 26 July 2016)

<sup>61</sup> Based on an interview with Avri Doria (who participated in these discussions) at ICANN56, Helsinki.

<sup>62</sup> See: <http://www.icann.org/structure/>.

<sup>63</sup> ICANN Generic Names Supporting Organisation, ‘Final Report Introduction of New Generic Top-Level Domains’ (8 August 2007) <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (accessed 21 July 2016).

<sup>64</sup> ICANN Generic Names Supporting Organisation, ‘Final Report Introduction of New Generic Top-Level Domains’ (8 August 2007) <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (accessed 21 July 2016).

that all applicants are required to designate whether their application is community-based or not. Designation or non-designation of an application as community-based is entirely at the discretion of the applicant. An application that has not been designated as community-based has been referred to as a standard application. A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. Any applicant may designate its application as community-based; however, each applicant making this designation is asked to substantiate its status as representative of the community it names in the application by submission of written endorsements in support of the application. An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a clearly delineated community.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD, including appropriate security verification procedures, commensurate with the community-based purpose it has named.
4. Have their applications endorsed in writing by one or more established institutions representing the community it has named.<sup>65</sup>

With regard to Community Objection, the AGB provides that the objector must prove that the community expressing opposition can be regarded as “a clearly delineated community”. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

When it comes to the String Contention Procedures, the AGB provides that community implies “more of cohesion than a mere commonality of interest”. Criteria that ought to be fulfilled to be considered a community are:

- an awareness and recognition of a community among its members;
- some understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and
- extended tenure or longevity—non-transience—into the future.<sup>66</sup>

The community priority criteria of which an applicant needs to score 14 out of 16 to be considered a community do not define community, but the criteria indicate what requirements a community needs to fulfil. Criterion 1 (Community Establishment) indicates that a community ought to score high on delineation and extension. It ought to be a clearly

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<sup>65</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04.

<sup>66</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-11.

delineated, organized, and pre-existing community of considerable size and longevity. The AGB guidelines on this criterion emphasize that “a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members.”<sup>67</sup>

### *CPE Guidelines*

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB.<sup>68</sup> This document is prepared by the EIU. These guidelines do not provide a definition of “community”, but sets out the questions based on which the evaluators score the application based on the criteria set out in the AGB. When it comes to “delineation” of the community, the EIU Guidelines provide that: “Delineation relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low. Delineation also refers to the extent to which a community has the requisite awareness and recognition from its members. The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certification aligned with community goals, etc.”<sup>69</sup> When it comes to the aspect of “extension”, the EIU Guidelines state that the following questions must be scored when evaluating the application: “Is the community of considerable size? Does the community demonstrate longevity? Is the designated community large in terms of membership and/or geographic dispersion?” With regard to the latter question it makes clear that communities may count millions of members in a limited location or spread over the globe, but also some hundred members spread over the globe.<sup>70</sup>

### *Conclusion*

The original GNSO intention appears to be that “community” is self-defining (a community is whatever the group claiming to be a community says it is). However, to be eligible for either priority consideration for a contended string, or to lodge a Community Objection, “communities” have to demonstrate certain characteristics. The fact that the characteristics of eligible communities vary within the body of ICANN’s own processes and guidance leads to confusion and a perceived lack of coherence.

To further develop the concept of CBA and community priority it could be useful to formulate a definition of community that is central to CBA, Community Objection and CPE. Based on the concept of association as used by the ECtHR and the United Nations, we believe “community” refers to: “Any groups of individuals or any legal entities brought together in

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<sup>67</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 4-12.

<sup>68</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.2.

<sup>69</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.4.

<sup>70</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.5.

order to collectively act, express, promote, pursue or defend a field of common interests”.<sup>71</sup> Any form of voluntary grouping for a common goal should be able to fulfil the standard of “community” for CBA.<sup>72</sup> A certain degree of institutional organisation ought to be required, but this does not mean that a community must have legal entity status in order to be eligible for a community TLD. The community has to be distinguishable from a mere gathering of individuals for the sake of socializing and therefore some degree of continuity and institutional elements must be in place.<sup>73</sup>

The broad definition of community as formulated by the GNSO has been severely restricted in the AGB and in the CPE Guidelines. The AGB narrows the concept of community down to a “clearly delineated, organized, and pre-existing community of considerable size and longevity” and the CPE guidelines require clear and straight-forward membership. It is not that the EIU would not at all accept a more unclear, dispersed or unbound definition of community, but the high threshold of a score of 14 out of 16 of the CPE criteria ensures that communities are indirectly forced in a straitjacket of strict membership. Based on the CPE Guidelines, the Panel awards a higher score to communities that are based on fees, skill and/or accreditation requirements, privileges or benefits entitled to members, and certification aligned with community goals. These are criteria that may fit economic communities, but not religious or social communities.

The criteria and questions formulated in the AGB and CPE Guidelines to determine whether the applicant can be regarded as a community do not correspond to the spirit of the intended goal that the GNSO had in mind when establishing the concept of community priority. In addition, many constituents of the ICANN community make clear that the EIU provides an even more narrow interpretation of the already narrowly formulated AGB and CPE Guidelines. Based on the desk research and interviews with members of the ICANN community we have conducted we believe that the methods used for interpretation by the EIU has led to rigidity that reduced the scope for success for community applicants to obtain a gTLD. As with legal texts, one can interpret the documented proof of the alleged validity of CBAs literally or purposively. The EIU Panel has used the method of literal interpretation: the words provided for by the applicants to prove their community status were given their natural or ordinary meaning and were applied without the Panel seeking to put a gloss on the words or seek to make sense of it. When the Panel was unsure, they went for a restrictive interpretation, to make sure they did not go beyond their mandate.

However, such a literal interpretation does not appear to fit the role of the Panel nor ICANN's mandate to promote the global public interest in the operational stability of the Internet. The concept of community was intentionally left open and left for the Panel to fill in. Community

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<sup>71</sup> This definition is based on the definition of “association” as formulated in: UN GA, ‘Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai’ (21 May 2012), A/HRC/20/27; UN GA, ‘Report of the Special Representative of the Secretary-General on human rights defenders’ (1 October 2004), A/59/401, para 46.

<sup>72</sup> Based on the concept of “association” as defined by the European Court of Human. See: Young, James, Webster v. the United Kingdom, Judgment of the European Court of Human Rights (Plenary) of 13 August 1981, App. nos. 7601/76; 7806/77.

<sup>73</sup> Based on the concept of “association” as defined by the European Court of Human. See: McFeeley v. The United Kingdom, Judgment of the European Commission of Human Rights (Plenary) of 15 May 1980, App. no. 8317/78.



priority was a new concept that was decided to be best developed as the process went on. The Panel should have interpreted the cases before it in light of the purpose for which it was enacted. In legal contexts, this approach is called the contextual, purposive or teleological approach. How to interpret (legal) texts has presented problems from the earliest times to the present day. Plato urged that laws be interpreted according to their spirit rather than literally. Voltaire expressed the view that to interpret the law is to corrupt it. Montesquieu viewed the judge as simply the mechanical spokesman of the law.<sup>74</sup> Due to the fact that the concepts of community and community priority have been intentionally left underdeveloped, one cannot regard the EIU Panel as a mechanical spokesperson of the AGB and CPE Guidelines. The EIU Panel ought to have helped develop the concept, which is not possible by means of a literal interpretation without due regard for context and circumstances.

In brief, we recommend ICANN to:

- Bearing in mind that community TLDs may be tools for citizens to enjoy their human rights to freedom of expression and freedom of association, define a clear and consistent definition of “community”, taking account of the fact that different groups of communities (geographic, religious, economic, social, cultural, gender-based and ethnic) may have different modes of functioning; a rigid set of evaluation criteria has the potential to be unduly restrictive for the wide variety of communities that ought to be eligible for a community gTLD.
- Re-assess the criteria and guidance as formulated in the AGB and CPE Guidelines in the light of the spirit of the GNSO Policy Recommendations.
- Instruct and train delegated decision-makers, such as the experts and panels deciding on Community Objections and CPE, to interpret the cases before them in light of the purpose for which community-based applications were enacted.

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<sup>74</sup> Report of Mr. Justice John L. Murray, President of the Supreme Court and Chief Justice of Ireland, ‘Methods of Interpretation – Comparative Law Method’, [http://curia.europa.eu/common/dpi/col\\_murray.pdf](http://curia.europa.eu/common/dpi/col_murray.pdf) (accessed 25 July 2016).

## 4. The concepts of priority and public interest

For the EIU Panel to be able to interpret the cases it evaluates in the light of the purpose of community priority, it needs to be perfectly clear why the ICANN community decided to establish priority for those applicants that can prove they deserve a “community” label. What was the GNSO’s intended goal and how was it intended to serve the public interest?

The concept of community priority stems from the GNSO’s policy recommendations on which the implementation of the New gTLD Program is based. It was expected that community-based TLDs would add value to the namespace in serving the needs of diverse user groups.<sup>75</sup> The benefits of a community-TLD put forward by ICANN are that it creates a rallying point for supporters of your cause, community or culture<sup>76</sup>; it will help strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members; it enables the community to control their domain name space by creating their own rules and policies for registration to be able to protect and implement their community’s standards and values; it will boost the trust and confidence of its members; the community may be recognized globally; members will be able to register a relevant, shorter and easy to remember domain name; and it will generate income from registration and annual renewal fees of domain names.<sup>77</sup> However, nowhere is it stated what the values are that community-based TLDs and community priority aim to protect. There is no doubt that the concept of community priority was supported by the ICANN community when the new gTLD program was initiated and developed. However, it is not clear what the goal is that is meant to be served by community-based applications, what sort of persons or organisations should benefit from the use of a community-based gTLDs to serve this goal and how these communities would actually benefit from having their own TLD. Before there are subsequent rounds of applications it is necessary to determine the public interest values that CBAs aim to protect. Below, we provide some input to serve these deliberations within the ICANN community.

There appears to be consensus on the idea that community TLDs ought to serve the public interest. As Olga Cavalli puts it: “Business communities should not be eligible for community applications if there is no public interest reason to differentiate them from generic applicants”.<sup>78</sup> However, ICANN has no definite definition of “the public interest”. ICANN’s Chairman Dr. Steve Crocker clarified that “historically at ICANN, there has been no explicit definition of the term “global public interest” and that “future conversation and work on exploring the public interest within ICANN’s remit will require global, multistakeholder,

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<sup>75</sup> ICANN, New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf> (accessed 26 July 2016).

<sup>76</sup> ICANN, Benefits and Risks of Operating a New gTLD, <https://newgtlds.icann.org/en/about/benefits-risks> (accessed 27 July 2016).

<sup>77</sup> ICANNwiki, ‘Community TLD’ [https://icannwiki.com/Community\\_TLD](https://icannwiki.com/Community_TLD) (accessed 27 July 2016).

<sup>78</sup> Based on an interview conducted with Dr. Olga Cavalli at ICANN56, Helsinki. Dr. Cavalli is Argentina’s GAC representative at ICANN and was also the Nominating Committee’s appointee to the GNSO, where she represents the Latin American/Caribbean region.

bottom-up discussion.”<sup>79</sup> Whether a community TLD serves the global public interest needs to be determined on an ad hoc basis. However, ICANN should provide clarity on the public interest values community TLDs ought to protect. Based on our study, we believe this list of public interest values should at least include:

- The protection of vulnerable groups or minorities. Community-based TLDs should take appropriate measures to ensure that the right to freedom of expression of their community can be effectively enjoyed without discrimination, including with respect to the freedom to receive and impart information on subjects dealing with their community. They should also take additional measures to ensure that the right to freedom of peaceful assembly can be effectively enjoyed, without discrimination.<sup>80</sup> Such vulnerable groups or minorities include groups of people or interests based on historical, cultural or social components of identity, such as nationality, race or ethnicity, religion, belief, gender, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive).<sup>81</sup>
- Pluralism, diversity and inclusion. ICANN and the GAC should ensure that ICANN’s mechanisms include and embrace a diversity of values, opinions, and social groups and avoids the predominance of particular deep-pocketed organisations that function as gatekeepers for online content.<sup>82</sup> As the NETmundial Multistakeholder Statement determines **In line with the Council of Europe declaration by the Committee of Ministers on Internet governance principles**: “Internet governance must respect, protect and promote cultural and linguistic diversity in all its forms.”<sup>83</sup> Pluralism is an important factor determining the scope and impact of a number of fundamental rights, such as the right to freedom of expression, freedom of association and freedom of religion. For the concept of pluralism, ICANN can seek inspiration from the fundamental principles pronounced by the ECtHR concerning the importance of pluralism and diversity of information in a democratic society, as these have been elaborated in its case law on broadcasting licenses. The ECtHR decided that, in the context of granting

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<sup>79</sup> Dr. Steve Crocker, ICANN Chair, ICANN Board Response to GNSO Query on Public Interest, <https://www.icann.org/en/system/files/correspondence/crocker-to-bladel-12apr16-en.pdf> (accessed 27 July 2016).

<sup>80</sup> Council of Europe Report on ‘ICANN’s Procedures and Policies in the Light of Human Rights, Fundamental Freedoms and Democratic Values, Prepared by Dr Monika Zalnieriute and Thomas Schneider (2014).

<sup>81</sup> GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué - scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011, <https://archive.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf> (accessed 24 July 2016).

<sup>82</sup> See also: Office of the Ombudsman, Case 16-00177, In a matter of a Complaint by dotgay LLC, 27 July 2016, <http://www.lahatte.co.nz/> (accessed 29 July 2016).

<sup>83</sup> NETmundial, ‘NETmundial Multistakeholder Statement’ (24 April 2014), <<http://netmundial.br/wp-content/uploads/2014/04/NETmundial-Multistakeholder-Document.pdf>> (accessed 17 August 2016); **The Council of Europe declaration by the Committee of Ministers on Internet governance principles determines in Principle 10**: “Preserving cultural and linguistic diversity and fostering the development of local content, regardless of language or script, should be key objectives of Internet-related policy and international co-operation, as well as in the development of new technologies”, see [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2f6](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2f6) (accessed 11 October 2016).

broadcasting licenses, states have to be guided by the importance of pluralism.<sup>84</sup> The Court also expressed the view that the exercise of power by mighty financial groupings may form a threat to media pluralism<sup>85</sup> as well as far-reaching monopolisation in the press and media sector.<sup>86</sup> By using the concept of pluralism, ICANN can serve the protection of individual and associational fundamental rights.

- Consumer or internet user protection. It can be in the best interest of the Internet community for certain TLDs to be administered by an organisation that has the support and trust of the community. One could think of strings that refer to particular sectors, such as those subject to national regulation (such as .BANK, .PHARMACY,) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse.<sup>87</sup> Such trusted organisations fulfil the role of steward for consumers and internet users in trying to ensure that the products and services offered via the domains can be trusted.

To award a community TLD to a community can – as such – serve the public interest. It can, for example, provide a space for a vulnerable group that helps strengthen the cultural and social identity of the group and provide an avenue for growth and increased support among its members. Alternatively, a community TLD can be awarded to an entity that cannot be regarded a community, but that does serve the public interest by the way it administers the TLD. This entity could even be a commercial applicant, which serves the internet community for example by protecting the intellectual property rights of musicians or making sure that all doctors that offer their services via the TLD are trustworthy.

The most important element of a CBA that should be evaluated is whether the applicant is expected to serve the global public interest by means of the community TLD. Such a judgement appears to be best conducted through ICANNs multistakeholder model, in which the entire internet community is represented in a multitude of constituencies. The internet community as a whole, represented by representatives from these constituencies, appear to be better positioned than expert Panels to determine what is in the best interest of the global internet community. The expert Panels, such as the International Center of Expertise of the International Chamber of Commerce (ICC) for Community Objections and the EIU for CPE

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<sup>84</sup> Demuth v. Switzerland, Judgment of the European Court of Human Rights (Second Section) of 5 November 2002, App. no. 38743/97. See for more information: Council of Europe, Thematic factsheet on freedom of expression and the broadcasting media' (April 2016), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680631e3c> (accessed 11 October 2016); Council of Europe, **Recommendation CM/Rec(2007)3 of the Committee of Ministers to member states on the remit of public service media in the information society (31 January 2007)**, [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805d6bc5](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d6bc5) (accessed 11 October 2016).

<sup>85</sup> VgT Verein gegen Tierfabriken v. Switzerland, Judgment of the European Court of Human Rights (Second Section) of 28 June 2001, App. no. 24699/94.

<sup>86</sup> De Geillustreerde Pers N.V. v. The Netherlands, Judgment of the European Commission of Human Rights of 6 July 1976, App. no. 5178/71.

<sup>87</sup> GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué - scorecard to serve as the basis of the GAC approach to Brussels ICANN Board/GAC consultation meeting 28 February-1 March 2011, <https://archive.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf> (accessed 24 July 2016).

would still be of importance to decide upon all other eligibility criteria that a community applicant must fulfil.

In brief, we recommend ICANN to:

- Provide clarity on the public interest values community TLDs are intended to serve. This provides the necessary clarity as to the goal of community-based applications which in turn allows for clarity as to the criteria an applicant needs to fulfil to be regarded a legitimate community-based applicant. These public interest values should include: the protection of vulnerable groups or minorities; pluralism, diversity and inclusion; and consumer or internet user protection.

## 5. Community Objections

There are two types of mechanisms that may affect an application. First, the ICANN's Governmental Advisory Committee may provide GAC Advice on New gTLDs to the ICANN Board of Directors concerning a specific application. The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. The second mechanism that may affect an application is the dispute resolution procedure triggered by a formal objection to an application by a third party. A formal objection can be filed only on four enumerated grounds: (1) String Confusion Objection: The applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications; (2) Legal Rights Objection: The applied-for gTLD string infringes the existing legal rights of the objector; (3) Limited Public Interest Objection: The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law; and (4) Community Objection.<sup>88</sup>

The process of Community Objection refers to an objection by a Community representative because of substantial opposition to the application from a significant portion of the community to which the string may be explicitly or implicitly targeted.<sup>89</sup> Established institutions associated with clearly delineated communities are eligible to file a community objection. But the problem arises especially because there was no reference to any reference system existing in the real world for communities. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. For such an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

These different types of objection procedures are administered by different Dispute Resolution Service Providers. Community Objections are administered by the International Centre for Expertise of the International Chamber of Commerce.<sup>90</sup> Applicants whose applications are the subject of an objection can reach a settlement with the objector, file a response to the objection and enter the dispute resolution process, or withdraw.

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<sup>88</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 3.

<sup>89</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Attachment to Module 3: New gTLD Dispute Resolution Procedure.

<sup>90</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04., Attachment to Module 3 - New gTLD Dispute Resolution Procedure.

Several issues have come up with regard to Community Objections, particularly in the interviews with community-based applicants. The following issues need to be taken into account and sorted before subsequent rounds of applications.

### *The objector's standing*

Established institutions associated within a clearly defined community have standing to file a Community Objection. Community organisations could not object collectively as a community, but could only object independently. In other words, community organisations could not jointly object together as one. Community objections are designed for situations in which there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string is targeted. The elements of “substantial opposition” and “significant portion of the community” is thus something that does not have to be proven by the community (since they cannot collectively file a community objection), but by the organisation representing the community. It appears to make more sense if the community as a whole is able to prove “substantial opposition” by a “significant portion of the community”. Under the current rules the community objector needs to live up to a high burden of proof: it needs to prove that its followers can be considered a clearly delineated community of which a significant portion of this group substantially opposes the application.

Furthermore, before subsequent rounds of applications ICANN might need to reconsider to what extent it is desirable for certain organisations within ICANN to be able to object. The Independent Objector can lodge objections in cases where no other objection has been filed. The Independent Objector has filed several Community Objections, but the amount of successful objections is limited.<sup>91</sup> Based on the first round of applications, ICANN should re-assess the role of the Independent Objector. Other ICANN organisations, such as the ICANN At-large Advisory Committee (ALAC) or GAC are not likely to have standing in Community Objections, because they most likely do not have the required “ongoing relationship with a clearly delineated community.”<sup>92</sup> ALAC did not have standing in two Community Objections it filed.<sup>93</sup> The GAC is also expected not to have standing in Community Objections, but does have the possibility to provide GAC Advice on New gTLDs to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities. The potential role for the ALAC and/or GAC could be taken into consideration in evaluating the role of the independent objector.

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<sup>91</sup> Independent Objector, The Objections Filed by the Independent Objector, <http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/> (accessed 27 July 2016).

<sup>92</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-8.

<sup>93</sup> The International Centre for Expertise of the International Chamber of Commerce, Case No. EXP/504/ICANN/121, ICANN AT-LARGE ADVISORY COMMITTEE (ALAC) (USA) vs. DOTHEALTH, LLC (USA) (Consolidated with case No. EXP/505/ICANN/122, ALAC vs. GOOSE FEST, LLC, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1684-6394-en.pdf> (accessed 27 July 2016);  
; The International Centre for Expertise of the International Chamber of Commerce, Case No. EXP/505/ICANN/122, ICANN AT-LARGE ADVISORY COMMITTEE (ALAC) (USA) vs. GOOSE FEST, LLC (USA) (Consolidated with case No. EXP/504/ICANN/121, ALAC vs. DOTHEALTH, LLC, <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-1489-82287-en.pdf> (accessed 27 July 2016).

## Costs

The AGB did not disclose the approximate costs of Community Objections. The Community Objectors indicate that these costs came out to hundreds of thousands of dollars for a single objection. This amount was even higher if the objector selected a 3-person panel, because of panellist fees and legal fees. Due to these excessive costs, communities were often not able to select a 3-person panel. Generally, communities lack the financial means to do so. In other words, non-profits were severely limited in filing objections due to the excessive costs. Furthermore, since organisations could only object one at a time, rather than collectively, the costs would have been in the millions for each case if many community organisations objected independently. It is expected that this prevented communities from objecting one by one. Providing a possibility to collectively object in conjunction with lowering the costs for Community Objections would help solve these issues.

## Inconsistent decisions

Several actors within different ICANN constituencies have expressed unease about the variations in (Community) Objection determinations.<sup>94</sup> There appears to be inconsistency when it comes to the entities that did or did not have standing. Objectors prevailed and had standing for .ARCHITECT (The International Union of Architects), .BANK (International Banking Federation), .INSURANCE (The Financial Services Roundtable), .MOBILE (CTIA - The Wireless Association), .POLO (United States Polo Association), .RUGBY (International Rugby Board), .SKI (Fédération Internationale de Ski), and .SPORTS (SPORTACCORD).<sup>95</sup> However, objectors for .BASKETBALL (Fédération Internationale de Basketball), .GAME (Entertainment Software Association), .GAY (The International Lesbian Gay Bisexual Trans and Intersex Association), .GOLD (World Gold Council), .INSURE (American Insurance Association), .KOSHER (Union of Orthodox Jewish Congregations of Americas), .LGBT (The International Lesbian Gay Bisexual Trans and Intersex Association), .MAIL (Universal Postal Union), .MUSIC (American Association of Independent Music or International Federation of Art Councils and Council Agencies) and .HOTELS (HOTREC, Hotels, Restaurants & Cafés in Europe) did not qualify<sup>96</sup>, while there appears to be little difference with those that did qualify when it comes to fulfilling the requirement of being an “established institution associated with a clearly delineated community”.

Another example is the decision in the case of the Republican National Committee against .REPUBLICAN.<sup>97</sup> The expert argues it is insufficiently clear whether the community involved in the objection is the Republican Community or the US Republican Party. The expert concludes that the objector does not have standing to object to the Applicant’s registration of

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<sup>94</sup> Based on interviews with people active within different ICANN constituencies during ICANN56, Helsinki.

<sup>95</sup> See: ICANN, ‘Objection Determinations’ <https://newgtlds.icann.org/en/program-status/odr/determination> (accessed 27 July 2016).

<sup>96</sup> Although HOTREC was considered to be an organisation representing the entirety to the hotel community in the .HOTEL CPE report. See <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>

<sup>97</sup> The International Centre for Expertise of the International Chamber of Commerce, Case No. Exp/485/ICANN/102, Republican National Committee (USA) vs. United Tld Holdco Ltd. (Cayman Islands), <https://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-1255-42012-en.pdf> (accessed 27 July 2016).



the new gTLD .REPUBLICAN, in the name of the so-called Republican Community, as it cannot be considered as a clearly delineated community, contrary to the US Republican Party. The Expert therefore analyses the merits on the assumption that the Objector is objecting to the new gTLD .REPUBLICAN in the name of the US Republican Party. The flexible approach of the expert in assessing the objection as if it stems from the Republican Community or the US Republican Party is highly appreciated in the light of due process in the context of a dynamic organisation like ICANN. However, the expert concludes that there is neither a substantial opposition to the Application from a significant portion of the community to which the string may be explicitly or implicitly targeted, *as the Republican Party only relates to US politics*, nor a likelihood of detriment to the Republican Party, if the new gTLD is granted to the Applicant, United TDL. Hence, the fact that the objection only relates to the USA automatically implies there is no substantial opposition to the Application from a significant portion of the community to which the string may be explicitly or implicitly targeted. Requiring such an implicit global reach is potentially unduly restrictive. Such implicit standards ought to be made explicit and should be evaluated in light of the intended goal of the programme before there are subsequent rounds of applications.

It appears that ICANN expected some level of inconsistency in Community Objection decisions.<sup>98</sup> Due process requires ICANN to guarantee a certain level of legal certainty, to protect applicants and objectors against arbitrary use of power and to be able for them to regulate their conduct, applications and objections. Maximum predictability of the Expert and Panel's behaviour needs to be guaranteed by ICANN. This allows applicants and objectors to organise their affairs in such a way that does not conflict with ICANN policies and procedures. This notion of "certainty" is strongly linked to that of individual autonomy. It is not clear whether ICANN indeed incorporated a quality control program in the Community Objections to guarantee maximum predictability. Quality control ought to include the assessment of a number of similar Community Objections against one another in light of consistency.

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<sup>98</sup> "[I]t would be surprising if among the corpus of reasoned objections [determinations] to have been issued thus far that a somewhat diverse marketplace of ideas had not developed; some variation is to be expected." See: ICANN's Brief Concerning the Final Declaration Issued in The Donuts, Inc. V. ICANN IRP Proceeding (19 May 2016), <https://www.icann.org/en/system/files/files/irp-corn-lake-icann-concerning-final-declaration-issued-19may16-en.pdf> (accessed 27 July 2016).

## *Appeal mechanisms*

There are no appeal mechanisms in place with respect to the Community Objection procedure. In practice, applicants that were competing for the same string and were dissatisfied with the outcomes of these procedures have sought justice or a win through existing mechanisms originally conceived to ensure ICANN's board accountability. These mechanisms include the Reconsideration Request, Cooperative Engagement Process (CEP), Independent Review Process Panel (IRP) and filing a complaint to the Ombudsman. These mechanisms have not been designed to function as a way of appeal in case of Community Objection or string contention, but have been used as such due to dissatisfaction with the outcome of evaluations in earlier stages of the application procedure. These mechanisms do not provide an appeal on the substance of the argument. Appeals function as a process of error correction as well as a process of clarifying and interpreting the applicable rules, such as those set out in the AGB. Particularly with regard to the fact that 3-person Panels have been too expensive to be affordable by community objectors, due process requires that another entity is able to provide a full evaluation that goes beyond assessing procedural fairness of the objection. Such an appeal mechanism should be able to also re-assess the facts of the case.

## *Independent, transparent and accountable decision-making*

It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN's vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest. There have been allegations of conflict of interest with regard to panellists deciding on objections against gTLD applications. In the case of the .MUSIC gTLD, DotMusic complained to ICANN and the ICC that Sir Robin Jacob (Panellist) represented Samsung in a legal case, one of Google's multi-billion dollar partners (Google also applied for .MUSIC), while there have been more allegations of conflict of interest against this specific panellist.<sup>99</sup> Moreover, in the Final Declaration of the Independent Review Panel of the International Centre for Dispute Resolution in decision of Donuts, Inc vs. ICANN on the objections concerning .SPORTS and .RUGBY, there was a dissenting opinion by one of the panel members because of a conflict of interest of one of the other panellists.<sup>100</sup> The dissenting opinion contends that the decision-maker (panellist) was the lawyer for undisclosed clients directly benefited by his ruling. With the dissenting panel member, we believe this is a failure of the promise of independent, transparent, accountable decision-making.

It is necessary to avoid the appearance of impropriety, which dictates the fullest disclosure. The decision-makers in both Community Objections and CPE have decision-making power similar to a judge or arbiter. Disclosure is a fundamental aspect of due process to guarantee the integrity of the International Center of Expertise of the International Chamber of

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<sup>99</sup> Joe Patrice, 'Conflicts of Interest Are Just Classier with English Accents' (1 March 2013) <http://abovethelaw.com/2013/03/conflicts-of-interest-are-just-classier-with-english-accents/> (accessed 27 July 2016).

<sup>100</sup> International Centre for Dispute Resolution, Independent Review Panel, Donuts, Inc vs. ICANN, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel, Dissenting Opinion of Philip W. Boesch, Jr, Panel Member (5 May 2016), <https://www.icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf> (accessed 27 July 2016).

Commerce as well as the integrity of ICANN's model that is depending on it. It should be the ICC experts' disclosures and not the party's private investigation into the expert's background, upon which the integrity of the ICC expertise system depends. The relevant principles of international law as set out earlier in this report, including due process with its requirements for independent, transparent and accountable decision-making as well as local (California) law apply. The promise of independent judgment, transparency and accountability as to decision-making regarding matters of public interest, should not be set aside by resort to technical rules.

There ought to be a remedy for impermissible non-disclosures. As a remedy of the lack of independence of the Panel member in the IRP of *Donuts, Inc vs. ICANN* concerning .SPORTS and .RUGBY, the majority of the Panel argues that it would not be inconsistent with ICANN's values and principles to provide for a rehearing of that objection, by a different expert (or three experts). This seems to be an advisory opinion that Donuts can and perhaps should petition for a rehearing. The Panel appears to not have the mandate to order a rehearing based on the appearance that fundamental due process standards have been violated. This is at odds with fundamental principles of due process, independence of the decision-maker, transparency and accountability. The mandate of dispute resolution panels should be re-assessed before there are subsequent rounds of applications.

Lastly, several actors within different ICANN constituencies have made clear that the lines of responsibility are unclear when it comes to the delegated decision-makers, such as the International Center of Expertise of the International Chamber of Commerce when it concerns Community Objections and the EIU when it concerns CPE. The AGB is straightforward when it comes to who is responsible: "The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process."<sup>101</sup> ICANN community members express concern that the ICANN Board does not go into the merits of the decisions by the ICC or EIU and provides a mere 'rubber-stamping'. They do this with the best intentions; these Panels ought to have the expertise and have invested adequate time in their evaluations and thus is the ICANN Board by no means positioned to provide a better decision. However, members of the ICANN community indicate this leads to both the delegated decision-maker and ICANN avoiding responsibility; the delegated decision-maker argues ICANN is responsible, while the ICANN Board avoids responsibility by stating it cannot be held responsible, since the delegated decision-maker is best positioned to take the decision.

As in the IRP of *Donuts Inc vs. ICANN* concerning .SPORTS and .RUGBY mentioned above, the applicant had every right to expect independent, transparent and accountable decision-making, in accordance with fair and reasonable processes. That is the responsibility of the ICANN Board in conjunction with the responsibility of the delegated decision-makers. The experts are appointed by or under authority of the Board and as such – whether they are agents of the Board, staff members reporting to the Board, a Board member or an independent contractors of the board – are with the Board responsible for ensuring that their decisions comply with due process standards.<sup>102</sup> ICANN should make sure that both the

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<sup>101</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, 3-17.

<sup>102</sup> See: International Centre for Dispute Resolution, Independent Review Panel, *Donuts, Inc vs. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel, Dissenting Opinion of Philip W. Boesch, Jr, Panel

delegated decision-maker and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board. ICANN needs to guarantee adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.

### *Qualifications of delegated decision-makers*

The competence and qualifications of panel members have been disputed both with regard to the International Center of Expertise of the International Chamber of Commerce when it concerns Community Objections and the EIU when it concerns CPE. It appears to be unclear to what extent panel members are required to have in-depth knowledge of the field to which the application or objection relates. Does the ICC Panel or EIU Panel for example need qualifications when it comes community-related decisions, and/or knowledge when it comes to the substance of the application, such as knowledge concerning the context and background of the music community when considering .MUSIC, rugby community when considering .RUGBY or knowledge about the relevant actors and sub-scenes when deciding on the application or objections for the .GAY or .LGBT gTLD?

The Expert Appointment Process in New gTLD Dispute Resolution Procedures administered by the ICC makes clear that the following aspects matter for appointing panel members: “nationality, training, qualifications, languages spoken, prior experience and knowledge of specific areas of law”.<sup>103</sup> The EIU was selected as a Panel Firm for the gTLD evaluation process based on a number of criteria, including: “The Panel will be an internationally recognized firm or organisation with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role”.<sup>104</sup> In other words, the panel must have significant and demonstrated expertise in evaluating community applications in which the defined community (such as the gay community, music community, rugby community or sports community) plays an important role. This information provides insufficient insight into the extent to which panel members are expected to have community-specific expertise.

The suitability and qualifications of Panel members have been disputed and more clarity on what is required would prevent ambiguity. ICANN should provide clarity about the required community-specific expertise of panel members. Besides that, it is important that ICANN makes sure there is no appearance of impropriety. For that reason, due process requires a fully transparent process, including information about the Panel members and insight into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN.

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Member (5 May 2016), <https://www.icann.org/en/system/files/files/irp-donuts-final-declaration-05may16-en.pdf> (accessed 27 July 2016).

<sup>103</sup> International Centre for Expertise of the International Chamber of Commerce, The Expert Appointment Process in New gTLD Dispute Resolution Procedures Administered by ICC makes clear that the following aspects matter for appointing panel members, <https://newgtlds.icann.org/en/program-status/odr/icc-expert-appointment-process-25sep14-en.pdf> (accessed 27 July 2016).

<sup>104</sup> The Economist Intelligence Unit, Community Priority Evaluations (CPE) Guidelines, Version 2.0, p.22.

In brief, we recommend ICANN to:

- Assess whether it is desirable and feasible to open up the possibility to collectively file a Community Objection.
- Assess whether it is feasible and desirable for certain organisations within ICANN, such as ALAC and GAC, to be able to file Community Objections.
- Provide clarity on the expected costs for Community Objection.
- Lower the costs for Community Objection.
- Incorporate a quality control program in the Community Objections to guarantee maximum predictability and ensure consistency of decisions taken along the whole process: from objection to evaluation.
- Expose implicit standards that have influenced the delegated decision-makers in their decision-making and assess to what extent these standards correspond to the goal of community-based applications.
- Incorporate a proper appeal mechanism that has the capacity to re-evaluate the entire case, including the fairness of the process as well as the substance of the argument.
- Reconsider the standards on disclosure in the light of due process for both ICANN as well as delegated decision-makers.
- Guarantee that both delegated decision-makers and the ICANN Board can be held to account for the decisions taken by third parties appointed by or under authority of the Board.
- Guarantee that adequate checks and balances are in place for the ICANN Board to be sure that its delegated decision-makers act in the global public interest based on international human rights law.
- Reconsider the mandate of delegated decision-makers in the light of the UN Guiding Principles on Business and Human Rights and its requirements concerning the provision of an effective remedy.
- Provide clarity about the required community-specific expertise of panel members of delegated decision-makers.
- Provide the fullest disclosure when it comes to the qualifications and background of Panel members of delegated decision-makers as well as into the extent to which these panel members have been trained to fulfil the task of delegated decision-maker for ICANN in the light of due process.

## 6. Community Priority Evaluation

String contention occurs when two or more applicants for an identical or similar gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes. In case of similar gTLD strings, the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated. Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. If no settlement or agreement is reached, the applications will proceed to contention resolution through either Community Priority Evaluation, in certain cases, or through an auction.<sup>105</sup>

CPE is a method to resolve string contention. It will only occur if a community application is both in contention and elects to pursue CPE. The evaluation itself is an independent analysis conducted by a panel from the Economist Intelligence Unit. The EIU was selected for this role because it offers premier business intelligence services, providing political, economic, and public policy analysis to businesses, governments, and organizations across the globe. As part of its process, the EIU reviews and scores a community applicant that has elected CPE against the following four criteria:

- Community Establishment;
- Nexus between Proposed String and Community;
- Registration Policies; and
- Community Endorsement.

An application must score at least 14 out of 16 points to prevail in a CPE. This bar was set high deliberately because awarding priority eliminates all non-community applicants in the contention set as well as any other non-prevailing community applicants.<sup>106</sup> If a single community-based application is found to meet these community priority criteria, that applicant will be declared to prevail in the CPE and may proceed. If more than one community-based application is found to meet the criteria, the remaining contention between them will be resolved as set out in the AGB.<sup>107</sup> If none of the community-based applications are found to meet the criteria, then all of the parties in contention (both standard and community-based applicants) will proceed to an auction.

This section examines the process for CPE and assesses the CPE criteria and scoring threshold in the light of international human rights law with a particular focus on due process standards. It is our contention that as the CPE assessment determines whether or not a CBA applicant gets priority over non-community applicants, which therefore presumes a successful delegation of the applied for string, the CPE is effectively a determination of rights.

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<sup>105</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, Module 4.

<sup>106</sup> ICANN, 'Community Priority Evaluation (CPE)', <<https://newgtlds.icann.org/en/applicants/cpe>> (accessed 13 July 2016).

<sup>107</sup> See: ICANN, gTLD Applicant Guidebook, Version 2012-06-04, section 4-8.

We were told by senior ICANN staff that although the high level policy on community applications was agreed by the GNSO, implementation of the policy was delegated in full to ICANN staff. Although the staff who wrote the AGB consulted widely on it, final decisions were taken by staff without additional recourse to any other elements of the ICANN community. Furthermore, as the AGB was written prior to the identification of any presumptive community applications, a number of community applicants pointed out that they had not been able to contribute to the consultation process. They felt that this meant that the implementation was decided by ICANN staff who had primarily consulted with potential generic applicants who would ultimately be in competition with community-based applicants and were particularly concerned to prevent “gaming” of the system.<sup>108</sup> They considered that it was for this reason that the scoring bar was ultimately set as high as it was.

It should be noted that more recently the GNSO has established a role for itself in both policy making and policy implementation although they were not involved in any aspects of implementation of the CPE or community application process in the gTLD round under consideration.

### Costs

A regular complaint from CBAs was the cost of seeing through an application, particularly when the applicant was involved in objection and/or accountability mechanisms. The cost of applying for the CPE process had been \$22,000<sup>109</sup>, although they had been originally estimated in the AGB to cost \$10,000<sup>110</sup>. It was unclear why the cost had more than doubled. The EBU which had been successful in CPE for their application for the .RADIO string, estimates that the total amount they paid for ICANN processes during their entire application process was in the region of \$250k, (plus substantial legal, consultancy and communication costs). Some applicants we spoke to claim to have already spent a total well over \$1m for applications that to date have not prevailed. There were widespread claims of well-funded commercial competitors prolonging the contention process in order to wage a “war of attrition”, with claims that 60-70% of all objection procedures were undertaken by the “Big Four” registry companies. We were also told stories of competitors trying to negotiate with CBAs to pay them to drop their contention.

We recommend that for any future gTLD rounds consideration is given to reducing the costs for CBAs for all processes. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.

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<sup>108</sup> We made widespread enquiries about perceived actual ‘gaming’ by CBAs. The only concrete example given to us was that it was arguable that the applicant for dot.osaka ‘gamed’ the system by applying as both a generic and community based applicant. Moreover, Judge Charles N. Brower argued in the IRP decision concerning Dot Registry LLC, that Dot Registry gamed the system by means of its CBAs for .INC, .LLC and .LLP. See: the Dissenting Opinion by Judge Charles N. Brower, page 15, para 35 of the IRP, Final Declaration 29 July 2016 between Dot Registry LLC and ICANN, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>.

<sup>109</sup> See CPE FAQs available at <https://newgtlds.icann.org/en/applicants/cpe/faqs-13aug14-en.pdf>

<sup>110</sup> ICANN, gTLD Applicant Guidebook, Version 2012-06-04, p. 1-46.

## *Time*

GNSO Principle A states that “New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.”<sup>111</sup> Unfortunately, the sheer and unexpected number of new applications resulted in a delay of ICANN’s own processes by about 7 months. Those applications still in contention have been open for some 4 years now, with no sign of imminent resolution of many of them. CBAs told us that it was their perception that ICANN had no internal deadlines for dealing with clarification issues, CPE, or replies to answers. But senior ICANN staff tell us that they did – but their targets were based on an estimated 500 applications, not the 2000 actuals. In fact, they say, their performance was proportionate. Going forward, ICANN staff say they would be prepared to have published deadlines if the number of applications were limited. They think it would also be helpful for there to be deadlines for the accountability mechanisms.

In order to manage expectations and enable a degree of accountability, ICANN staff should establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and appeal mechanisms for future gTLD rounds. These deadlines can be framed in bands, to take account of variances in the number of applications received.

## *Conflicts of interest*

It was pointed out to us that Eric Schmidt became an independent director of the Economist Group (the parent company to the EIU) whilst executive chairman of Google (he also is Google’s former CEO). Google is in contention with CBAs for a number of strings, which to some observers gives an appearance of conflict. Another potential appearance of conflict with Google arises in the case of Vint Cerf who has been Vice President of Google since 2003 and who chaired an ICANN Strategy Panel in 2013 (when applications were being evaluated). Whilst there is no evidence to suggest that Google in any way influenced the decisions taken on CPEs, there is a risk that the appearance of potential conflict could damage ICANN’s reputation for taking decisions on a fair and non-discriminatory basis. This appearance of conflict can be particularly acute when ICANN is trying to introduce new community players into its sphere; as ICANN is by its history closely associated with the existing internet industry, it is easy to suspect that the odds will be stacked against new aspiring market entrants.

On a more pervasive level, it is clear that some stakeholders consider that there is a fundamental conflict between ICANN’s stated policy on community priority and the potential revenues that can be earned through the auction process. It is felt by some that the very fact that auctions are the resolution mechanism of last resort when the CPE process fails to identify a priority CBA, there is an in-built financial incentive on ICANN to ensure the CPE process is unsuccessful. Therefore, care must be taken to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.

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<sup>111</sup> see <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>



## Assistance and dialogue

Under ICANN's published procedures, once a contention set is identified and an applicant is eligible for CPE, ICANN staff are available to advise on timing and to work with applicants to help them understand the process. However, the applicants we spoke to said that ICANN staff were never involved and did not help or assist. The result of this was the impression given to CBAs that the process was somehow divorced from ICANN's involvement altogether and merely handed over to the EIU to deal with. This was compounded by the fact that other than passing over any clarifying questions from the EIU (and many Evaluation Panels asked no questions), there was hardly any dialogue whatsoever with the EIU (or ICANN) during the CPE process. Indeed some applicants, such as the EBU, were notified by ICANN not to approach the EIU directly for clarification of issues because this was forbidden within the existing procedure.

Furthermore, objections, complaints to the Ombudsman or entry by contenders into the IRP process were not routinely communicated to CBAs. ICANN staff told us that these matters are published on the ICANN website, but confirmed that there is no specific procedure to inform affected applicants separately.

Another lack of dialogue involved the exclusion of applicants when contenders made objections, complaints or applications for accountability mechanisms; CBAs were given no opportunity to comment on contenders' claims, even where they considered the claims to be misleading.

ICANN should consider whether it should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms' length from ICANN, then there should be staff support for community applicants.

In addition, greater care could be taken to keep CBAs informed about anything which affects the progress of their application. They should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.

## Consistency

In February 2016, an IRP Panel issued its Final Declaration in the IRPs relating to .HOTEL and .ECO.<sup>112</sup> The Panel suggested that a system be put in place to ensure that CPE evaluations are conducted "on a consistent and predictable basis by different individual evaluators," and to ensure that ICANN's core values "flow through...to entities such as the EIU."

In response, the ICANN Board "notes that it will ensure that the New gTLD Program Reviews take into consideration the issues raised by the Panel as they relate to the consistency and predictability of the CPE process and third-party provider evaluations. The Board also affirms that ICANN, as appropriate, will continue to ensure that its activities are conducted through open and transparent processes in conformance with Article IV of

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<sup>112</sup> Available at <https://www.icann.org/en/system/files/bm/briefing-materials-2-redacted-10mar16-en.pdf>

ICANN's Articles of Incorporation. The Board also encourages ICANN staff to be as specific and detailed as possible in responding to DIDP requests, particularly when determining that requested documents will not be disclosed.<sup>113</sup>

A number of different areas of alleged inconsistency were put to us. First, there was inconsistency between the AGB and its interpretation by the EIU which led to unfairness in how applications were assessed during the CPE process. This is considered in more detail below.

The Guidebook says utmost care has been taken to avoid any “double-counting” – any negative aspect found in assessing an application for one criterion should only be counted there and should not affect the assessment for other criteria.

However, the EIU appears to double count “awareness and recognition of the community amongst its members” twice: both under Delineation as part of 1A Delineation and under Size as part of 1B Extension.

As an example, the .MUSIC CPE evaluation says:

*1A: However, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).*

*1B: However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.*

Although both 1A and 1B are part of the same criterion, the EIU has deducted points twice for the same reason.

It is also interesting to note that the EIU Panel has not considered this question of “cohesion” at all in the CPE for .RADIO, where the term does not appear.

Second, the EIU Panels were not consistent in their interpretation and application of the CPE criteria as compared between different CPE processes, and some applicants were therefore subject to a higher threshold than others.

The EIU appears to have been inconsistent in its interpretation of “Nexus” Under Criterion 2 of the CPE process.

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<sup>113</sup> <https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>

The EUI awarded 0 points for nexus to the dotgay LLC application for .GAY on the grounds that more than a small part of the community identified by the applicant (namely transgender, intersex, and ally individuals) is not identified by the applied for string. However, the EIU awarded 2 points to the EBU for nexus for their application for .RADIO, having identified a small part of the constituent community (as identified), for example network interface equipment and software providers to the industry who would not likely be associated with the word RADIO.

There is no evidence provided of the relative small and “more than small” segments of the identified communities which justified giving a score of 0 to one applicant and 2 to another.

The EIU has demonstrated inconsistency in the way it interprets “Support” under Criterion 4 of the CPE process.

Both the .HOTEL and .RADIO assessments received a full 2 points for support on the basis that they had demonstrated support from *a majority* of the community:

.HOTEL: “These groups constitute the recognized institutions to represent the community, and represent a majority of the overall community as defined by the applicant.”<sup>114</sup>

.RADIO: “the applicant possesses documented support from institutions/organizations representing a majority of the community addressed”.<sup>115</sup>

By contrast, both .GAY and .MUSIC only scored 1 point. In both these cases, despite demonstrating widespread support from a number of relevant organisations, the EIU was looking for support from a single organisation recognised as representing the community in its entirety. As no such organisation exists, the EIU did not give full points. This is despite the fact that in both the case of the hotel and radio communities, no single organisation exists either, but the EIU did not appear to be demanding one: “Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”<sup>116</sup>

Another example of inconsistency occurred in the case of the dotgay LLC application for .GAY, where the applicants were penalised because of lack of global support. Global support would be very hard to satisfy by a community that is fighting to obtain the recognition of its rights around the world at a time in which there are still more than 70 countries that still consider homosexuality a crime.

Third, the EIU changed its own process as it went along. This was confirmed to us by ICANN staff who said that the panels did work to improve their process over time, but that this did not affect the process as described in the AGB.

Fourth, various parts of the evaluation of the gTLDs are administered by different independent bodies that could have diverging evaluation of what a community is and whether they deserve special protection or not. Such inconsistencies are for example observed between the assessment of community objections and CPE Panels, leading to unfairness. An example that was presented concerned the deliberations on the community objection by the International Lesbian Gay Bisexual Trans and Intersex Association to .LBGT which rejected the objection on the grounds that the interests of the community would be protected through the separate community application for the .GAY string. In fact the CPE

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<sup>114</sup> See: <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>, p.6.

<sup>115</sup> See: <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, p.7.

<sup>116</sup> See: <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-rr-1-1713-23699-en.pdf> p.11 and <https://www.icann.org/sites/default/files/tlds/music/music-cpe-1-1115-14110-en.pdf> p.8.

panel rejected the community application for .GAY largely on the grounds that transsexuals did not necessarily identify as gay. There is therefore an inconsistency between the objections panel and the CPE panel on whether or not transsexuals are or are not part of the wider gay community.

We found that although the Statement of Works (SOW) between ICANN and the EIU<sup>117</sup> refers to ICANN undertaking a Quality Control review of EIU work and panel decisions, we are not aware that a proper quality control has been done. Indeed, a number of CBAs complained about the lack of quality control. Proper quality control, as alluded to in the SOW, should entail an independent party looking at a number of CPE reports to ensure consistency and quality control between them. A mere assessment of consistency and alignment with the AGB and CPE Guidelines does not suffice.<sup>118</sup> Such a limited assessment could be compared to only relying on the written law in a lawsuit before a court, rather than relying on both the law and how courts have applied this law to specific situations in previous cases. The interpretation as provided by courts of the law is highly relevant for the cases that follow and this logic equally applies to the EIU's decision-making. ICANN and its delegated decision-makers need to ensure consistency and alignment with the AGB and CPE Guidelines (which is analogous to the written law), but also between the CPE reports concerning different gTLDs (which is analogous to the interpretation as provided by court of the law).

Having a clear set of definitions and/or guidance that works across different but related ICANN processes would reduce apparent inconsistency. Furthermore, the application of a comprehensive Quality Control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.

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<sup>117</sup> See Section 8 of EIU Contract and SOW Information, at <https://newgtlds.icann.org/en/applicants/cpe>

<sup>118</sup> ICANN, 'Program Implementation Review' (29 January 2016), p. 122, <https://www.icann.org/en/system/files/files/program-review-29jan16-en.pdf> (accessed 20 August 2016).

## Transparency

GNSO Policy Recommendation 1 states: “The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.”<sup>119</sup>

A number of complaints were raised on the grounds of lack of transparency. Applicants told us they are not given sight of the additional materials which the Panels consider as the basis of their decisions (such as EIU research, and opposition to applications). As a result, applicants are unable to counter any claims made in material submitted in opposition to their applications.

Nor are they given details of the individual panel members who undertake the evaluations. The anonymity of panel members has been defended on the grounds that the Panels are advisory only.

This is an area where greater transparency is essential. It is indeed the case that the SOW makes clear that the EIU is merely a service provider to ICANN, assessing and recommending on applications, but that ICANN is the decision maker. As quoted by the ICANN Ombudsman in his report <sup>120</sup>, the EIU state, “We need to be very clear on the relationship between the EIU and ICANN. We advise on evaluations, but we are not responsible for the final outcome—ICANN is.” However, in all respects the Panels take decisions as ICANN has hitherto been unwilling to review or challenge any EIU Panel evaluation.

When we researched this point, it became clear that although ICANN staff routinely checked the EIU Panel reports for clarity and comprehensiveness, they neither questioned nor rejected the Panel’s conclusions. In terms of ICANN’s own processes, CPE is a staff, not a Board decision and ICANN has in effect fully delegated the process to the EIU. This means that there is no means of appeal (as it is only a staff decision) and any review through the Independent Review Process is limited to a review by the Board Governance Committee of whether there has been any contravention of established policy or procedure by ICANN staff. As there is no transparency of the process followed by the EIU Panels when conducting CPEs, the hurdles for proving such a contravention are arguably unsurmountable.

As the CPE process – if successful – provides the CBA with the right to string priority, the lack of transparency of the evaluation process as well as the lack of an appeals process arguably fails to meet the principles of Article 6 of the ECHR.

It is therefore crucial that a full review of all processes should be undertaken with a view to introducing as much transparency and sharing of information as possible. The decision on CPE is a determination of the rights of the applicant and should therefore be subject to a full appeal process, regardless of where the initial decision is taken. But it is not a lower level

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<sup>119</sup> ICANN GNSO, ‘Introduction of New Generic Top-Level Domains - Final Report’ (8 August 2007), <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-a-08aug07.htm> accessed 24 August 2016.

<sup>120</sup> Case 15-00110 In a matter of an Own Motion Investigation by the ICANN Ombudsman, Report dated 13th October 2015.

decision which should be treated as inviolate by the ICANN Board; ultimately, greater responsibility than delegation to an external third party is called for.

### *EIU Guidance: timing and content*

It is unfortunate that the EIU issued its own guidance on CPE criteria after applications had already been submitted. It is widely considered that the EIU not only added definitions, but that they reinterpreted the rules which made them stricter. As will be seen in some examples provided below, the EIU appeared to augment the material beyond the AGB guidance. This left applicants with a sense of unfairness as, had the EIU Guidance been available pre-submission, the applications may well have been different, and of course, it was strictly forbidden to modify original applications (unless specifically asked to do so by ICANN).

Care must be taken in any future new gTLD rounds to ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.

### *Scoring bar*

“An application must score at least 14 points to prevail in CPE. There was considerable debate about what the proper threshold should be for a prevailing score. The implications of a prevailing score are that the community-based application receives priority over all other applications in the contention set, so care needed to be taken to ensure that the threshold was set adequately high to prevent illegitimate use of the mechanism, while also allowing communities that met the definitions as established in the AGB to have a legitimate opportunity to pass the evaluation.”<sup>121</sup>

“It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. This is a fundamental reason for very stringent requirements for qualification of a community-based application”<sup>122</sup>

Regardless of the reasoning, the relatively low number of applicants who have successfully got through CPE leaves room for question. Applicants, observers, and members of the ICANN community we spoke to believe that the hurdle of scoring 14 out of a maximum 16 points (i.e. 88%) is too high.

It is recommended that either the scoring system and points bar should be re-evaluated or a new process should be developed for assessing community applicants. Some suggestions are discussed below in chapter 8.

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<sup>121</sup> Final Issue Report on New gTLD Subsequent Procedures, 4 December 2015

<sup>122</sup> AGB 4.2

## Criteria

There are four sets of criteria that are considered during the CPE process: community establishment, nexus between the proposed string and the community, registration policies and community endorsement. The application contains a set of questions specifically for CBAs and it is the answers to these questions which are assessed against the criteria should the applicant be eligible for and choose to enter CPE. The AGB describes the criteria and the EIU guidance adds subsequent elucidation on how the criteria will be interpreted.

Criterion 1 concerns “Community Establishment” and is divided between:

- 1A: Delineation (clearly delineated, organized, and pre-existing community) which carries a maximum score of 2 points, and
- 1B: Extension (considerable size and longevity), also with a maximum score of 2 points.

### **Contrast between the AGB, Application Form and EIU Guidelines (Community Establishment)**

AGB: "Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.

Application form: How is the community delineated from Internet users generally? Such descriptions may include, but are not limited to, the following: membership, registration, or licensing processes, operation in a particular industry, use of a language.

EIU: “Delineation” also refers to the extent to which a community has the requisite awareness and recognition from its members. The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certifications aligned with community goals, etc.

Criterion 2 considers the “Nexus” between the proposed string and community.

- 2A: Nexus (the string matches or identifies the community). This carries a maximum 3 points and it is not possible to score 1 under 2A; just 3, 2 or 0.
- 2B: Uniqueness (the string has no other significant meaning beyond identifying the community described in the application). This carries a score of 1 point.

Only two CBAs have scored the maximum on Nexus: Osaka and Spa. This is the hardest criterion to score full points on.

We consider the criterion of nexus to lack justification in the case of community TLDs; why should a string connected to a community bear such a close connection as to effectively disbar any other interpretation or meaning, as long as there is a clear connection between the string and the community?



### **Contrast between the AGB, Application Form and EIU Guidelines (Nexus)**

AGB: “Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community... If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.

Application Form: Explain the relationship between the applied for gTLD string and the community. Explanations should clearly state:

- relationship to the established name, if any, of the community.
- relationship to the identification of community members.
- any connotations the string may have beyond the community.

EIU: “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.

Criterion 3 covers “Registration Policies” (each scoring a maximum of 1).

- 3A: Eligibility (eligibility restricted to community members).
- 3B: Name Selection (Name selection rules are consistent with the articulated community-based purpose of the applied for TLD).
- 3C: Content and Use (Rules of content and use are consistent with the articulated community-based purposes of the applied for TLD).
- 3D: Enforcement (policies include specific enforcement measures with appropriate appeal mechanisms).

### **Contrast between the AGB, Application Form and EIU Guidelines (Registration Policies)**

AGB: Accountability: The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.

Application Form: (b) Explain the applicant’s relationship to the community.

Explanations should clearly state:

- Relations to any community organizations.
- Relations to the community and its constituent parts/groups.
- Accountability mechanisms of the applicant to the community.

EIU: Do enforcement measures ensure continued accountability to the named community?

It should be noted that there is no monitoring by ICANN of enforcement of registry conditions once a string has been delegated. For all generic applicants, registration policies are left to the registry to determine with the only requirement being that the registries publish their policies. *ICANN introduced an important addition to the basic registration requirements with the Public Interest Commitment (PIC) Specification, which allowed applicants the opportunity to make specific public interest commitments based on statements made in their applications*

and/or additional public interest commitments which were not included in their applications but to which they intend to commit.<sup>123</sup> These commitments then become part of the applicant's new gTLD registry agreement. *Community applicants have not been required to submit a PIC Specification to incorporate the community restrictions proposed in their applications as binding commitments. However, any community applicant that does not submit a PIC Specification will still be expected to enter into a registry agreement incorporating the community registration restrictions proposed in the application. Especially when it comes to community-based applicants, PIC Specifications or community registration restrictions as proposed in the application should be binding commitments that are published. In this way, an element of self-regulation would operate through the ability of the relevant community and wider stakeholder group to monitor compliance with the applicant's obligations and to hold the applicant to account.*

Criterion 4 covers "Community Endorsement".

- 4A: Support (documented support from recognised community institutions/authority to represent the community). This carries a maximum of two points.
- 4B: Opposition (no opposition of relevance). This also carries two points.

It would seem that the EIU prefers to award full points on 4A for applicants who are acting on behalf of member organisations. The AGB says: "Recognized" means the institution(s)/organization(s) that through membership or otherwise, are clearly recognized by the community members as representative of that community." If the cases of .HOTEL and .RADIO are compared with .MUSIC and .GAY (and see the box above for further comparison), it appears that the EIU has accepted professional *membership* bodies as "recognised" organisations, whereas campaigning or legal interest bodies (as in the case of ILGA and IFPI) are not "recognised". This is despite the fact that the AGB does not limit recognition by a community to *membership* by that community.

#### **Contrast between AGB, Application Form and EIU Guidelines (Opposition)**

AGB: Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.

EIU: No guidance issued on any of "clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction".

- There is a real danger that opposition to an application can count against an applicant twice; first prior to CPE during a community objection process (and any subsequent reconsideration request) as well as under Criterion 4B. The AGB states: "When scoring "Opposition," previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context." Furthermore, The identification of whether an opposition is relevant or not, is something that needs to be carefully assessed to prevent opportunistic objections by competitors.

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<sup>123</sup> See: <https://newgtlds.icann.org/en/announcements-and-media/announcement-06mar13-en>; <https://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>.

This group of criteria does not necessarily create a cohesive whole, as the questions which are being asked are basically: “Is the applicant representing a bona fide community, and does it have the support of that community?” “Is there a clear link between the community and the string which is being applied for?” and “Are the registration policies consistent with the community’s purpose?” These points need unpicking.

It seems to us that the core questions for ICANN to be assured of when giving priority to a CBA are the first ones: “Is the applicant representing a bona fide community, and does it have the support of that community?” We would add a third question here: “Is the applicant properly accountable to the community it represents?” If the answers to those questions are “yes”, then that should be the basis for awarding priority. The question of nexus is one which can be settled during the community objection process: if the applied for string does not have a clear connection to the alleged community, then the CBA will lose the community objection.

Arrangements for registration policies should, we believe, either be left to the registries or be mandatory requirements. Questions of how the string is used and who is eligible to use it should be matters for the community itself and the accountability mechanisms in place for the applicant. We believe there should be mandatory obligations for enforcement measures and in particular every community applicant should be required to have an appeal mechanism in place as a tool to assign 2<sup>nd</sup> level domains.

In brief, we recommend ICANN to:

- Consider reducing the costs for CBAs for future gTLD rounds. Accurate estimates should be provided of the costs involved in both defending and pursuing applications, and not just in submitting them.
- Establish and publish clear time deadlines for the various stages of the application process, accountability mechanisms and any appeal mechanisms for future gTLD rounds in order to further due process, manage expectations and enable a degree of accountability. These deadlines can be framed in bands, to take account of variances in the number of applications received.
- Take care to ensure appearances of conflicts of interest are minimized. Full transparency and disclosure of the interests of all decision makers and increased accountability mechanisms would assist in dispelling concerns about conflicts.
- Consider whether ICANN should provide dedicated staff assistance to CBAs. There appears to be confusion around whether the EIU acts *on behalf* of ICANN staff under delegated authority or is *separate* from ICANN. If evaluations are made at arms’ length from ICANN, then there should be staff support for community applicants.
- Take greater care to keep CBAs informed about anything which affects the progress of their application. To facilitate due process, they should have the opportunity to provide input into such matters, including accountability mechanisms instituted by third parties.
- Have a clear set of definitions and/or guidance that works across different but related ICANN processes to reduce apparent inconsistency. Furthermore, the application of a comprehensive quality control process into the CPE process would ensure greater consistency between Panels. Full disclosure of the assessments made by the EIU and more detailed reasoning would also assist.

- In any future new gTLD rounds ensure that post hoc guidance is not issued in such a way as to give any impression of unfairness. Any such guidance should be subject to independent quality control to ensure that it does not in fact alter the meaning and intentions of the Guidebook. In so doing, the implicit standards in the EIU interpretation should be reviewed and revealed in order to assess them against the intended purpose of CPE.
- Either re-evaluate the scoring system and points to lower the bar or develop a new process altogether for assessing community applicants. The newly arrived CBA admitted within ICANN could contribute with their direct experience to this process to improve previous too restrictive rules.
- Full registry conditions, including key elements of the application and PICs, should be published to enable on-going monitoring by stakeholders to ensure compliance by the applicant to the community to which it is accountable.

## 7. Accountability mechanisms

There are no appeal mechanisms in place neither with respect to the Community Objection Procedure nor with regard to the CPE. In practice, applicants that were competing for the same string and were unsatisfied with the outcomes of these two procedures have sought justice or a win through existing mechanisms originally conceived to ensure ICANN's board accountability. These mechanisms include the Reconsideration Request, the Cooperative Engagement Process (CEP), the Independent Review Process (IRP) and filing a complaint to the Ombudsman. These mechanisms have not been designed to resolve string contention, but have been used as such due to dissatisfaction with the outcome of evaluations in earlier stages of the application procedure and the lack of alternative ways to appeal. This chapter looks at each of these mechanisms in turn and concludes that a simple appeal mechanism would better serve due process concerns, and be likely to be faster and cheaper than utilising the accountability mechanisms which were not designed for either the Community Objection Procedure or the CPE.

### *Reconsideration requests*

A Reconsideration Request can be filed by any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information.

Reconsideration requests have very limited scope in relation to CPEs. This is, as discussed above, because CPE is treated as a staff process that has been fully delegated from staff to the EIU. Even though ICANN is ultimately responsible for decisions arising from the CPE, ICANN staff confirmed to us that they have never challenged or disagreed with the recommendations made by EIU Panels. The decisions are taken by the Panel alone; ICANN staff verify the Panels' reports for completeness and ensure they are comprehensible for the ICANN community, they do not interfere with the scoring or the results.

The Board has designated the Board Governance Committee (BGC) to review and consider any such Reconsideration Requests.<sup>124</sup> A reconsideration request has for example been filed by Dotgay LLC. The request asked the BGC to reconsider the outcome of their CPE, which resulted in Dotgay LLC's .GAY application not achieving community priority. The BGC argued that it is only authorized to determine if any policies or processes were violated during CPE and that the BGC has no authority to evaluate whether the CPE results are correct. BGC decided in February 2016 that the CPE process for Dotgay LLC's .GAY application did not violate any ICANN policies or procedures.<sup>125</sup>

Under existing rules, reconsiderations are only permitted on the grounds that the published process has not been followed, either through error or malice. CBAs have pointed out that as applicants have no sight of what the EIU or the Panels have done, they are not in a good position to identify whether or not the published process has been followed. In the future, however, reconsiderations will also be permitted on the grounds that the decision has gone against ICANN's mission. This provides greater accountability and may allow more scope for successful reconsiderations of CPE outcomes.

In cases where a third party requests a reconsideration of a CPE which has evaluated in favour of a CBA, community applicants have indicated that they are not included at all in the process. Under ICANN rules, reconsiderations are bilateral between the claimant and ICANN with no involvement of third parties. Given that erstwhile priority CBAs could potentially have their rights fundamentally affected by the outcome of such a reconsideration, it seems counter to fair process for them not to be consulted or given an opportunity to comment on matters which directly affect them.

The Independent Review Panel decided in the IRP between Dot Registry and ICANN that the ICANN Board (acting through the BGC that decides on Reconsideration Requests) “failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfil its transparency obligations (including both the failure to make available the research on which the EIU and ICANN staff purportedly relied and the failure to make publicly available the ICANN staff work on which the BGC relied).”<sup>126</sup> The Panel majority further concluded that the evidence before it does not support a determination that the Board (acting through the BGC) exercised independent judgement in reaching the reconsideration decisions. By doing so, the Board did not act consistently with its Articles of Incorporation and Bylaws. The procedural flaws addressed by this Independent Review Panel must be corrected before any next rounds of gTLD applications take place.

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<sup>124</sup> ICANN, Bylaws, Article IV: Accountability And Review, Section 2: Reconsideration, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV>> (accessed 13 July 2016).

<sup>125</sup> ICANN, ‘BGC’s Comments on Recent Reconsideration Request, <<https://www.icann.org/news/blog/bgc-s-comments-on-recent-reconsideration-request>> (accessed 13 July 2016).

<sup>126</sup> See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

### *Independent Review Process (IRP)*

Another accountability mechanism that has been used to obtain some sort of review of decisions made with regard to CBAs is the independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws.<sup>127</sup> The Panel compares contested actions of the Board to the Articles of Incorporation and Bylaws, and declares whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must focus on issues of conflict of interest, due diligence/care and whether the Board members exercise independent judgment.<sup>128</sup> The Panel is not asked to, nor allowed to, substitute its judgment for that of the Board.<sup>129</sup> The Panel does not have the mandate to review the actions or inactions of ICANN staff or third parties, such as objection experts or the CPE Panel, who provide services to ICANN.<sup>130</sup> The only way in which conduct of ICANN staff or third parties is reviewable is to the extent that the board allegedly breached ICANN Articles or Bylaws in acting or failing to act with respect to that conduct.<sup>131</sup> The IRP is considered the last resort and is decided upon by the International Centre for Dispute Resolution.

Prior to initiating an independent review process, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP.<sup>132</sup> Cooperative engagement is expected to be among ICANN and the requesting party, without reference to outside counsel.<sup>133</sup> Again, if the cooperative engagement involves a contender for a string which has been subject to a successful CPE process, the CBA is not permitted to participate or make written submissions. This lack of transparency has caused some IRP cases to take as long as 2 years (including the Cooperative Engagement Process) to resolve, where the intention of the complainant was apparently to delay the gTLD launch of potential competitors. This “gaming” of the rules by some of the stronger actors in the market, has been also noted by the Ombudsman in its own motion report on CBA.<sup>134</sup>

Under the current system, the applicant chooses one IRP panel member, ICANN chooses one, and they jointly appoint a third. The process is costly for the applicant. Under the new

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<sup>127</sup> [ICANN, Bylaws, Article IV, Section 3.](#)

<sup>128</sup> ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

<sup>129</sup> See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

<sup>130</sup> ICANN, Approved Board Resolutions - Regular Meeting of the ICANN Board (25 June 2016), Consideration of Independent Review Panel's Final Declaration in the Donuts Inc. v. ICANN IRP, <<https://www.icann.org/resources/board-material/resolutions-2016-06-25-en#2.d>> (accessed 14 July 2016).

<sup>131</sup> See: Declaration of the Independent Review Panel in the case of Dot Registry v. ICANN (29 July 2016), <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> accessed 24 August 2016.

<sup>132</sup> ICANN, Bylaws, Article IV: Accountability and Review, Section 3: Independent Review of Board Actions, <<https://www.icann.org/resources/pages/governance/bylaws-en#IV-3>> (accessed 13 July 2016).

<sup>133</sup> ICANN, Cooperative Engagement Process – Requests for Independent Review 11 April 2013, <<https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>> (accessed 13 July 2016).

<sup>134</sup> <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>

Bylaws, this is proposed to change to create a cheaper mechanism for the applicant: ICANN will select seven individuals to be standing members of the IRP and the applicant will select individuals to sit on any specific review.

The ICANN Board adopted New Bylaws on 27 May 2016. These New ICANN Bylaws will be deemed effective upon the expiration the IANA Functions Contract between ICANN and NTIA. Under the new process the scope of IRP will broaden. The new Bylaws prescribe that ICANN needs to act in compliance with its Articles of Incorporation and Bylaws as well as its Mission. The actions that are covered by IRP is extended and includes the actions and inactions of ICANN staff members more explicitly as well as action or inaction that resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws. Under the new Bylaws, each IRP Panel shall conduct an objective, de novo examination of the Dispute, which will lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction. Under the new process and for Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.<sup>135</sup>

This new process is a major improvement in term of human rights and due process in particular. However, in principle, and similar to the Reconsideration Request, the Panel does not have the mandate to affirm, reverse or vacate the decision. The Panel can only assess whether ICANN acts in accordance with its mission, Bylaws and Articles of Incorporation. This means that there is no adequate mechanism of checks and balances in place, which is a foundational aspect of accountability. Under the new Bylaws, the IRP Panel conducts de novo review, thus, the Panel acts if it were considering the question for the first time. The extent to which this 'de novo' review includes the capacity to do its own fact finding is not clear. As it stands, the outcomes of a Reconsideration Request and of an IRP are solely recommendations to the Board as to whether the mission, Bylaws and Articles of Incorporation have been respected. As such, the Board has the capacity to judge on the merits of the case. There is no reason to believe that the Board is better positioned than an Independent Review Panel that relies for its verdict solely on ICANN's mission, Bylaws and Articles of Incorporation to judge upon the substance of the case.

### *Ombudsman*

In addition to these accountability mechanisms ICANN has its own independent and impartial Ombudsman. The Ombudsman's function is to act as an Alternative Dispute Resolution office for the ICANN community who may wish to lodge a complaint about an ICANN staff, board or supporting organization decision, action or inaction. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly.<sup>136</sup> The Ombudsman has been asked to look at decisions of the ICANN Board in Reconsideration Requests and received many complaints concerning the CPE process. Both Chris LaHatte and Herb Waye (Ombudsmen) indicate their role is not to conduct a first

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<sup>135</sup> ICANN, Bylaws adopted by ICANN Board on 27 May 2016, section 4.3,

<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> accessed 25 August 2016.

<sup>136</sup> ICANN, What the Ombudsman Can Do for You, <<https://www.icann.org/resources/pages/contact-2012-02-25-en>> (accessed 13 July 2016).

level review; their role is to provide recommendations (not binding) concerning the fairness of the process.<sup>137</sup> The Ombudsman perceives informality to be the strength of the ICANN Ombudsman, the Ombudsman does not prescribe to change policy, but helps to solve problems by talking to the parties.<sup>138</sup>

Although lodging a complaint with the ICANN Ombudsman is not strictly an accountability mechanism, it operates in a similar way insofar as it works to block the progress of an application. Complaints arise about how long an application can be blocked by the Ombudsman's own process and the lack of transparency. Moreover, when a third party makes a complaint to the Ombudsman the other parties in contention, including CBAs, are not specifically informed, even though the complaint blocks the furthering of the process. There is no communication between the Ombudsman and these other parties in contention, including CBAs, on grounds of 'confidentiality'.

The somewhat informal manner in which the ICANN Ombudsman operates does not seem to fulfil a clear purpose when extremely valuable gTLDs are in contention. It seems highly unlikely that a disgruntled applicant will accept a view from the Ombudsman that ICANN did act fairly without resorting to more formal accountability mechanisms. As such, complaining to the Ombudsman is too easily used as just another obstructing mechanism.

Based on a number of different complaints about the CPE process, the Ombudsman undertook his "own motion investigation" into the issues raised in these complaints as well as the overall CPE process.<sup>139</sup> The Ombudsman criticised an element of the CPE process, such as anonymity of the EIU Panel members, but has not found issues sufficiently serious to recommend any action other than recommendations about changes for the next round.

### *Legal process*

The contracts that applicants sign with ICANN on submitting their application commits them against bringing legal action against ICANN.<sup>140</sup> However, the US District Court in Central California rejected the validity of that prohibition when it issued an injunction against ICANN in favour of one of the applicants for the .AFRICA string. On 12 April 2016 the same court granted a preliminary injunction to prevent ICANN delegating the string to another applicant who, in ICANN's view, had successfully gone through the evaluation process for a geographic name. The Court held that the circumstances of the case raised serious questions about the enforceability of the Release against bringing litigation on the grounds of it being contrary to California Civil Code § 1668 which says that "[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud,

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<sup>137</sup> Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki.

<sup>138</sup> Based on an interview with Chris LaHatte and Herb Wayne at ICANN56, Helsinki. See also: Office of the Ombudsman, Case 16-00177, In a matter of a Complaint by dotgay LLC, 27 July 2016, <http://www.lahatte.co.nz/> (accessed 29 July 2016).

<sup>139</sup> Office of the ICANN Ombudsman, Case 15-00110, In a matter of an Own Motion Investigation by the ICANN Ombudsman (13 October 2015).

<sup>140</sup> See Module 6, AGB, para. 6 "Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application, and irrevocably waives any right to sue or proceed in court or any other judicial for a on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application."



or wilful injury to the person or property or another, or violation of law, whether wilful or negligent, are against the policy of the law.”

It is particularly interesting that this case was brought by the applicant on First Amendment (freedom of speech) grounds and successfully persuaded the Court that once the string was delegated, the applicant’s rights would be abrogated. Furthermore, the Court considered the public interest in granting an injunction: “Here, the public has an interest in the fair and transparent application process that grants gTLD rights. ICANN regulates the internet – a global system that dramatically impacts daily life in today’s society. A full hearing on the merits of the case has not been set, but it does set a precedent to suggest that applicants who have gone through ICANN’s own accountability processes may still have recourse to a court of law.

### *Appeals*

ICANN does not offer an appeal of substance or on merits of its decisions in the Community Application process. Yet the terms of its contract with applicants suggest that the availability of its accountability mechanisms provides an opportunity to challenge any final decision made by ICANN.<sup>141</sup> This is complex in terms of the CPE process as ICANN has avoided any admission that CPE is anything other than an evaluation taken by a third party (the EIU) and asserts that no decision has been taken by ICANN itself. And yet, ICANN relies on that evaluation as a “decision” which it will not question.

Therefore, as seen above, the accountability mechanisms which are available to CBAs who have gone through the CPE process are limited to looking only at the EIU’s processes insofar as they comply with the AGB. The lack of transparency around the way in which the EIU works serves merely to compound the impression that these mechanisms do not serve the interests of challengers.

The GAC has expressed its concerns about the consistency of the CPE process and asked the ICANN Board to consider implementing an appeal mechanism in the current round of the new gTLD Program. In a letter from the ICANN Board to the GAC Chair<sup>142</sup>, the Board declined to do so for the current round. The New gTLD Programme Committee (“NGPC”), “determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. The NGPC recommended that the development of rules and processes for future rounds of the New gTLD Program should explore whether there is a need for a formal review process with respect to Expert Determinations more broadly, including CPE determinations.”

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<sup>141</sup> *Ibid* (emphasis added) “Applicant acknowledges and accepts that applicant’s nonentitlement to pursue any rights, remedies, or legal claims against ICANN or the ICANN affiliated parties in court or any other judicial fora with respect to the application shall mean that applicant will forego any recovery of any application fees, monies invested in business infrastructure or other startup costs and any and all profits that applicant may expect to realize from the operation of a registry for the TLD; **provided, that applicant may utilize any accountability mechanism set forth in iCANN’s bylaws for purposes of challenging any final decision made by ICANN with respect to the application.**”

<sup>142</sup> Dated 28 April 2015

ICANN should institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeals mechanism could effectively replace the other existing ICANN accountability mechanisms.

In brief, we recommend ICANN to:

- Institute a single appeal mechanism which can reconsider the substance of a decision, as well as procedural issues. In order to avoid the appeal mechanism being effectively used as the primary decision making body, it would be reasonable to seek to limit the grounds of appeal, similar to those in legal proceedings. However, this would require greater transparency of the decision making process at first instance (currently at the EIU Panel level). Such an appeal mechanism could effectively replace the other existing ICANN accountability mechanisms.

## 8. Concepts for the next gTLD application rounds

The following are some ideas that arose through our research and discussions which we propose for further consideration by the ICANN community. It may be that a combination of proposals would create a fair and transparent process which meets both GNSO and human rights principles.

### *Consider community applications first*

ICANN staff who have been involved with the current new gTLD round have suggested that in any new round, community applications should be considered first. If, after evaluation, an applicant is deemed to be “community” (in ICANN terms), then no other applications for the applied-for string should be considered.

### *Consider whether the model applied for geo-names TLDs could offer possibilities for CBA*

In consideration of the rules in the AGB for geographic names (where a verified non-objection from the corresponding government or authority is provided), it is suggested that further thought could be given to the possibility of establishing prior consultation obligations with entities and organisations already accredited as representatives of certain communities, e.g. by relevant specialized international organizations (e.g. membership to I.O.C. , UNESCO for ethnicity and language based communities, etc.).

### *Have applications in staggered batches*

ICANN could invite “expressions of interest” in applying, asking potential applicants to submit an interest in a string of their choice. ICANN could then advertise the strings in batches, requiring all competing applications to be submitted simultaneously. At the same time, they could ask for any community objections. This would help ICANN manage the workload and make keeping to deadlines feasible. Publishing a timetable for future string batches would also help potential applicants manage their application workload and business expectations. This would also comply neatly with GNSO Principle 9: “There must be a clear and pre-published application process using objective and measurable criteria. “

### *‘Beauty parade’ for all applications*

Rather than having a high bar for priority, ICANN could consider all applications for a particular string together. Retaining the principle of preference for bona fide communities, all applications from self-declared CBAs should be looked at together to determine which one best meets the selection criteria. The criteria would be similar to those in the AGB for CPE.

Given that many ICANN stakeholders seem troubled with the notion of a “beauty parade” involving subjective judgement, it is important that any competitive assessment be based on transparent and clear criteria and that the assessment Panel be truly accountable (unlike the EIU Panel). It may be appropriate to construct a Panel consisting of members appointed by the ICANN multi-stakeholder community.

### *Have a different community track*

Most countries around the world have systems in place for the licensing and regulation of community media.<sup>143</sup> Useful precedents can be borrowed from these existing regimes. For example, in the UK the telecoms and broadcasting regulator Ofcom requires community media, “Not be provided in order to make a financial profit, and uses any profit produced wholly and exclusively to secure or improve the future provision of the service or for the delivery of social gain to members of the public or the target community.”<sup>144</sup> Furthermore, community media must be accountable to the target community.

ICANN already sets more stringent registry conditions for strings delegated to CBAs, so there is a precedent for treating community applicants differently. Setting tougher criteria which would effectively deter any commercial applicant from “gaming” as a CBA would make it much easier to assume that a self-declared CBA actually is one. In effect, it could make the practical application of GNSO Guideline IG H much simpler: claims that an application is in support of a community will be taken on trust *except* in cases of contention where the claim “is being used to gain priority for the application.”<sup>145</sup>

A tighter set of restrictions on how a community string can be used and on the use of profits would mean that generic commercial applicants would have no interest in pretending to be communities. Those communities that did apply could then be assessed in accordance with their level of community support, accountability to that community, and their proposals for providing benefit to the community. Certain mandatory registry requirements could be set in advance, such as having an effective appeals mechanism.

At the moment, accountability to the community is merely a background factor only taken into account by the EIU when considering Enforceability under Criterion 3, CPE Guidelines: “The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.” It is not a determining factor in itself, whereas it could be a major determinant in identifying bona fide CBAs.

Ensuring there is real accountability to the community would also provide a stronger proxy for enforceability. A number of GNSO principles<sup>146</sup> refer to enforceability of those promises made in an application, but in practice the enforcement mechanisms rely on transparency by the registry (by publishing its policies) and ICANN (by publishing the terms of registry agreements). Looking for clear accountability mechanism between the CBA applicant and

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<sup>143</sup>In the US, the FCC licenses non-profit stations but these are meant to be exclusively granted to “educational organizations”, so not of particular relevance to ICANN. In fact, most are licenced to either NPR or religious organisations.

<sup>144</sup>See Para 2.2 at <http://licensing.ofcom.org.uk/binaries/radio/community/thirdround/notesofguidance.pdf>

<sup>145</sup> GNSO 2007 Principles and Recommendations

<sup>146</sup> GNSO Principles E: “A set of capability criteria for a new gTLD registry applicant must be used to provide an assurance that an applicant has the capability to meets its obligations under the terms of ICANN’s Registry agreement.” Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.” Principle 17: “A clear compliance and sanctions process must be set out in the base contract which could lead to could lead to contract termination. “

its community – and ensuring they can be enforced going forward – will strengthen compliance with the GNSO principles.

## 8. Conclusion

ICANN's remit is to look after the technical coordination of the Internet's domain name and addressing system (DNS) in the global public interest. ICANN's function as a global governance body that develops Internet policy has the capacity to impact on human rights such as the rights to freedom of expression, freedom of association, due process and non-discrimination. This report has reviewed the range of problems encountered by community applicants and sought to identify how such problems could be avoided in future gTLD application rounds. This study aims to catalyse discussion on CBAs and human rights and to contribute to the GNSO Policy Development Process (PDP) on this issue. The findings of the study stem from in-depth analysis of ICANN's policies and procedures, international human rights law and interviews with community-based applicants, ICANN staff and other relevant actors within the ICANN community. This report intends to assist ICANN in implementing its commitment to the global public interest and international human rights law.

The ICANN community went to considerable lengths to prepare the new gTLD program and the Applicant Guidebook as the user manual for the process. It is inevitable that there would be problems with the process as a whole and community-based applications; the process was brand new and it was expected that situations would arise that could not have been anticipated. The first round of applications provides the ICANN community with a wealth of information based on which ICANN's policies and procedures can be re-evaluated to improve ICANN's policies and procedures for the subsequent round of gTLD applications.

Our study reveals that the intended goal of the concept of prioritising communities is insufficiently developed. It is insufficiently clear which public interest values are served by CBAs and which types of individuals or groups should be regarded as communities to fulfil this goal. The ICANN community should invest time in fundamentally re-assessing the purpose of CBA to be able to provide a clear insight into the values it is meant to serve. This will provide the necessary guidance on the definition of communities to provide delegated decision-makers, such as the ICC and EIU, with the contextual background required for them to decide on objections and CPE in the light of the public interest purpose of community priority. The current assessment by delegated decision-makers based on strict metrics alone as set out in the AGB and CPE Guidelines is insufficient to live up to due process standards.

In his final report dated 27 July 2016, the outgoing Ombudsman Chris LaHatte looked at a complaint about the Reconsideration Process from dotgay LLC.<sup>147</sup> Here, he took to task the fact that the BGC has “a very narrow view of its own jurisdiction in considering reconsideration requests.” He points out that “it has always been open to ICANN to reject an EIU recommendation, especially when public interest considerations are involved.” As identified by us in this report, Chris LaHatte raises issues of inconsistency in the way the EIU has applied the CPE criteria, and reminds ICANN that it “has a commitment to principles of international law (see Article IV of the Bylaws), including human rights, fairness, and transparency”. We endorse his view and hope that our report will strengthen the argument

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<sup>147</sup> Available at <http://www.lahatte.co.nz/>.

behind his words and result in ICANN reviewing and overhauling its processes for community-based applicants to better support diversity and plurality on the Internet.

In delegating global top level domains, ICANN is allocating scarce and valuable resources in a competitive market, much the way governments and regulators allocate spectrum. Just as spectrum is allocated through a combination of: auctions (typically for telecommunications use where only light touch obligations are placed on the use of spectrum), specific allocation for government and defence need, and special licensing (for broadcasting with particular obligations on use), ICANN delegates domain names for generic purposes, specific geographic country use, and special community use. The process for special delegations is still in its infancy and, as demonstrated in this report, is in need of considerable re-evaluation and development. The opportunities for ICANN as an exemplar for global governance are enormous as it builds on its multi-stakeholder model to become a truly international and inter-state body. But just as regulators have learned to be “principles-based”, ICANN must learn to take decisions that are not simply binary ones developed from “box ticking” assessments. ICANN must develop confidence in taking judgements based on its core values and principles.

## List of interviewees

- Mark Carvell, member GAC, UK
- Dr Olga Cavalli, member GAC, Argentina
- Avri Doria, member GNSO, Community TLD Applicant Group
- Christine Willett, ICANN staff
- Chris LaHatte, ICANN Ombudsman
- Herb Waye, ICANN Ombudsman
- Representative from CORE Registry: Werner Straub
- Representatives from Decherts LLP: Erica Franzetti, Harsh Sancheti and Erin Yates.
- Representative from dotgay LLC/.Gay application: Jamie Baxter
- Representatives from DotMusic/.MUSIC application: Constantine Roussos, Tina Dam, Paul Zamek, Jason Schaffer
- Representatives from EBU/.RADIO application: Alain Artero and Giacomo Mazzone



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