

Draft Proposal: Board Reversal of its Adoption of a GNSO PDP Recommendation

Introduction

There is no specific mechanism identified in the ICANN Bylaws for the ICANN Board to reconsider or reverse its adoption of a GNSO PDP recommendation. While the Board must act in accordance with the ICANN Bylaws, in the global public interest, and make decisions that are in the best interest of ICANN and the ICANN community, irrespective of whether or not a documented process exists to take such action, the lack of a mechanism was identified as a potential procedural gap in the context of the [Board's concerns](#) related to Recommendation 18 from the Temporary Specification for gTLD Registration Data Expedited Policy Development Process.

In the context of the New gTLD Subsequent Procedures (SubPro) PDP and in particular Recommendation 20.6 on joint ventures, the ICANN Board was confronted with changing circumstances and new information that led it to conclude that the recommendation it had previously adopted was no longer in the best interest of ICANN and the ICANN community. Although there is still no specific mechanism to allow the ICANN Board to reverse its adoption of a GNSO recommendation, the Board [communicated](#) its intention to do so and the Council [responded](#) and informed the Board that it would not seek to intervene in the reversal of the adoption of the recommendation. In the Council's letter, the Council did however indicate the need to develop and document the mechanism by which the Board can reverse its adoption of a GNSO PDP recommendation, in consultation with the GNSO Council and the community, including the adoption of guardrails where necessary.

Background: Reversal of SubPro Recommendation 20.6

SubPro Recommendation 20.6¹ had already been adopted by the ICANN Board and was in the midst of being implemented by ICANN org, in consultation with the Implementation Review Team (IRT). However, the Board was considering new information, such as ALAC Advice and GAC Advice where both advised the Board to ban private resolution and in the case of the ALAC Advice, also specifically advised against allowing joint ventures. In addition, the report

¹ Recommendation 20.6: The Working Group recommends allowing application changes to support the settling of contention sets through business combinations or other forms of joint ventures. In the event of such a combination or joint venture, ICANN org may require that re-evaluation is needed to ensure that the new combined venture or entity still meets the requirements of the program. The applicant must be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delays.

requested by the Board ([‘Addressing monetary means of private resolution’](#)) and delivered to ICANN in May 2024 by NERA (a leading economic advisor on the design and implementation of auctions) brought to light the tension between banning private resolution and trying to allow good faith joint ventures at the same time.

The ICANN Board’s reversal of its adoption of SubPro Recommendation 20.6 was on the basis of new information and subject to the same standard by which the Board may decline to adopt a GNSO recommendation (i.e., if the adoption of the recommendation would not be in the best interest of ICANN or the ICANN community).

As communicated in the Board’s [letter](#) to the Council on 13 September 2024, the result of the Board’s reversal on Recommendation 20.6 is to provide the GNSO Council with the opportunity, per Bylaws Annex A Section 9, to submit a Supplemental Recommendation to the Board, following the applicable procedures.

Considerations From the Reversal of SubPro Recommendation 20.6

The reversal of the Board’s adoption of SubPro Recommendation 20.6 was done in the absence of a defined process. However, regardless of whether or not a defined process exists for any particular Board action, the GNSO Council recognizes that the Board is always bound to act in the global public interest and to make decisions that are in the best interest of ICANN and the ICANN community.

Notwithstanding this overriding Board responsibility, the experience with Recommendation 20.6 may serve as a useful guide to develop and document a manner in which Board adoption of a GNSO PDP recommendation can be reversed. Documentation of a process that may be followed in this scenario will help to increase transparency and predictability for the Board, GNSO, and broader ICANN community.

The specific outcome for Recommendation 20.6 was that it is being treated akin to non-adoption, which may help provide a path towards a simple solution. For instance, Board non-adoption is subject to specific Board voting thresholds, requires rationale for non-adoption, and provides the Council with recourse (i.e., Supplemental Recommendation), all of which are likely Council expectations for a reversal mechanism. The process used in this case should be documented so that, in the unlikely event that the Board must reverse a decision in its fiduciary duty, there is a documented process in place that can be utilized, at the Board’s discretion, for predictability and transparency for all parties involved.

Draft Proposal

In the limited circumstance where the ICANN Board has adopted a GNSO recommendation and where that recommendation has not yet concluded its implementation, the Board may adhere to the following process. The Board should make all reasonable efforts to engage in dialogue with

the GNSO Council to, at a minimum, (i) communicate its intentions to reverse its adoption, (ii) detail the issue(s), (iii) provide rationale for the intended action, and (iv) explain why reversal is the only or best option prior to taking reversal action.

The GNSO Council anticipates that the Board's reversal of adoption of policy recommendations will be used sparingly and only where deemed necessary. Further, the Council notes that this process does not appear proper for policies that have already been implemented and are in force that may require modification.

The reversal of adoption shall be treated akin to non-adoption:

- The same standard for non-adoption shall apply: the policy is not in the best interests of the ICANN community or ICANN.
- The same voting thresholds shall apply:
 - For those recommendations adopted by a GNSO Supermajority: two-thirds (2/3) of the Board.
 - For those recommendations adopted by less than a GNSO Supermajority: a majority vote of the Board.
- The Board must articulate the reasons for its determination in a report to the Council and submit the Board Statement to the Council.
- The Council shall be afforded the opportunity to develop a Supplemental Recommendation if it so wishes.
- The Board's consideration of any Supplemental Recommendation will be subject to the same voting thresholds as above.

How and Where to Document This Process

The core of the draft proposal relies on the Board exercising its fiduciary duties, which are overriding for the ICANN Board. In other words, it is not intended to be a restrictive process that seeks to define a singular Board action (i.e., non-adoption of a previously Board adopted GNSO recommendation). Accordingly, some thought was given to simply seeking to gain mutual agreement and understanding between the ICANN Board and GNSO Council (e.g., exchange of correspondence).

However, given the impactful nature of non-adopting a previously Board adopted GNSO recommendation, the GNSO Council agreed that it preferred to document the draft proposal in a more formalized manner although if possible, not to the extent of having to modify the ICANN Bylaws to do so.

If the goal is to avoid modifying the ICANN Bylaws, and correspondence is insufficient, the next logical target is to amend the GNSO Operating Procedures. Or more specifically, the PDP, EPDP, and GGP Manuals. Using the [PDP Manual](#) as an example, a new section could be added underneath Section 14: GNSO Council Role in Implementation. Here, language could be inserted that is similar to the Draft Proposal above.