

ICANN Options Following the IRP Declaration on ICM's .XXX Application

Pursuant to the Board's 12 March 2010 Resolution, this report describes the most plausible process options ICANN has following the issuance of the IRP Declaration with respect to ICM Registry's application ("Application") for the .XXX sTLD. A graphical "decision tree" describing ICANN's options is being posted on the ICANN website along with this report. In accordance with the Board's resolution passed in Nairobi, this report will be posted for public comment for no less than 45 days.

At the outset, ICANN acknowledges ICM's recent correspondence dated 21 March 2010 offering to work cooperatively with ICANN to resolve this matter. In that correspondence, ICM stated that it has "identified no option other than prompt execution of the 2007 negotiated agreement." The Board has considered this option, but the general sense is that if the Board determines to move forward on ICM's Application for the .XXX sTLD, using either the 2004 criteria or the criteria established for the new gTLD Program, minimally, it is appropriate to conduct some due diligence to ensure that the applicant would meet (or still meet) the requisite financial and technical criteria, in a manner sufficient to operate the proposed top-level domain. It is also important from an ICANN Bylaws standpoint to consider compliance with the provisions relating to GAC advice.

The descriptions below of the decision tree process options posted with this report provide greater detail about, as well as the considerations surrounding, each option that has been identified to date. ICANN welcomes public comment on any of the listed options or any additional options that the Board might consider.

Decision Tree Part 1 – ICANN Options In Considering The IRP Declaration

<http://www.icann.org/en/irp/icm-v-icann/options-map-26mar10-en.pdf>

The three primary options in considering the Panel's IRP Declaration include: (1) accept findings of the majority in full; (2) accept findings of the majority in part; or (3) disagree with majority and accept findings of the dissenting Panel member.

1. Accept Findings of the Majority in Full

The Board could accept the Declaration of the Panel's majority in full and undertake evaluation of ICM's Application. This raises additional issues, however, including a determination of what evaluation criteria should be applied to ICM's Application, whether and the extent to which ICANN's Governmental Advisory Committee's ("GAC") advice on ICM's .XXX sTLD Application should be solicited anew, and the terms of the registry agreement that the parties would sign.

2. Accept Findings of the Majority in Part - Considerations

The Panel's Declaration was premised on two findings of fact: **(A)** The ICANN Board decided on 1 June 2005 that ICM's .XXX sTLD met the sponsorship criteria;

and **(B)** the Board's reconsideration of that finding in 2007 was not consistent with the application of a neutral, objective, and fair documented policy.

As an initial matter, the ICANN Board must decide whether it agrees with these findings.

Decide if Application Goes Forward

Based on the Board's consideration of **(A)** and **(B)**, above, and in view of whether the ICM Application meets all the requisite selection criteria (whichever criteria are applied), the ICANN Board must determine whether ICM's Application should be permitted to go forward. In other words, even if the Board agrees with the majority of the Panel that **(A)** the ICANN Board decided in June 2005 that the ICM Application for a .XXX sTLD met the required sponsorship criteria and/or **(B)** the Board's 2007 reconsideration of that finding was not consistent with the application of documented policy, the Board could nevertheless determine that other considerations warrant a decision to not permit ICM's Application to go forward.

➤ *Yes, Application Moves Forward*

If it is determined that ICM's Application should go forward, then the Board should move to the evaluation decision process. See Part 2 of Decision Tree as described below for the evaluation decision process options.

➤ *No, Application Does Not Move Forward*

If the ICANN Board determines that ICM's Application should not move forward, ICANN must evaluate the continued uncertainty and risk associated with its decision, including risks to ICANN resulting from potential legal actions.

3. Adopt the Findings of the Dissent

The dissenting opinion of the Panel's Declaration concluded that ICM never satisfied the sponsorship requirements and criteria for a sponsored TLD, and that the ICANN Board denied ICM's application for the .XXX sTLD "on the merits in an open and transparent forum." The Board could vote to adopt the dissenting opinion of the Panel's Declaration on the basis that the Board thinks that the Panel's majority opinion was wrong and that the Board's conduct was consistent with ICANN's Bylaws and Articles of Incorporation.

Notably, the Panel unanimously agreed that its Declaration is not binding. Accordingly, while the ICANN Board is required to consider the Declaration, the Board is not required to follow the majority views.

Should the Board choose to adopt the dissenting opinion of the Panel's Declaration, it must evaluate the continued uncertainty and risk associated with its decision.

Decision Tree Part 2 – The Decision Process

<http://www.icann.org/en/irp/icm-v-icann/eval-decision-process-26mar10-en.pdf>

The Decision Process described herein does not include an option for the ICANN Board to allow ICM and ICANN to go directly to contract negotiations or enter into the agreement that was posted for public comment in 2007 that was eventually voted down on 30 March 2007 in Lisbon. A key issue in this regard is that ICM first submitted its .XXX sTLD Application more than six years ago. A process for evaluating ICM's Application is necessary to obtain assurances that ICM is able to fulfill the obligations and commitments set forth in its Application.

In addition, in the event that the ICANN Board does decide to move forward with ICM's Application, the ICANN Board would still need to evaluate whether entering into a registry agreement with ICM is against GAC advice, and if so, "try in good faith and in a timely and efficient manner, to find a mutually acceptable solution" with the GAC." ICANN Bylaws, Article XI, § 2.1(j).

4. Consider Application Using Selected Criteria

If the Board determines that a comprehensive evaluation of ICM's Application is appropriate, it must next determine the criteria against which the Application should be measured. There are two options, both of which raise additional issues:

a. Apply the 2004 Round Criteria

In 2004, objective criteria were designed to enable independent evaluators to determine which applicants best met ICANN's requirements. The selection criteria consisted of four categories: (1) Sponsorship Information; (2) Business Plan Information; (3) Technical Standards; and (4) Community Value.

➤ Convene An Independent Evaluation Panel

ICANN could convene new independent evaluation panel(s) that would objectively consider ICM's .XXX sTLD Application in accordance with the 2004 sTLD selection criteria.

➤ ICANN-conducted Due Diligence

Alternatively, ICANN could consider conducting its own review/due diligence to determine whether ICM is still able to fulfill the obligations and commitments set forth in its 2004 application.

b. Apply the Criteria Being Created for the New gTLD Program

ICANN is presently working toward the expansion of the generic top-level domain (gTLD) space. See <http://www.icann.org/en/topics/new-gtld-program.htm>. The

ICANN Board could choose to apply the criteria being created for the new gTLD Program in evaluating ICM's Application for the .XXX sTLD.

➤ ***Apply Draft Applicant Guidebook 4 Standards***

Within the context of the new gTLD Program, and at the same time as all other applications in the new gTLD Program, the Board could decide to apply the standards articulated in the Draft Applicant Guidebook, version 4 (subject to material revisions made after public comment), which is intended to be posted in time for consideration during the Brussels International Public Meeting in June 2010.

➤ ***Formulate an Expedited Process for .XXX***

Alternatively, the Board could decide to formulate an expedited process applying the new gTLD Program criteria for evaluating ICM's Application on an individual basis.

5. Determine Whether ICM's Application Meets The Selected Criteria

It must next be determined whether ICM's Application meets the selection criteria under whichever path is selected pursuant to section 4 above.

a. Application Fails to Meet Standards

If it is determined that ICM's Application fails to meet the selection criteria, the Board must evaluate the continued uncertainty and risk associated with that decision.

b. Application Meets Standards

If it is determined that ICM's Application satisfies the selection criteria, the Board must decide the extent to which it will consider input from the GAC in approving the Application and moving forward with a registry agreement. The Board has three options with respect to the GAC, which must be considered at this step, but certainly could be considered earlier in the decision process:

➤ ***Seek New Input from GAC***

First, ICANN could solicit new advice from the GAC to assess the GAC's current position with respect to ICM's Application for the .XXX sTLD. If sought, or if the GAC provides advice on its own accord, that advice must be considered in accordance with Article XI, section 2.1(j) of the Bylaws.

➤ ***Use Input from GAC Prior to 2007 Decision***

Second, ICANN could consider all comments and advice from the GAC submitted prior to the Board's 30 March 2007 decision to reject ICM's .XXX sTLD Application.

➤ ***Use Input from GAC Prior to 1 June 2005 Resolution***

Third, the ICANN Board could consider only the GAC advice received prior to the 1 June 2005 resolution referenced in the Panel Declaration.

6. Consideration of Input from GAC

Once the Board determines whether to seek new advice from the GAC, consider all old advice from the GAC, or consider only GAC advice received prior to the 1 June 2005 resolution, the Board must determine whether to approve ICM's Application and whether approval (or disapproval) is consistent with GAC advice and recommendations.

a. Approval of .XXX Application

If the ICANN Board approves ICM's .XXX sTLD Application, its decision to do so may be consistent with GAC advice or inconsistent with GAC advice.

➤ ***Approve Application Consistent with GAC Advice***

If GAC advice supports approval of ICM's Application, ICANN and ICM would then commence (or resume) contract negotiations in an effort to negotiate a registry agreement. Negotiations would be required even if the 2004 criteria were applied - over three years have passed since the last negotiations and the final round of public comments to the agreement were not addressed in those negotiations.

➤ ***Approve Application Inconsistent with GAC Advice – Follow Override Process in Bylaws***

In the event the Board decides to approve ICM's Application, and if that decision is inconsistent with the GAC's advice, the Board must follow the override process established in ICANN's Bylaws. This process requires that the Board inform the GAC that it intends to take action that is not consistent with the GAC's advice and state the reasons why the Board decided not to follow the GAC's advice. The GAC and the Board must then try, in good faith, and in a timely and efficient manner, to find a mutually acceptable solution. See ICANN Bylaws, Article XI, § 2.1(j).

b. Disapproval of ICM's Application

After considering ICM's Application and the GAC's advice, the Board could ultimately not approve ICM's Application. Any decision not to approve may be consistent with GAC advice or inconsistent with GAC advice; if a decision is inconsistent with the GAC's advice, the Board would need to proceed as outlined above.

7. Approve ICM's Application

If the Board decides to approve ICM's Application, ICANN would then proceed to (or resume) contract negotiations with ICM in an effort to negotiate a registry agreement.

a. *Post Agreement for Public Comment (30 Days)*

Once a draft registry agreement is negotiated, ICANN must post the draft agreement for public comment for a period of at least 30 days.

b. *Board Approval of Agreement*

After the draft agreement is posted for posted for public comment, the agreement must be submitted to the ICANN Board, along with a summary and analysis of public comment, for final approval, subject to any appropriate revisions resulting from public comment.

8. *Disapprove ICM's Application*

If the ICANN Board decides not to approve ICM's Application, the Board must evaluate the continued uncertainty and risk associated with its decision.

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