



## COMMENT OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON ICANN'S DRAFT GNSO OPERATING PROCEDURES AND BYLAWS

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on ICANN's proposed modifications and additions to the GNSO Operating Procedures and, if applicable, those parts of the ICANN Bylaws pertaining to the GNSO as a result of the work of the GNSO Rights & Obligations under Revised Bylaws Drafting Team.<sup>1</sup> The IPC appreciates the work of the GNSO Rights & Obligations under Revised Bylaws Drafting Team and ICANN staff to improve GNSO Operating Procedures and parts of the ICANN Bylaws pertaining to the GNSO.

The IPC was an integral contributor to the drafting of the GNSO Operating Procedures and relevant ICANN Bylaws, and specifically the process that created the Empowered Community. Throughout this process, the IPC has advocated that GNSO Stakeholder Groups and Constituencies should appropriately shape how the GNSO operates in the Empowered Community.

The IPC reiterates its view that the GNSO Council's permitted scope of activity is managing the policy development process, consistent with Article 11 of the ICANN Bylaws. Article 11 creates both the GNSO and the GNSO Council. Section 11.2(d) expressly states that it is creating a "GNSO Council responsible for managing the policy development process of the GNSO." Section 11.3(d) again states that "The GNSO Council is responsible for managing the policy development process of the GNSO, as well as the Stakeholder Groups and Constituencies. Section 11.3(d) goes on to say that the Council "shall adopt such procedures (the "GNSO Operating Procedures") as it sees fit to carry out *that responsibility*." (emphasis added) The GNSO Council is not a general purpose deliberative and decision body for the GNSO. It has been chartered in the ICANN Bylaws with a specific responsibility and with the power to adopt procedures to carry out that responsibility. The Council does not have the power to grant itself new responsibilities or to adopt procedures to carry out new responsibilities. That is a power that resides in the ICANN Bylaws and in the procedures to amend those Bylaws if those .

The Council's policy management function is separate from that of the Empowered Community, which serves to hold ICANN and its Board to account to the wider community. It is for this reason that the IPC voted against permitting the GNSO Council to serve as a proxy for the GNSO within the Empowered Community. The IPC strongly urges ICANN's consideration of the rationale put forward for this position in the 2016 Minority Report of GNSO Bylaws Drafting Team.<sup>2</sup>

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<sup>1</sup> <https://www.icann.org/public-comments/gnsop-procedures-2017-06-19-en>.

<sup>2</sup> <https://gnso.icann.org/en/drafts/bylaws-drafting-team-minority-report-10oct16-en.pdf>

The IPC believes that the current construct creates a risk which has not been properly analyzed from a legal point of view. The risk is created by the fact that the ICANN Bylaws do not grant any voting power to the GNSO Council in relation to the exercise of powers of the Empowered Community. Thus, any action taken by ICANN based on an Empowered Community vote based on GNSO Council action raises the possibility of a challenge to that action as “ultra vires” for both the Council, the Empowered Community and ICANN. We believe any member of the EC who votes differently from the GNSO would have standing to challenge such an act by ICANN, perhaps including the possibility of obtaining an injunction against implementation of an EC decision. This result would severely limit the effectiveness of the Accountability mechanisms developed via the Multi-Stakeholder bottom-up process. Accordingly, the GNSO and/or ICANN should obtain an independent legal opinion from counsel (ideally, one familiar with the structure of the EC) regarding this risk prior to proceeding with the amendments to the Operating Procedures.

Past the scoping issues discussed above, we note that following this decision, the IPC, Business Community, and Internet Service Provider & Connectivity Provider Constituency jointly proposed that the Drafting Team refrain from requiring majority or supermajority voting thresholds in each house when making Empowered Community decisions. These thresholds were created for policy management purposes and should not be transmuted for other purposes. These Drafting Team members demonstrated that a majority (and even a supermajority) of the GNSO could exist without a majority existing in each house. As a result, a GNSO Councilor could single-handedly prevent action by the GNSO. The IPC reiterates that such a result would be detrimental to the goal of the Empowered Community.

We again urge ICANN to recognize that the GNSO Council serving as a proxy for the GNSO at large within the Empowered Community is improper. Further, we have clearly demonstrated – in partnership with the BC and ISPCP – that the construct created enables GNSO action in the Empowered Community in spite of majorities and even supermajorities should a GNSO Councilor choose to do so.

Separately, in the event the amendments are moved forward and to the extent that waiver of time requirements may depend on a discretionary decision of the Chair and Vice Chairs of the GNSO Council, such a discretionary decision should be required to be unanimous.

The IPC commits to ensuring that the Empowered Community may operate as envisioned, and commits to work with ICANN and other stakeholders to achieve this vision. However, the IPC prefers to do so in a way that is free from legal doubt and which properly empowers the GNSO community.

Respectfully Submitted,

Intellectual Property Constituency