The ICANN GNSO "Business Constituency"

ICANN Business Constituency (BC) Comment

on

Pilot Holistic Review Revised Draft Terms of Reference

27-Nov-2023

Introduction:

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter. The mission of the BC is to ensure that ICANN policy positions are consistent with the development of an internet that:
- Promotes end-user confidence, because it is a safe place to conduct business;
- Is competitive in the supply of registry- and registrar-related services; and
- Is technically stable, secure and reliable.

General Comment:

The Business Constituency thanks the ICANN Board for seeking input on the Revised Draft Terms of Reference ("ToR") for the Pilot Holistic Review ("PHR"). The community recommended that a Holistic Review be carried out in May 2020 so we look forward to this ATRT3 recommendation being implemented as soon as is practicable.

It is important to clarify that the stated purpose of the PHR is *not* to actually implement the ATRT3 recommendation. The revised T0R states "It is not the role of the PHR to make Recommendations with respect to the purpose or structure of the ICANN SOs, ACs, the NomCom, ICANN org or the Board." For further clarity The cover note from the ToR Development states "In the latest ToR revision, the SO, AC, and NomCom self-assessments would come directly from each group's reporting of their continuous improvement efforts under the Continuous Improvement Program (CIP), not the Holistic Review itself. "

It is the BC's understanding that the purpose of the PHR is an initial exercise to satisfy the "*ICANN Board-Identified Information Gaps*" in the ATRT3 recommendations. For ease, we copy below the texts as published by ICANN:

> *The purpose of this review is to:*
> *a) define the inter-dependencies between future Holistic Reviews and other Specific and Organizational Reviews or Continuous Improvement Programs (CIP), and ongoing work streams,*
> *b) address, based upon community input, methods for future Holistic Reviews including the make-up of the review teams and their role,*
> *c) define the roles of the community structures, the Board and ICANN org, and whether, and if so how, external parties should be involved,*

d) consider what Bylaws amendments may be necessary to ensure that future Holistic Reviews can be conducted in accordance with the Third Transparency and Accountability Review Team (ATRT3) recommendations and the findings of this review.

ATRT3 Holistic Review Objectives
In its recommendation for the creation of a Holistic Review, the ATRT3 identified the following objectives for such a review:
- *Review continuous improvement efforts of SO/AC/NomCom based on good practices.*
- *Review the effectiveness of the various inter-SO/AC/NomCom collaboration mechanisms.*
- *Review the accountability of SO/ACs or constituent parts to their members/constituencies (this will include an in-depth analysis of the survey results).*
- *Review SO/AC/NomCom as a whole to determine if they continue to have a purpose within the ICANN structure as they are currently constituted, or if any changes in structures and operations are desirable to improve the overall effectiveness of ICANN as well as ensure optimal representation of community views (but taking into consideration any impacts on the Board or the Empowered Community).*

The BC supports the objectives of the ATRT3 recommendations but we are concerned, on several fronts, whether the PHR can lead to fulfilment of the objectives.

Concerns with the Timeline of the PHR/HR
As ICANN org currently expects to "*begin preparations for the start of the Pilot Holistic Review*" in FY25, we respectfully note that this means the PHR, not the Holistic Review itself ("the Review"), will only begin to be "prepared" 5 years after the Review was recommended by the community. No actual timeline is foreseen for the opening of the Review itself. While we appreciate the need to correctly manage resources, we struggle to understand why the Review has not been prioritised as the current structure and working practices of ICANN are in need of improvement and meanwhile have a direct, tangible effect on the allocation of those same resources, resulting in both procedural roadblocks and implementation delays of the core policies that the global user community relies upon ICANN to deliver.

Structural concerns:
The BC regrets that once again, ICANN has decided not to address the practical - that is, structural - issues targeted by the ATRT3 recommendation. As we raised in our Comments in May 2020 (Enhancing the Effectiveness of ICANN's Multistakeholder Model), July 2020 (ATRT3) and November 2022 (ToR for the PHR):
> " …. *Structure continues to be the most significant gap in community efforts to enhance the effectiveness of the multistakeholder model … Currently, the balance of stakeholders is set up in a way that does not properly consider the underlying incentives of each group, forcing very difficult or sometimes impossible compromises to achieve even simple goals. Thus, the problems identified by the community with regard to "Consensus, Representation, and Inclusivity" are merely symptoms of an underlying structural imbalance which remains unaddressed.*"

The BC has full respect for the multistakeholder model, which we firmly believe is the most appropriate way to ensure that all voices from all communities and regions are both heard and addressed in the open, secure and resilient gTLD ecosystem. We have always sought to work within this model with integrity and diligence, and will continue so to do. However, in specifying that the PHR will not "*make Recommendations with respect to the purpose or structure of the ICANN SOs, ACs, the NomCom, ICANN org or the Board*" but rather will develop guidelines for how the Review itself may do so, the current

structural problems in the GNSO will only continue to undermine its effectiveness and fairness as a policymaking body, with the related accountability shortcomings of certain GNSO constituencies.

There is also no reference in the ToR to the structure of the Board. The Holistic Review is the only route open to us to address such concerns. ICANN's Continuous Improvement Program has made no difference to these frequently raised problems. Further, not only is there no timeline foreseen for the Review itself, as the bylaw-mandated five-yearly GNSO Review was deferred for this Review, it is clear that ICANN does not intend to allow us to examine the structure and thus efficacy of the GNSO for several years to come, and notably far outside the five year window (the last such GNSO Review being conducted in 2014 and approved by the Board in 2016).

The ToR state that "*If in the process of developing guidelines and testing those guidelines, observations are made that are relevant to purposes or structure, these may be included in the Final Report of the PHR to be considered by the future Holistic Review*." This is exactly what the ATRT3 recommendation identified in its objectives for the Review. Postponing the practical import of the recommendation for an undefined period neither serves the community nor enhances our reputation to the outside world. Unfortunately, there is no clarity in the ToR as to how such "observations" could be "considered".

ICANN's questions:

1. **Do you support the Pilot Holistic Review Revised Terms of Reference as drafted?**

The BC again notes the absence of reference to any consideration of the composition of the ICANN Board. Despite the importance of the GNSO in terms both of policy development and ICANN revenue, it is currently allocated only 2 of the 15 Board seats, forcing an artificial representation model on the (already artificially constituted) NCPH as it ignores the reality that the NCSG and CSG represent very different communities. This in turn fuels unwanted and certainly unhelpful intra-GNSO impasses and procedural delays. No one in the NCPH wants to maintain the current scenario of repeated circular debates, and the difficulties they create for good working relationships and respect for timelines.

We therefore, once again, call on ICANN to include in the ToR the potential for the restructuring of the Board; a simple allocation of 4 seats to the GNSO: 2 for the CPH and 2 for the NCPH. This would have immediate positive impact without any effect on the overall size of the Board as these 2 seats should be removed from the NomCom's purview. We do not believe that this would be contentious.

The ToR suggests that the PHR should be completed within 18 months. Assuming that the target date of FY25 is met, this means that it will close at the earliest in late 2026. We regret the lack of any reference as to when the actual Review will therefore be launched.

Given ICANN's oft-cited concerns about its own prioritisation, we trust that sufficient resources will be allocated to the PHR Team so that the 12 deliverables can be adequately achieved within this timeframe, especially given the references to a Public Comment proceeding and regular consultation with the community, Board and ICANN org. We would appreciate a clear, structured project plan so that the deliverables are tangible and actionable.

Further, who will decide on the composition of the PHR Team? If it is to follow the Operating Standards for Specific Reviews, is it to be limited to "*21 review team members from among the prospective members nominated by the Supporting Organizations and Advisory Committees, balanced for diversity*

and skill" with a Board member as a liaison? Will it be limited to certain SOs and ACs? Will constituencies be represented? Is ICANN org (alone) intending to identify the appropriate skill set? Will the Team appoint its own leadership/chair? Under whose ultimate authority will they act?

2. **Does the Pilot Holistic Review Revised Terms of Reference sufficiently address the four primary issues identified in the first Public Comment proceeding?**

The scope of Holistic Review is unclear.
While we appreciate the shortened and revised the ToR document with its more direct language and clearer deliverables, our understanding is that this not to actually be a review, but a working group to define what the Review will look like and how it will operate.

There is a lack of independent examination in the Holistic Review.
This does not seem to be addressed in the ToR. Since the SO/AC/NomCom need self-assessment and Continuous Improvement Programs are the mechanism to do so, external consultation would be helpful in obtaining objective input.

There is a lack of identified dependencies.
This does not seem to be addressed in the ToR. If the dependency is understanding what the community SO/AC/NomCom need from the Holistic Review, and if that requires these parties to identify their needs, BC has done so here and previous submissions.

Under Operating procedure, we see "The Community should also be openly and transparently engaged early in the process to ensure their input on findings is considered, especially as it relates to their unique operations, processes, and procedures. This will help flag potential issues with recommendations before they are finalized". How will the community be involved? Is it via public comment, or the **Formation of a Continuous Improvement Program Community Coordination Group (CIP-CCG), or** is there any other mechanism being considered?

The community might not have the ability to support the Pilot Holistic Review work.
Please see the comments above as to timeline and prioritisation. Should the PHR run into FY25 and Holistic Review take place later, many of the frustrations that exist today will continue to intensify, further diminishing the productivity of the community.

3. **Does the Pilot Holistic Review Revised Terms of Reference sufficiently clarify the deliverables for the Pilot Holistic Review?**

There are 12 deliverables in the Revised ToR, all focussed on developing the pathway for future Holistic Reviews. With the intention of the ATRT3 recommendation in mind, we note the absence of any pathway for the concerns about "*the purposes and structure*" to actually be addressed in any "*consideration*" by the Review. Clarity is needed on what such "consideration" will entail, who will be involved in reviewing "*the SO/AC/NomCom as a whole to determine if they continue to have a purpose within the ICANN structure as they are currently constituted, or if any changes in structures and operations are desirable to improve the overall effectiveness of ICANN as well as ensure optimal representation of community views*" and how this will be achieved.

In addition, we note that the development of the new schedule of all existing reviews to accommodate HR is not one of the deliverables. Will this schedule be proposed by another small group before HR can be integrated?

4. **Do you support the next steps for the Pilot Holistic Review?**

Given the concerns cited above about the time taken to date to address the community's concerns as articulated in ATRT3, we trust that the PHR will be launched as soon as practicable, and regret that this is not foreseen before FY25. We also regret the lack of any projected timeframe for Board approval, "*the initiation of the process of adding the Holistic Review to the Bylaws, updating Operating Standards for Specific Reviews to include this new review, and updating the schedule of subsequent reviews that are dependent on the completion of this pilot*."

We stress that the BC fully supports the ATRT3 recommendation, but we note that it is unlikely to enter any form of implementation for several years to come.

In the guiding principle the first one states that "ATRT3 Recommendation 3.5 (as stated in the ATRT3 Final Report) and elaboration where further clarity is required.", who will provide this clarity wherever required?

This comment was drafted by Vivek Goyal, Timothy Smith, Marie Pattullo, and Mark Datysgeld.

It was approved in accord with the BC Charter