

Distribution	Public
Date	15 July 2023

Governmental Advisory Committee (GAC) Comment on the Draft Framework for Closed Generics

Introduction	1
Overarching Comments	2
GAC Input on Specific Elements of the Draft Framework	3
1. GAC Input on the Application and Application Process	3
2. GAC Input on the Evaluation Process	6
3. Input on Post-Contracting/Post-Delegation	7
Conclusion	8

Introduction

The GAC welcomes the efforts made by the members of the facilitated dialogue on Closed Generic gTLDs from the GAC, GNSO and ALAC. The GAC expresses strong appreciation for the amount of thought and work put into the present [Draft Framework](#) for Closed Generic gTLDs (Draft Framework) and for the opportunity to provide input on the Draft Framework.

In line with [ICANN77 GAC Communiqué](#), the GAC reiterates concerns “*over the lack of convincing resolutions for preliminary yet fundamental matters in the Draft Framework*” in particular on “*competition issues, the overall assessment of the value of Closed Generic gTLDs*”

for the Internet, their potential negative economic and social impacts, and the evaluation panel". Some of these challenges, and especially those related to competition issues, have only increased in the last decade, due to the concentration of the digital markets and assets in fewer hands. The GAC wishes to prevent closed generics from accelerating this phenomenon and to avoid privatization or nationalization of important sections of the open digital space without having a clear understanding of the overall benefits and risks involved.

The GAC further reiterates that, as per the ICANN77 GAC Communiqué, *"additional steps, including the possible initiation of a GNSO policy process, should only be undertaken if in the final draft specific solutions are proposed and the above-mentioned issues are adequately addressed"*, and that *"no policy option, including the prohibition of Closed Generic gTLDs, should be excluded if a way forward that satisfies GAC concerns is not found. In any event, the framework will be subject to the GAC consensus agreement"*.

Overarching Comments

The GAC notes that comments made at the various stages of the process in the Draft Framework do not necessarily signify the GAC's agreement with the principle of Closed Generic gTLDs. The GAC reiterates that it notes *"that the issue of closed generics has generated considerable debate and diverse views. Broadly speaking, while the GAC does not believe closed generics are necessarily inherently anti-competitive, it considers that restricting common generic strings for the exclusive use of a single entity may have unintended consequences, including a negative impact on competition, if appropriate guardrails are not established."*¹

In terms of specifics regarding the Draft Framework, the GAC wishes to highlight some areas of concerns for the facilitated dialogue group's consideration, which will be further discussed in this comment. The first area identified by the GAC to be explored further is the lack of definitions of key concepts such as public interest or representativeness, which the Draft Framework is based on. The GAC notes that the lack of such definitions may hinder understanding how the framework could work in practice, and may indicate a difficulty in agreeing on such important concepts. GAC members consider that basic definitions should be included in the Framework. At the same time GAC members are mindful that a working definition of such concepts, which is necessary to make immediate progresses on this exercise, may be further detailed in the potential subsequent Policy Development phase, but wishes to note that attributing the interpretation of these concepts to the evaluation panel presented in the Draft Framework would not be an adequate response to the policy challenges raised by

¹ GAC Comment on Subsequent Rounds for New gTLDs Draft Final Report Public Comment Proceeding: <https://gac.icann.org/file-asset/GAC%20Subpro%20Final%20Report%20Collective%20Comment%20-%20FINAL.pdf>

Closed Generic gTLDs. This may entail failure to citizens and communities since governments would be delegating to unknown individuals the responsibility of discussions and decisions that relate to core societal values. Furthermore, the GAC notes that evaluating whether a proposed Closed Generic gTLD would meet a public interest goal, as proposed in the Draft Framework, may likely create significant costs for the ICANN community with no corresponding benefit, as in most cases, a Closed Generic gTLD would serve only the private interests of its operator without benefits to the public, unless a clear case is made and confirmed during the application and evaluation phases.

Concrete and well-explained use cases are the second area for the facilitated dialogue group to further explore, to show the value of delegating Closed Generic gTLDs beyond any reasonable doubt, illustrating their benefits for individuals and communities. GAC members note that while the Draft Framework includes a few types of organizations that potentially might be interested in applying for Closed Generic gTLDs (such as the International Red Cross and other similar not-for-profit international organizations), it may also benefit from the addition of examples involving commercial and for-profit entities.

The GAC appreciates the opportunity to provide input to this Draft Framework and thanks the facilitated dialogue group for their consideration while reviewing the input received before continuing with the next steps on this topic.

GAC Input on Specific Elements of the Draft Framework

1. GAC Input on the Application and Application Process

The GAC believes that important clarifications would be needed for the application/application process part of the Draft Framework to respond to GAC's concerns as expressed in the [ICANN76](#) and [ICANN77](#) Communiqués and statements mentioned above.

The GAC understands the desire to keep the application process simple and in line with other gTLDs (**element 1**), however it wishes to note that Closed Generic gTLDs are a distinctively new category that might present high socio-economic risks and implications from a policy perspective. The attribution of Closed Generic gTLDs, and even more so the attribution to the wrong candidates, could have severe consequences not only from a competition/market but also from human rights perspective underlying the open Internet, with the privatization or closed nationalization of entire sections of the Internet information space based on what is a currently undefined "public interest". Therefore, the delegation of Closed Generic gTLDs, if at all

agreed by the ICANN community, should follow a specific and carefully thought-through application process and should not be a simple expansion of the general gTLDs procedures.

In view of the specific features and risks raised by Closed Generic gTLDs, the application process should not merely replicate that for standard gTLDs. In addition to the "additional" criteria, "*criteria specific to the risks inherent in closed generics*" should be specified (**element 1**). All the information requested from each applicant should include a high degree of precision, which implies reinforcing the language. For example, "*abstract or generalized statements will not be sufficient for evaluation*" (**element 3.a**). The precision required in applications necessitates definition of the public interest, the scope of which is not at the discretion of the application (**elements 4; 5; 7; 8; 9; 10; 13; 15**) and precisely defining it clearly in the Draft Framework.

While the GAC appreciates that the burden of proof to establish eligibility falls on the applicant (**element 3**), this approach requires stronger definitions of key terms and requirements within the present Draft Framework as to leave no space for unintentional or intentional wrong interpretations from the applicants. Additionally, for consistency with **element 21.a.**, some guiding questions should be made available for applicants to answer as a basis for evaluation. If relevant, more information can be provided by the applicant.

On framework **elements 4, 7, and 8**, the GAC notes that the concept of "public interest" must not only be defined in the framework but also the adopted definition should be workable/operationalizable. This definition is crucial as the Draft Framework relies on this notion to ensure that Closed Generic gTLDs add value to broader or smaller communities. Otherwise, the GAC notes there could be no convincing rationale for why operating the gTLD in a closed manner, as opposed to an open manner, would be a better fit. Additionally, the GAC urges members of the facilitated dialogue group to specify the following point prior to it being asked of applicants: "*Provide clear and concrete rationale for why operating the gTLD in a closed manner, as opposed to an open manner, better serves the identified public interest goal(s)*" (**element 7**).

Furthermore, the GAC considers that the introduction of "private interests" in the Draft Framework is misleading and should be re-considered completely, and if kept, the final draft should include a concrete way forward to define what level of commercial or individual interest is acceptable and when/whether this is compatible with public interest.

The GAC reiterates the difficulty in evaluating organizations' commitments to public interest in the absence of a shared operational definition of the latter (**element 8**). Different societal and legal frameworks in different geographical contexts can lead to very diverging interpretations of what public interest is, potentially leading to lengthy discussions and legal proceedings to decide whether a specific applicant's understanding of Closed Generic gTLDs is in line with

others' values and views of what 'public good' is. The final framework should be fully persuasive that the ICANN community is not moving towards a process that could lead to its own paralysis. Additionally, the specific information outlined in **element 8** should include the number of years of activity, followed by the list of activities per year.

The GAC expresses concerns about a potential contradiction in the case of private sector entities on demonstrating the nexus between the applicant and the Closed Generics term (**element 9**). For private sector entities it may indeed seem relevant to not be connected to the object of the Closed Generic application (as not to raise competition or market dominance concerns) while at the same time they are requested to prove that they have a strong connection with this area. The GAC notes lack of clarity on how this contradiction can be cleared up within the current Draft Framework.

Pertaining to the concept of "representativeness" (**element 10.a**), some GAC members consider that this idea may prove unworkable at the global level. Unless there is a commonly agreed definition of what "*all or a significant part of the businesses*" means, it is unclear how this notion could be interpreted at the local, regional, national or global levels and how conflicts between different applicants and constituencies could be resolved. Those GAC members therefore raise the following questions for the facilitated dialogue group's consideration:

- How would a regional application for a domain like .volunteering compete against another regional or global application?
- Would a regional applicant always be less representative than a global applicant?
- How could representativeness be considered at different geographic levels and within communities that are structured to many different extents in associations or umbrella organization?

GAC members note that even within a theoretical framework where a significant level of global "representativeness" can be defined, full control over a generic gTLD casts serious questions about its effects on market openness and contestability. These questions need to be addressed ex ante for new gTLD rounds to avoid raising countless tensions between communities.

On **element 10.a.ii**, the GAC notes that a consultation should include a public announcement or media release in the relevant community or professional assembly.

The GAC stresses the importance of the identification of risks associated with Closed Generic gTLDs and possible mitigation actions (**element 13**). As such, the GAC notes that this identification of risks or threats should not be left to the appreciation of candidates. In the final framework document, the GAC asks for the inclusion of a preliminary reference list of risks, as well as a procedural consideration of an external control or validation of the risks and related risk mitigation strategy.

The GAC notes that beyond self-policing and self-regulation, candidates and processes should also be expected to comply with existing legislations and policies (i.e., competition and consumer protection rules) (**element 14**).

Finally, GAC members underscore that more elaboration may be required regarding how the applicant will comply with certain obligations (**element 15**) so the applicant must ensure that the Closed Generic gTLD is not used to incite hatred to any community or group, nor that it violates the provisions of any established treaty signed by UN members.

2. GAC Input on the Evaluation Process

As Closed Generic gTLDs pose unique competition-related risks, they should be subject to a specific evaluation process, taking into account special criteria with regard to the risks inherent to Closed Generics (**element 17**). Extending the gTLDs' standard evaluation process to Closed Generic gTLDs can be seen as an efficient measure from an organizational perspective but does not meet the GAC's expectations in terms of attention to be dedicated to Closed Generic gTLD applicants. In addition, GAC members reiterate the need to address preliminary and fundamental questions about the evaluation. It is not sufficient to mention "*professional judgment*", without elaborating more on this notion, like specifying the qualifications and expertise of evaluators. "Professional judgment" must be clarified and defined similarly to the concept of "public interest" (**element 18**). As such, the GAC suggests modifying **element 19** to read "*if it fully meets the criteria*".

GAC members flag that in order to fully appreciate the adequateness of the proposed Draft Framework, the evaluation criteria for Closed Generic gTLD applications should, to the extent possible and as appropriate to be convincing in this phase, be contained in this framework and should address the policy concerns of the GAC as expressed in the ICANN76 and ICANN77 Communiqués as well as in earlier statements (**element 18**).

Clarification on whether the panel may seek input from an independent external consultant would be appreciated by the GAC (**element 19**). Furthermore, the "*evaluation panel consisting of suitably-qualified individuals*" should be further characterized in the Draft Framework, and more clear information should be provided concerning the selection of individuals, their required skills, geographical and sectoral representativeness, ensuring stakeholders' regional and linguistic diversity.

GAC members underline that it would be essential to have additional information on the scoring system as part of the Draft framework. Without a definition of what is in the public interest, it is impossible at this stage to assess the extent to which the application meets the prerequisites **(element 20)**.

GAC members agree with the notion that no priority should be given to an application of a Closed Generic gTLD in case of a contention **(element 20)**. The GAC, however, notes concerns on the use of the standard procedure of string contention resolution in the event that more than one application qualifies as an acceptable Closed Generic gTLD **(element 20.b)** due to the potential moral or societal questions around the interpretation of “public interest”. The GAC urges the facilitated dialogue group to further reflect on this topic within the Draft Framework.

The GAC underscores the need for the inclusion of agreed concrete elements of the scoring system in the context of this framework, in order to consider its feasibility in relation to the overall concerns around Closed Generic gTLDs (i.e. embed the elements underpinning the “public interest” notion once defined) **(element 21.b)**

Furthermore, GAC members underscore that given the specific nature and risks of Closed Generics, the objection procedure should not be the same as in the standard process **(element 22)**, and agree with the extended phase for objection and public comment considering the unique nature of Closed Generic gTLDs. GAC members note that a customized objection process should be defined in the framework. Finally, the GAC notes that a similar approach should be carried out on public comments **(element 22.b)**, inter alia that Closed Generic gTLD applications should have a special public comment approach, which goes beyond extending the comment period and could include additional and extraordinary measures such as reaching out to potential concerned communities asking for their input, or advertising the applications through external media and publications to reach a wider audience.

3. Input on Post-Contracting/Post-Delegation

The GAC notes that certain points of the post contracting/post delegation phase require further attention. The GAC expresses some doubts on the applicability of the Base gTLD Registry Agreement to Closed Generic gTLD applications, in particular pertaining to specific obligations of potential operators which are mentioned in the Draft Framework **(element 24)**. The GAC urges the facilitated dialogue group to produce a final draft providing more clarity about these obligations, which should be included in the contract alongside the consequences in case of non-compliance (the suspension and/or cancellation of the Registered Name registration).

The GAC underscores that on top of the publication of its policies concerning the delegation of

Second Level Domains (SLDs), the registry operator should also be required to report regularly on its “representativeness”, when applicable, and the steps taken to consult the community on topics of relevance for the management of Closed Generic gTLDs (**element 26**).

Finally, the GAC notes that in addition to ICANN’s supervision of the applicant’s accountability including the way a public interest is served, there should be a guideline about the withdrawal of the delegation if commitments are not met by the applicant/registry (**element 28**).

Conclusion

The GAC wishes to express its appreciation to members of the GAC, GNSO and ALAC facilitated dialogue on Closed Generic gTLDs for this preliminary framework, and looks forward to reviewing the final framework in due time.

GAC members broadly agree that certain areas and provisions in the Draft Framework should be further elaborated, including defining use cases, risks, and criteria for evaluation of applications. The GAC also understands that GAC consensus is required to achieve GAC, GNSO and ALAC agreement in finalizing this Draft Framework and to make it workable to set the basis for a potential Policy Development Process, which would further define the necessary policy elements applicable to closed gTLDs on the basis of a convincing starting point that addresses GAC’s fundamental concerns.

The GAC remains available should the facilitated dialogue group wish to ask clarifying questions on any of the input provided above.