
ICANN68 | Virtual Policy Forum – At-Large: PICS and PICDRP: What's the Right Path Forward?
Monday, June 22, 2020 – 15:00 to 16:30 MYT

YEŞİM NAZLAR:

Good morning, good afternoon, and good evening to all. Welcome to the At-Large policy session on “Public Interest Commitments and Public Interest Commitments Dispute Resolution Procedure: How to get them right,” on Monday, 22nd of June, 2020, at 7:00 UTC.

My name is Yeşim Nazlar from At-Large staff, and I am remote participation manager for this session. Please note that this session is being recorded and follows the ICANN expected standards of behavior.

We will not be doing rollcalls during ICANN68 but will note attendance for all sessions. During this session, questions or comments submitted in chat will only be read aloud if submitted in English using the proper form, as I have noted in the chat. I will read questions and comments aloud during the time set by the chair or moderator of this session.

If you would like to ask your question or make your comment verbally, please raise your hand and, when called upon, kindly unmute your microphone and take the floor.

Please state your name for the record and the language you will speak if speaking a language other than English. Please note, this session includes interpretation in French and Spanish. To hear the interpretation, you will need to download the interpretation application, which I'm currently displaying on the screen for the QR

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code. More information can be found in the session details on the events schedule and instructions are in chat.

We have also posted all the details on the At-Large ICANN68 Wiki page. The link is posted in the chat, and I'm going to post it once again. A kind reminder to please speak clearly, at a reasonable speed, to allow for accurate interpretations and, again, to state your name each time you take the floor. With that, I will now hand the floor back over to you, Holly. Thanks so much.

HOLLY RAICHE: Thank you, Yeşim. Could I have the first slide, please? Thank you. Okay.

YEŞİM NAZLAR: Holly? I'm so sorry for interrupting but it seems like your audio is a bit fainter than it used to be. If we can arrange that, please, before we get started? Holly, shall we try again? Okay. It looks like Holly just dropped. Apologies for this. We'll dial back to her momentarily. Apologies for the delay. For those who have just joined us, we're trying to reach out to Holly, as you—

HOLLY RAICHE: I am here.

YEŞİM NAZLAR: Okay, perfect. Back over to you, Holly, then. Thank you.

HOLLY RAICHE:

Thank you. Okay. First slide. First of all, welcome to our four speakers, Laureen Kapin, who has just gotten off another call, Jamie Hedlund, Richard Hill, and Griffin Barnett. The topic today, “PICs and the PICDRP.” Our theme for the position is, essentially, how to actually get them right. Could I have the next slide please, Yeşim?

This is my favorite slide, and it’s my favorite slide for two reasons. The first is ... Before I go any further, this is Justine Chew’s slide. She spent a lot of time on this and it is extremely valuable in terms of all of the information that is here. If you want to know anything about PICs, you start here.

All you have to do is find a magnifying glass, a spare half hour in your life, a strong cup of coffee, and you’ll be about halfway to understanding PICs. The other reason I like this slide is that it shows how complicated, indeed, how very difficult it is to understand what PICs are and what they do. So, may I have the next slide, please?

This was my shorthand. It took me about half an hour to condense at least some of the information about what PICs are, and I will leave it up to the four panelists to explain what they should be and, possibly, what they could be.

The first point is to be made is the PICs are add-ons that were not part of the original agreement that was drafted to sit between ICANN and registries. Or we can put it another way: public interests are an add-on.

For the Public Interest Commitment, and again, this is referenced back to Justine’s slide, there are three different types of PICs. Some of the PICs are mandatory. A lot of those have to do with, actually, issues about DNS abuse or use of registrars, and some of those were actually discussed the last session on DNS abuse.

And for some of them, the compliance department is where you go to have compliance of the PICs, but for others of them, they’re handled differently. Now, that’s the first category of PIC.

The next category of PICs are the ones that we call “voluntary.” These are the ones that a would-be registry owner can sign up to. Again, some of them have to do with DNS abuse or DNS safety, but some of them have to do with the relationship between the name being sought and the registries that use it.

They’re called “voluntary,” but once they are accepted by ICANN they then become mandatory. So, we’ve got the voluntary PICs that are mandatory, and after a lot of discussion with advisory committees, included GAC, there are now categories of “voluntary.”

There are three basic categories that have been agreed of the “voluntaries” that are really mandatory. The first has to do with names, or potential names, that might deal with so-called “regulated factors,” things like names that might relate to health and fitness, or financial, or education.

The second category is “highly regulated.” I’ll give you a couple of examples just to demonstrate the difference. If the general category of

name is about health and fitness in a “just regulated” area, you might have a name being sought like “diet,” or “health,” or “physio.”

The “highly regulated” refers to a name being sought that might be “dentist” or “pharmacy.” In the last session, it was “pharmacy” that illustrated the point as to the way in which names can be misleading.

Particularly, the concern would be “pharmacy” being used by organizations that are not pharmacy organizations, or by dentists who, in fact, are not dentists.

So, that’s just those two of those categories, the “regulated” and “highly regulated,” and the third is about what we’re calling “special safeguards.” Some of those are about the potential for cyber-bullying if those names are used.

And the other category is called “inherently governmental functions.” Those relate to things that would necessarily be governmental: army, navy, and so forth.

So, we’ve got the mandatory PICs, we’ve got the voluntary that are mandatory, and three categories of those, and then we’ve now got the voluntary that are voluntary. They stay voluntary.

And if we were going to go back to the slide, which I am not suggesting, you would see that, for some of the mandatory, the pathway to compliance is directly to ICANN’s compliance area.

Others, because they are part of the contract but they were voluntary before they were mandatory, actually go to the PIC Dispute Resolution Procedure.

And then, the PICs that stay voluntary, called “voluntary registry commitments,” actually don’t go anywhere. So, you perhaps understand why there’s a fair bit of confusion.

The aim of this session, really, is to better understand the categories, to better understand what they mean, how they might be used, how they better might be understood and used, how they can be improved.

The title of the session is “How to Get Them Right.” And the first speaker is Laureen Kapin. One of the many hats that she wears is as counsel for the international consumer protection area of the Federal Trade Commission.

Laureen, I would point to a comment that you made just a couple of hours ago. You talked about ... And it was a term you used: “Inherently deceptive.” So, I'm going to ask you to put the hat on that you had when you sat through the development of the Competition, Consumer Trust, and Consumer Choice ICANN report on the new gTLDs, and wearing your FTC hat, as well.

What do you mean by “inherently deceptive”? Is there such a thing? And in particular, what is it that consumers expect from the next gTLDs, and how can PICs work for end-users? So, over to you, Laureen. And could we have Laureen’s slides, please?

LAUREEN KAPIN:

Thanks so much, Holly. I so appreciate being here. So, I practice consumer protection law at the Federal Trade Commission, which is the leading consumer protection agency in the United States, but the comments you're about to hear are mine. They don't reflect the official position of the FTC. I do wear many hats. Next slide, please.

One of my other hats is as co-chair of the Governmental Advisory Committee's Public Safety Working Group. And the other relevant hat that I wore was one of the subgroup leads on the Competition, Consumer Trust—that's the key part I was focusing on—and Consumer Choice Review Team.

And in that review, we really took a close look at the Public Interest Commitments and how they came to be, how they were working, and also had an eye to how they could be improved.

I especially appreciate the focus of this session, which focuses on the end-user. That's you and me! That's everyone, in some part of their lives. So, this is a very important perspective, particularly because we use the Internet a lot more these days, especially for the fact that many of us are relying on the Internet to work from home, to request deliveries of food, to communicate with loved ones. Even if they're local, we may not be seeing them in person.

So, this end-user perspective is key, particularly in the focus of this session, which are the Public Interest Commitments in connection not just with the new gTLDs but for any future gTLDs. Holly, I'm going to

keep your question in mind about “inherently deceptive” and talk about that later on in my presentation.

So, let’s begin with the new gTLD program, because this is the program that birthed the concept of Public Interest Commitments. So, we went from a system that had about 22 Generic Top-Level Domains to a system that had a rapid growth to over 1,200, everything from .accountant to .yoga. I really appreciated Holly’s orientation in showing how complicated the Public Interest Commitment evolution was, and also implementation.

Part of the reason that there was even a need for Public Interest Commitments is the breadth of new gTLDs that came into being. So, some were, perhaps, not so sensitive, so, we see there is one for “hotels,” but others were much more sensitive.

For example, .charity, .pharmacy. As an end-user, you’re going to look at that domain and those words are going to mean something so you. You may assume certain things about these domains when you look at those words.

And one of the concepts we have already been introduced to are words that fall into regulated and highly regulated sectors. And by the way, “charity” and “pharmacy,” those are in the highly regulated sectors.

So, let’s talk a little bit about consumer expectations. Next slide, please. As part of our review team work, we had certain surveys that asked questions of the public about what they expected, and we found out a lot of interesting information.

If you want to read about this in detail, you can look at the final report of the Competition, Consumer Trust, and Consumer Choice Review Team, which have links to all the underlying surveys and the data, and also talk about that data in detail.

But essentially—and none of this is earth-shattering or unexpected—there is a connection between the name of a top-level domain and the websites associated with that top-level domain. Folks expect that if you have a .hotel website associated with the .hotel domain, that website is going to be about hotels, not puppies.

The public also expects that, when websites have different extensions, i.e. they end in .hotel, or .doctor, or .exercise, that is going to give some indication of the purpose, or owner, or content, or function of that domain.

So, what's the converse of this? The converse is that, if you have a domain website that contradicts or doesn't relate to the domain name, that is conflicting with user expectations.

In some cases, that's not a sensitive issue, but in other cases, it might be. So, if you're going to a website affiliated with .accountant domain and you're being asked for sensitive financial information for accounting services, and it turns out that the entity behind that domain is not an accountant, that could be a problem.

And the rest of this slide really points to some of the specific statistics that we found. The bottom line is that there is a very high amount of end-users that have this expectation of a relationship between the

domain name and the content of what's on that website. Next slide, please.

Next slide, please. Okay. So, there are also expectations not just about this connection between the name and the content, but also about restrictions. So, in keeping with my .accountant example, there is an expectation that there will be some sort of mechanism to screen that the proper people, with the proper credentials, can purchase these domain names.

And in fact, if there are such restrictions, that makes the public trust them more. So, if an entity is going to be trusted, the public expects that there are certain precautions and procedures that are going to be taken about who gets the domain name and that there is going to be some sort of screening, so not just anyone can purchase a domain name, for example, in a highly regulated industry. For example, a pharmacy or a bank.

And again, we found very high levels of expectation, here, on the part of the public. 80% of end-users expect that not only are there going to be restrictions but that they are going to be enforced. Next slide, please.

So, in light of these expectations, the Consumer Trust team came up with some recommendations to create incentives, or eliminate disincentives, to encourage the gTLD registries, basically, to take into account these expectations and incorporate procedures that meet these expectations.

So, there should be a relationship of a domain name to content. There should be restrictions as to who can register a domain name in certain gTLDs, and based upon implied messages of trust.

And again, we have examples: charity, pharmacy, bank, accountant, lawyer. These carry very specific impressions that folks will have certain credentials if they are going to be purchasing such a domain name.

And the other way this comes into play is that certain domain names are more apt to involve collecting very sensitive information, including sensitive health and financial information.

So, these incentives could include—guess what?—Public Interest Commitments. And the other part of this recommendation talked about including these expectations in the next Applicant Guidebook. Next slide, please.

So, we have this great term, “Public Interest Commitment,” which implies a pledge, or maybe something else. Here is where things started. The GAC, in its Toronto Communique, and that’s Government Advisory Committee, advised that all commitments and objectives in the new gTLD application shouldn’t just be a pledge but it should actually be a promise. It should be transformed into binding contract obligations subject to oversight by ICANN Compliance.

And in the Beijing Communique, it was very specific advice to come up with safeguards, particularly with regard to these new domain names in regulated and highly regulated industries. And that led to the mandatory and, perhaps ill-named, voluntary Public Interest

Commitment. The key with the voluntary is that, once you decided to do it, you decide, so it's voluntary, but then you have to stick to it, and then it's not so voluntary.

But either way, those were, then, part of the contracts and they became enforceable through this Public Interest Dispute Resolution Process, or the wonderfully titled "PICDRP." I'm going to call it the Public Interest Dispute Resolution Process, since "PICDRP" sounds so unpleasant. Although, it turns out that process is, indeed, unpleasant, as we'll find out a little bit more about shortly. Next slide, please.

So, the place where these Public Interest Commitments live in the Registry Agreement is in Specification 11. That strange sound you're hearing is my beagle, Daisy, who keeps me company in my home office. So, apologies for that.

The Registry Agreement in Spec 11 includes certain provisions that relate to the Public Interest Commitments. This first one is what I'll call a downstream requirement. It basically has registries requiring registrars to include a provision in their Registry Agreements with registrants. All this jargon!

But the folks who are ultimately buying a domain name are entering into a contract that prohibits them from certain types of illegal behavior. So, distributing malware, operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, etc.

And that provision also says that there need to be consequences for such activities. And then, there is also a requirement for registries to, basically, be on the look-out and conduct a technical analysis to see whether security threats are going on in their space, and to maintain reports. And if ICANN Compliance wants to look at those reports, they have an obligation to do so. Next slide, please.

So, that's all well and good as far as it goes, and that's why I have the question, here, "Pledge or ...?" What we found out—and this is very explicit in recent correspondence that certainly was informed by concerns that were expressed about these contract provisions—is that these so-called "commitments" aren't so enforceable.

The board, in a recent correspondence from February, indicated that this Specification 11, which is where these Public Interest Commitments live, doesn't grant ICANN Enforcement the right against registrars who fail to include the required language in their agreements, authority over how, or to determine whether registrars do impose these consequences.

So, just putting that into more plain language, ICANN Compliance can enforce against registries who fail to require their registrars to include this language, but when it comes to doing something about the bad behavior that's being prohibited, well, there's not much ICANN Compliance can do about that.

So, they can't determine how or whether registrars do impose consequences. So, you could look on this, essentially, as an obligation

to include a contract provision, and that's great, that there's a contract provision. But then, there is not much beyond that. So, clearly, there is some room for improvement there.

Regarding the Registrar Agreement, the model Registrar Agreement talks about the registrar imposing consequences if the registrant engages in these bad activities, but it doesn't talk about what those consequences are or when the registrar has to impose them.

So, for example, this correspondence highlighted that the ICANN Organization has no contractual authority to instruct registrars to delete or suspend domain names.

And granted, I certainly recognize that registries and registrars have to have discretion to run their businesses. But there is certainly room for improvement in these contract provisions to provide more meat on the bone for specific obligations and what has to happen in the face of illegal and prohibited behavior.

So, I want to turn, as promised, to the mechanism that has to be used to enforce these Public Interest Commitments. And there, we also have a real problem. Next slide, please.

So, this is the Public Interest Commitment Dispute Resolution Process. Is this an enforcement mechanism or, perhaps, a stairway to nowhere? The Government Advisory Committee expressed concerns repeatedly about this dispute resolution process, calling it complex, lengthy, ambiguous, and raising questions about its effectiveness and it

addressing serious threats. They didn't do that just once. They did it many times.

So, what is this process, exactly? Keep in mind this “stairway to nowhere.” Next slide, please. So, we start in this process with a complaint to ICANN Compliance. ICANN Compliance reviews it. If it's sufficient, then it goes to the registry operator.

If the registry operator then fails to act, it can go back to ICANN Compliance to engage in further review, and if ICANN Compliance finds that there are sufficient grounds for further action, then they can refer it to an expert panel.

This expert panel, then, can decide whether to issue an enforcement notice that would eventually go to the registry. If the registry didn't resolve it, it can go back to ICANN Compliance, and ICANN Compliance can decide to impose a remedy.

If the registry objects to the remedy, guess what happens? Then, the registry can decide to invoke yet another dispute resolution process. I don't have enough room on this slide to go into the details of that separate dispute resolution process, but suffice it to say we're in déjà vu all over again.

And by the way—next slide—this whole process, which is intended to deal with serious issues, takes a lot of time. And also, besides a lengthy timeline—this could last more than 105 days before anything happens—there is no guarantee that, many steps of the way, anything is going to happen.

ICANN Compliance can decide to impose any remedial measure, even if the registry doesn't comply with the panel's enforcement notice, and there could be no resolution to the report of non-compliance because there is this whole separate dispute resolution process that can be invoked.

So, this is a real problem because this is the whole mechanism that's supposed to enforce the Public Interest Commitment. So, again, this is an area ripe for improvement during the next go-around. Next slide, please.

I am wrapping up. In terms of room for improvement, the next Public Interest Commitments need to result in clear and enforceable contract obligations. It has to be something more than just requiring registrars to put some language in its contracts with registrants. There have to be consequences for breaches of the obligation not to engage in domain name abuse and other illegal activities.

There have to be effective mechanisms to resolve disputes that don't just lead you into an endless array of dispute resolution processes that are lengthy and guarantee no outcome, even in the face of clear violation. And also, there have to be timelines that are quick enough to deal with serious security threats. Next and final slide. Another area that's ripe for improvement deals with these highly regulated gTLDs that carry implicit messages of trust to the public.

If we are dealing with a domain name that has a name that carries this message of trust, like a pharmacy, a charity, a bank, an accountant,

some profession where if you are dealing with that profession you are going to be, naturally, considering handing over sensitive financial information or health information, there has to be a system in place to make sure that the folks who buy those domain names have the credentials that are expected and, indeed, mandated by governments before any sale occurs.

So, that has to be a gateway before a registrant can purchase these types of highly regulated domain names. And you have to not just check before the sale, but you have to conduct periodic checks to ensure the ongoing validity of these credentials and that there is, actually, compliance with maintaining those credentials.

This was contained in GAC Safeguard Advice but, regrettably, wasn't implemented in as a robust manner as the GAC had advised. So, this is another ripe area of improvements.

We really want to strive to make these public interest – and keep your eye on that first part of the sentence. It's in the public interest to protect the end-users. We want to strive to make this something that is, indeed, a commitment, a promise, not just something that falls far short of that. I'll pass the baton over.

HOLLY RAICHE:

Laureen, thank you very much. We have gone into everybody else's time, and I apologize for that, but that was really interesting and raised some very important points, certainly from the end-user perspective, which is really what ALAC's about.

Jamie Hedlund. He's senior Contractual Compliance and Consumer Safeguards with ICANN. Could we have Jamie's slides, please? Thank you. Jamie, over to you. Thank you.

JAMIE HEDLUND:

Thank you. I am senior vice-president for Contractual Compliance and Consumer Safeguard. Thank you, At-Large, for allowing me to participate in this discussion. Next slide, please.

Next slide, please. My agenda is the same as the agenda for this section. I'll discuss the role of compliance in general, first, and then, in particular, with respect to enforcement in the Public Interest Commitments. And then, I'll conclude with a thought on how to strengthen enforcement of the PICs. Next slide, please.

So, first, how does Compliance fit within ICANN? We're charged with ensuring that policies developed by the community and incorporated into our agreement with registrars and registries are, in fact, being implemented.

How do we do this? We enforce the agreements in response to complaints submitted by third-party reporters and we conduct inquiries based on our own monitoring.

On an annual basis, we process approximately 20,000-30,000 complaints. We also conduct regular audits of the contracted parties. We have recently adopted a risk-based approach focusing on areas of the greatest potential impact on security, stability, and resilience.

Last year, we conducted an audit of the registry operators and their compliance with applicable DNS security threat obligations. We're going to conduct a similar audit of registrars when it's reasonable to do so, taking in account the global impact of COVID-19.

Finally, we publish reports on our enforcement efforts, including a monthly dashboard and 13-month rolling metrics of complaints broken down by registry, registrar, region, country, complaint volume and type, processing status, and resolution explanation. Next slide, please.

So, what is the role of Compliance in PICs, and what is a PIC? We've already heard from Laureen on giving an explanation of what is in Specification 11, but they are binding obligations incorporated into the operator's contracts with ICANN Org. They are subject to compliance oversight and enforcement, both by ICANN Org—so, by Compliance—as well as through a PICDRP panel.

For those gTLDs who have signed agreements incorporating PICDRP, which is not all of them – procedures available to any party harmed by a registry operator's failure to comply with its PICs. Next slide, please.

So, this slide shows the experience of Compliance in enforcing the PICs. Today, we have gotten 34 complaints alleging violation of a registry's public interest obligations. 28 of those were invalid.

Of the six that we have addressed, three have been based on the obligation to use only registrars who had executed a 2013 RAA, and all three cured. One alleged a violation of section three of Specification 11,

but that registry was found to be in compliance. We received exactly zero complaints alleging violation of any of the voluntary PICs.

And finally, two complaints were referred to a PICDRP panel. Both were found to be in breach of Specification 11.3.c, requiring registry operators to operate in a transparent manner consistent with general principles of openness and non-discrimination.

Just to give a quick explanation or examples of some of the reasons that so many of them were found to be invalid, we find this across all complaint types but, for these types of complaints, there were instances where the reporter failed to provide the evidence required to sustain the complaint.

The complaints were filed against gTLDs that did not include Specification 11 in the Registry Agreement. There were complaints about website content or amount charge for hosting. We got one when we followed up with a reporter to asked which PIC was being violated. The reporter asked, “What’s a PIC?” so we didn’t deal with that one. Next slide, please.

So, given that context, how can we strengthen enforcement of PICs? Compliance is not going to hesitate to enforce our agreements with registries and registrars, but neither we nor a panel can enforce provisions that are unclear, vague, and do not benefit from a shared understanding of what they require.

So, going forward in policy development and implementation, it’s important and critical for Compliance to do its job, that any and all

obligations are clear, and that all stakeholders, especially the contracted parties, understand what it means to fulfill the obligations. With that, I'll turn it over to the next presenter, or back to you, Holly.

HOLLY RAICHE: Thank you, Jamie. Just a question: who can actually bring a complaint?

JAMIE HEDLUND: Anyone—

HOLLY RAICHE: For example, I—

JAMIE HEDLUND: Sure.

HOLLY RAICHE: So, if I go to a website, and it's a new gTLD, and it's "pharmacy," and the website that I have gone to has absolutely nothing to do with "pharmacy" at all, can I go to ICANN and say, "This website has got a new gTLD, 'pharmacy,' but it's actually selling shoes"? Can I do anything about it?

JAMIE HEDLUND: So, in the .pharmacy, I don't have the .pharmacy agreement. But in agreements like it, there are eligibility restrictions as to who can register a domain for that TLD.

HOLLY RAICHE: Sure.

JAMIE HEDLUND: And if a registrar has registered a name for a registrant who shouldn't be eligible for it, and the registry allowed that to happen, that would be a violation of the registry's agreement.

HOLLY RAICHE: Okay. But just as an individual ... Jeff Neuman doesn't like me saying "pharmacy." So, let's say that I'm looking up gymnasiums, and still, what's on sale for that website is shoes, can I just ring up ICANN and say, "Look, I've just gone to a website, and it's .gymnasium, but they don't have anything to do with 'gymnasium,' they're just selling shoes," can I just, as an individual, contact ICANN and say, "What's going on here?"

JAMIE HEDLUND: So, anyone harmed by a violation of the PICs can submit a complaint to ICANN. In your example, it would come down to whether or not the Registry Agreement itself has eligibility of restrictions/limitations in the terms of who can register names.

HOLLY RAICHE: Okay. So, I think we maybe need a little bit of clarity on that. Now, Richard, you're next, and I'd like to hear the role that the dispute resolution process uses, its eligibility, and its timeframes.

YEŞİM NAZLAR: Holly, apologies for interrupting. Actually, we have received a couple of questions. Would you like to leave them to the end?

HOLLY RAICHE: No, I don't. I could take them at the end because we're running out of time, and I'd like the presenters to have time. Okay?

YEŞİM NAZLAR: Okay, sure.

HOLLY RAICHE: We can take a lot of stuff offline but I would like to have Richard be able to present, and Griffin. We've asked them to do a presentation, and I'd like them to be able to present. We will try to have as much time as possible at the end.

RICHARD HILL: Hi, can you hear me? Yes, you can.

HOLLY RAICHE: Yes. Thank you, Richard.

RICHARD HILL:

I'm just going to make some brief comments on the DRP. I was a former member of the standing panel. There were only two cases. I never got a case myself, but I have read the two decisions that have been made carefully. I would urge everybody who is interested in this to read the first decision that was made because, since it was the first decision, the panel, very appropriate, had a discussion about what exactly is the role, and what could they do.

And what they did, I think, is perfectly reasonable. They pointed out that this is a very narrow process where you're verifying, as Jamie said, whether or not there is a breach of the PICDRP specification.

In the first complaint, as I recall, many of the allegations went well beyond the actual PICDRP specification. And so, the panel said, "Well, we're not going to do anything about that," but they did find some [mind] compliance, as Jamie said.

The other thing that's important to keep in mind is that the enforcement is entirely done by ICANN. So, I think Holly would be good to correct the first slide, which is a bit misleading, perhaps, in that respect.

HOLLY RAICHE:

Okay.

RICHARD HILL:

The PICDRP is simply part of the ICANN process. Now, I would presume—and that’s, at least, what appears in the first two cases—that many of the complaints that get handled directly by ICANN Compliance will not need the PICDRP.

PICDRP, in my view, is simply a tool that ICANN Compliance can use to get a more balanced, external opinion on whether there is something that they need to do or not, and then, when the panel comes back to ICANN, they will decide what to do.

Now, the point was made in one of the other presentations that this is kind of cascading, because what happens if ICANN does not enforce a recommendation from the PICDRP panel? That has not happened in the two cases. ICANN did enforce them and, in fact—Jamie, correct me if I'm wrong—the resolution was found, so the issues were addressed.

So, what happens if ICANN doesn't do it? Well, then you would have some other mechanism. You could either go to court—well, you can go to court, for example, if a doctor is advertising who is not a doctor—or you could invoke the general ICANN dispute resolution mechanism that ICANN has acted outside of its bylaws, or inconsistent with its bylaws.

On the other hand, if ICANN takes action against the registry—for example, saying that, “You violated your terms, and therefore we’re going to cancel your contract”—then there is a binding arbitration foreseen in the Registry Agreements.

So, in either case, there is some enforcement mechanism. It might be complex. It might take some time, that’s true. And it might be

expensive, because the other dispute resolution mechanisms are not free for the complainant.

So, if a consumer has a complaint, Holly, in your case, reports it to ICANN, and ICANN does not act to the consumer's satisfaction, then it's not going to be a free process. Probably, the consumer is going to have to spend money or find a consumer association who will help them, or something like that.

But I think, as is pointed out on the list, an important question is, to what extent has this actually been happening, and to what extent does it have to do with the issues that ICANN can actually tackle?

As I posted on the list, it seems to me that a lot of the issues ... Because we're putting significance into names, and that is complicated. As was pointed out on the list, .gift, if you're an anglophone, means a "present," a donation, or something like that. If you're a German speaker, it means "poison."

So, a German speaker might suddenly say, "What's going on? Everything is wrong in this site," but that's not really an ICANN or a PIC problem. That's the general problem of putting significance into names, and that's not what this session is about.

So, if we focus back on this session, what I have seen when I did the training to be on the standing panel and on the two decisions that have been made, the PICDRP process is doing exactly what it was designed to do, which is to give additional information and arguments to ICANN so that they can go off and enforce things.

And in particular, when there are systematic violations and it's not just a one-off ... One website is violating the PICDRP? Well, presumably, the registry will correct that on its own. It's not even going to get up to ICANN Compliance.

If the registry doesn't, or if the consumer chooses to report it directly to ICANN rather than to the registry, then ICANN will quickly intervene, and those things will be solved. So really, the DRP part of the PICDRP, in my view, is about the more systemic issues, and, indeed, the two cases that were brought did allege systemic issues.

And as Jamie said, there was some merit to those and, in fact, they were addressed through ICANN Compliance. So, I'll be happy to take any questions if they are addressed to me later on. Thanks.

HOLLY RAICHE:

Thank you very much. My one question was, could the role be, actually, clearer or stronger in meeting the consumer expectations that Lauren so nicely expressed? Hello? We've lost Richard. Hello?

YEŞİM NAZLAR:

Richard?

RICHARD HILL:

Yeah. They have an automatic muting problem, so you cannot unmute yourself. The answer to that is ... So, I'm speaking here in a legal

capacity. As anybody knows, if you ask any complicated question to a lawyer, the answer you'll get is always the same, "It depends."

In this case, it depends on what issues you want to address. Some issues, yeah, it could be explained more clearly as to what it's about, what the limits are, and so on. I'm not sure it could be tightened up in any significant way, although that can always be discussed.

As I said before, many of the issues that have been raised, to me, don't actually have to do with ICANN or the PICDRP. They're broader issues about how to ensure that there is no consumer confusion and no abuse, etc., and those are not things that you could actually, I think, address by improving the PICDRP. They're much broader issues that need a discussion at a different level. But that's just my narrow, legalistic view of the PICDRP process.

HOLLY RAICHE:

It's an excellent answer. Look, if you can, please stay on the call. We've got time for Griffin Barnett, who is with the Winterfeldt IP Group. Could we have his slides, please? What he brings to this table is a great deal of experience in the complaint process, and I would like to hear his perspective before we open this up. Griffin, can we hear you?

GRIFFIN BARNETT:

Hopefully, you can. So, I don't have any slides, unfortunately. I just didn't—

HOLLY RAICHE: No, that's fine.

GRIFFIN BARNETT: —Prepare any, like some of my co-panelists. But I will give an introduction of why I'm on the panel, I think, and hopefully, in the few minutes that we have remaining, give an account of my experience as one of the parties who helped to bring the .feedback PICDRP, which, as others have mentioned, was the first PICDRP that actually went to a standing panel for a standing panel decision.

So, Holly, as you mentioned, I'm an IP and Internet attorney with Winterfeldt IP Group, based in the Washington DC area. Yeah. So, as I mentioned, we brought the .feedback PICDRP. There were a number of reasons why we brought this proceeding.

I will say it was brought on behalf of about a dozen or so individual complainants, all individual businesses and brand owners who felt that there were systemic problems with how the .feedback top-level domain was being operated.

And without getting into too much detail, since we have fairly limited time left, there were a number of key claims in the complaint that I'll highlight very quickly to recap.

So, we alleged that there were a number of ongoing violations of two major provisions of the Public Interest Commitments, the first being Specification 11, section 3.a, and the second being various violations of Specification 11.3.c.

And so, our allegations, to try and boil them down, basically, are that the registry repeatedly changed its own policies on the fly – it did various marketing programs where it would constantly change its own programs and rules.

Our allegation was that this was done intentionally to, essentially, confuse certain parts of the Internet community, primarily brand owners who were looking at this TLD because of some of the practices that it had indicated that it was going to engage in in order to, allegedly, be a bastion for free speech, and commentary, and criticism, when our contention was, basically, that this was more of a façade in order to try and isolate itself from potential liabilities.

And so, if you review the complaint you'll find that allegations about, again, these changes to its own policies: not adhering to its own policies after the fact; self-allocating and reserving domains in order to circumvent the Sunrise Period; applying discriminatory pricing to Sunrise registrations.

Mandating that all domains in the TLD point to a live website where people can give feedback, even though the operator of the TLD actually appeared to have hired individuals to write fabricated reviews to post on the sites, [which was] never disclosed, and in other cases, actually just pulling content from third-party sites like Yelp to populate these sites and, effectively, there being no actual organic or legitimate customer or user reviews.

Changing its policies to run a marketing program that it called the “FREE.FEEDBACK program,” which effectively was a program where it would take the WHOIS information of an existing brand owner’s .com domain and, basically, use that to populate its own registry with corresponding .feedback domains corresponding to the brand names, and, in some cases, providing those on a one-year-free basis and then, sort of deceptively, marketing renewals of those domain names to the brand owner itself at a later time.

And so, we brought this complaint to address this laundry list of what we felt were just really irresponsible and, in many cases, deceptive practices by the registry.

And again, without going into incredible amounts of detail, we filed this complaint back at the end of 2016. Right off the bat, we experienced a number of what we felt were procedural deficiencies in how the process unfolded.

Very basic due process things like not receiving a copy of the registry operator’s response to the complaint, which to us felt like an extremely bizarre treatment and something that would run afoul of general principles of accountability and transparency, and things that really cut against what you would expect in the context of an adversarial proceeding.

Things like not providing the names of the appointed standing panelists that had been appointed to actually hear the matter, not being given any kind of timeline for when the decision was due.

And we understand that this was, obviously, the first PICDRP that went to a standing panel, so I think some of these things were operational issues that this was troubleshooting, being the fact that it was the first to go through the full process.

But again, I think we felt like it was not particularly well [inaudible] from an operational and procedural standpoint. And ultimately, the PIC panel did issue a report about six months or so after the complaint was filed. The complaint was quite substantial. You can review it, obviously, through the ICANN website. I think it was about a forty-page complaint with thousands of pages of evidentiary materials.

And ultimately, the panel found that it could not find a violation of section 3.a, which related to allegations about the registry engaging in fraudulent and deceptive practices, because 3.a only requires the registry to, basically, ensure that registrants downstream don't engage in fraudulent and deceptive practices.

But apparently, the panel would not go so far as to say that a registry itself has an obligation not to engage in fraudulent and deceptive practices, which is a little absurd. But we'll come back to that in a minute. I'm trying to rush through this because I know we're running out of time.

I will say, also, that what the panel did ultimately conclude were violations related to section 3.c of Specification 11, which related to maintaining clear and transparent registry policies. And so, there is a

whole host of violations that the PIC panel found in relation to that section of Specification 11. I'll run through some of these quickly.

So first, they announced policy changes in the press but did not adhere to the 90-day notice requirement that they had actually set out in their own registration and launch policies.

They also failed to adhere to other notice requirements for a change in policy when they introduced, in the midst of their Sunrise Period, a new early-access free speech partner program.

They changed their schedule of fees and, in some cases, had never actually published the schedule of their fees for any of their different phases, and so on, and so forth.

Again, you can read the PICDRP decision that recounts all of these. Given the time, I won't go through all of them. But in short, there were a number of violations found and, as a result of that, ICANN Compliance then took the proceeding back over because, obviously, as others have alluded to, it is, ultimately, a compliance process, and the PIC panel is really only one component in the process.

And while they do, effectively, rule on the merits of the complaint, Compliance department is quite heavily involved at the front-end in terms of actually vetting the materials up-front before it even gets to the standing panel.

And then, once the panel issues the decision, Compliance, essentially, is then responsible for taking any further action to remediate any breaches that are found.

And so, ICANN did issue a breach notice in March of 2017 identifying a set of the specific deficiencies, [which] interestingly included not only the specific findings of the panel in terms of the violations of Specification 11 in section 3.c, but also a number of additional deficiencies that were not specifically enumerated therein; things like overdue fees, a failure to publish/use “contact” on its website, and a few other items.

Now, following that, there was, purportedly, a remediation plan submitted to ICANN Compliance by the registry operator. We were never permitted to see that.

It’s ICANN’s policy that the remediation steps, in the context of a breach notice, are entirely confidential as between the registry operator and ICANN, which, for us, I think we found very disappointing. I think we felt, ultimately, that the remediation that was ultimately accepted by ICANN did not go far enough to actually address the breaches that had been found.

And we ultimately filed several complaints after that with the ICANN complaints office, recounting not only some of the procedural deficiencies that I mentioned earlier but also some of the shortcomings in terms of not being involved at all in the remediation of our ostensibly successful complaint – at least in part.

The complaints office did, ultimately, issue a response to our series of complaints related to what we believe were shortcomings in this whole process, and some of those did precipitate changes to the PICDRP that are now in effect. As of February this year, actually.

It is now an express requirement that all documents that are shared by either party be shared with the other party, which seems like a no-brainer, but that wasn't our experience.

And things like any communications between ICANN and the standing panel should also be shared with the parties. And again, that was something that wasn't part of our experience.

So, I think we were able to precipitate some incremental but important procedural and transparency-related improvements to the PICDRP, a lot of which, again, stemmed from our experience.

And I will note—and I know Jeff Neuman alluded to this in the chat, earlier—our experience also informed discussions in the Subsequent Procedures PDP where there is now, currently, a draft final recommendation for an express provision in future Registry Agreements that registry operator may not engage in fraudulent and deceptive practices.

It's a bit sad that it needs to be explicit for there to be anything within ICANN that could be done about it but, now that it is a recommendation, we do hope that that moves forward.

So there are, I think, some incremental improvements that we're seeing not only in the PICDRP itself but, again, also as I mentioned, some of the things that are going to be coming out, hopefully, of SubPro.

But I do think that there is still a lot of room for improvement in terms of how ICANN Compliance treats enforcement of Public Interest Commitments. And I will also mention that we did make some efforts to raise some of these concerns about this registry outside of the ICANN process entirely.

We did actually have some communications during the process with a state Attorney General and there were also discussions about other possible avenues of address, such as litigation and so forth.

But unfortunately, those things require either a level of political capital, or resources, or other things that ... Unfortunately, I think that the group that helped support this effort ultimately weren't able to sustain.

So, yeah. That's very brief and probably rambling. It's a little after 4 AM here, so forgive me, but I hope that conveyed it, and I'm happy to—

HOLLY RAICHE:

Look, it did. Thank you very much. Just one quick question. Are there reforms that needed to happen to meet the very issue that Lauren identified, the user expectation? And if that's going to take a long time, an e-mail would be great, because this is just the beginning of a very long conversation that had already gone on in SubPro.

GRIFFIN BARNETT: It is, and I'll—

HOLLY RAICHE: It's just, have you got a ...?

GRIFFIN BARNETT: Just a couple of quick—

HOLLY RAICHE: Sorry, go ahead.

GRIFFIN BARNETT: Thanks, Holly. A very quick reaction to that, which is to say we have provided input, as I mentioned, to SubPro because I think you're right, that is sort of the primary channel that we've had to this point to try and improve the PICS and the PICDRP, as well.

But I do think there is more that can be done, and I would point to some of the correspondence. I know Lauren alluded to one of the pieces of correspondence.

There was also recent correspondence, I think from April, between the CSG and the board asking some pointed questions, I think, about enforcement of the PICS, as well. And so, I would encourage folks to take a look at some of those questions. Thanks.

HOLLY RAICHE: Okay. I think that answers the question from Justine Chew, who is our ALAC person on SubPro, “What else needs to be improved?” but I gather there’s a bit of a list and you think some of it has been covered. So, I think we’ll now have time for just a few questions.

But before we do that, first of all, I’d like to again thank Justine for the use of her slides, which I’ve found really helpful, if not very complex, and I would particularly like to thank the four of you, Laureen Kapin, Jamie Hedlund, Richard Hill, and Griffin Barnett, for what has been a really interesting session.

Thank you for the efforts you have put in. I realize that, for many of you, this is ... Let’s just say for once in Australia it’s a reasonable hour here, and it’s not a reasonable hour there, so thank you. We don’t have time for a lot of questions but I know that Jeff Neuman would like to say a few things. Is anybody else watching hands up? See if anybody else has put their hands up.

YEŞİM NAZLAR: Holly, if I may? We have, actually, received a couple of questions on the chat pod, which I have listed. Would you like me to read them out?

HOLLY RAICHE: Could you read them out, please?

YEŞİM NAZLAR: Of course.

HOLLY RAICHE: Yes, please.

YEŞİM NAZLAR: And while I'm reading them out, I'm going to post them once again on the chat pod so our presenters can see them as well.

HOLLY RAICHE: Thank you.

YEŞİM NAZLAR: So, the first question we received was from Volker Greimann: “‘Need for improvement’ implies there have been significant issues so far, and heard of no such issues. Where is the need beyond the theoretical?” is our first question. I believe Volker asked this question, if I'm not mistaken, during Lauren’s presentation.

HOLLY RAICHE: Okay. Lauren, would you like to start with this and see if anybody else would also like to add? Has somebody muted her?

LAUREEN KAPIN: Okay, free at last. So, it’s a fair question, Volker. One of the problems that we have with trying to get at the level of the scale of a problem is that it is actually quite hard to gather data on this.

And so, one of the things that the CTT Review Team really focused on and emphasized, and in fact carried out these first steps to doing, was to start to gather data.

And as I pointed out in the chat, it's all very well for folks to look at the complaints that ICANN Compliance received and say, "Well, not very many complaints. They received a couple, and out of those a lot were invalid, and out of those only a couple actually made it through the entire process, and out of those, only one was found to be valid," and clap your hands and brush them off and say, "We're done. We're okay. Everything is fine."

The end-user probably has never heard of ICANN, much less know that they have some sort of right to file a complaint. Many members of the public, even in the United States, don't even know that the Federal Trade Commission focuses on consumer protection issues and not trade issues. Maybe that's a problem with our name.

But my point is that you can't get at the scale of problems that are out there by just looking at certain very discreet mechanisms that not everyone knows about.

So, I think that gathering data in terms of what the public's expectations are is certainly a starting point, and that data shows us that consumers do have expectations about this relationship between a domain name and its contents.

They do have expectations that if a domain name has this "trusted" element in its name, which implies that you have to have a credential

or some sort of expertise or an education in order to qualify for something, that in fact is going to happen before someone has the ability to buy a domain in that sector.

So, we do have this as a starting point and I would say that that's not theoretical at all. We do know that that happens. And I think that more work can be done to gather data to show where the real rather than theoretical problems are. So, I certainly take your point in that regard.

HOLLY RAICHE:

Thank you. Jamie, Richard, Griffin, do you want to add anything, or should we go to the next question? Okay. Let's go to the next question, Yeşim. Could you read the next question, please?

YEŞİM NAZLAR:

Yes. Sure, Holly. Actually, we have two questions from Justine Chew and both of them are for Jamie Hedlund, so I'm going to read both of them. Let me also share them here on the chat pod.

So Justine Chew says, "For Jamie Hedlund, what criteria does Contractual Compliance rely on to determine whether a complaint is valid or invalid?" And the second question from Justine Chew is also for Jamie Hedlund: "How does ICANN Org educate the public on PIC and PICDRPs?" Let me quickly unmute. Oh. I see Jamie is already unmuted. Over to you, Jamie.

JAMIE HEDLUND:

On the first question, we make sure that a complaint is relevant to a particular contractual provision. So, if we get a complaint about a domain name costing too much, there is no pricing provision in the RAA so we would not take that complaint.

Sometimes, we have different complaint forms and someone might file a complaint alleging abuse but mistakenly submit it under a different complaint form type. We'll still look at that under abuse, even though it was selected.

The main thing is that it has to relate to a contractual provision that we enforce, because our authority stems from the contracts that we have with the registry operators and registrars.

And then, we make sure that there is sufficient evidence to sustain the complaint. So, a lot of times people will ... Not a lot of times, but we get a number of complaints that don't have any evidence, for example, that the complainant first went to the registrar to try to resolve the issue.

And so then, it gets closed without any further inquiry. I hope that is helpful. And then, I gave examples of reasons specific to PIC compliance where we found them to be invalid.

“How does ICANN Org educate the public on PICS and PICDRPs?” One of the requirements of the original program when it was launched was to do outreach in advance of the launch of the program.

ICANN Org did that. There was a global program to educate and build awareness of the program, as well as the Applicant Guidebook and all

the requirements. We also have, since then, built up a lot of materials on the website that go a long way to explain PICS and the PICDRP. I'll send links to those, as well.

And then, whenever we get complaints, either we or the Global Support Center get inquiries. We provide information and, through our Global Stakeholder Engagement team, provide education and awareness on the new gTLD program and other matters, as well.

HOLLY RAICHE:

Thank you, Jamie. I've got one question, and that is, does Compliance do any actual monitoring so that if, for example, there are registry commitments in regards a name and its use, does Compliance monitor at all that those conditions have been kept? Hello? Has somebody muted me?

YEŞİM NAZLAR:

Holly, we are able to hear you and your question was for who, if you can please specify that?

HOLLY RAICHE:

Jamie Hedlund.

YEŞİM NAZLAR:

Okay.

JAMIE HEDLUND: Thanks, Holly. Yes, we do monitor. We do not have to rely on complaints only in order to investigate inquiries and enforce. And in fact, we do so. There are many instances where we have picked up on things either through our own observation or through blogs or media, and we have used that to begin inquiries and look into ensuring compliance with the obligations.

HOLLY RAICHE: That's good. Thank you very much. Are there any final questions for our panelists, or are we going to let them have five minutes spare?

YEŞİM NAZLAR: Holly, if I may? We have a couple more questions already noted, if I may.

HOLLY RAICHE: Yes, please.

YEŞİM NAZLAR: And also, just to draw your attention that we have a raised hand from Jeffrey Neuman, also.

HOLLY RAICHE: Okay, thank you. Would you take that?

YEŞİM NAZLAR: Sorry, which one? Jeffrey first, or myself with the questions?

HOLLY RAICHE: Yeah. Jeff first, please. Thank you.

JEFFREY NEUMAN: Great, thanks. Hopefully, you can hear me. I'm one of the co-chairs of the SubPro Policy Development Process, along with Cheryl Langdon-Orr. And so, I just wanted to make a couple of comments because I think we're conflating a lot of issues, calling them PIC and PICDRP issues when I don't really think that they necessarily are.

So, Lauren's comments on the semantic association between a string and a word, while I'm not going to comment on whether that's an issue or not, it's not really a PIC issue. At least, not a current PIC issue.

If that is something that the community wants to add as a PIC, that would be one thing. But at this point, there is no PIC that says that there needs to be a semantic association between the string and the word.

There are some PICs that say that if you have a string that is highly regulated—let's just call it that—Category 1, that you have certain PICs that you [cross talk].

The second thing, just real quick, is ... And I'd love to do another session on this because I think it would be great to clear up some of the misconceptions. I was one of the drafters.

HOLLY RAICHE: Sure. Okay.

JEFFREY NEUMAN: [Of the PICDRP]. And so, I know there is not much time, and I think that you should get to the online questions, but I'd be happy to clear up some of the confusion, especially with the ... As Lauren pointed out, it's dispute, after dispute process, after dispute, and it's not really.

The second dispute resolution process is actually arbitration between a registry and ICANN about the remedy that is ordered against the registry, which could include termination of a registry.

So, it's not dispute, after dispute, after dispute [and it's like a new trier of fact]. It's just really limited to the remedy issue. Anyway, lots of complications, and would love to actually explain it in a follow-up session. Thank you.

HOLLY RAICHE: Well, thank you, Jeff. I don't know how much time we've got left but I'm sure that you can have a word with Jonathan and maybe we can have, at the very least, a special issue call on the Consumer Policy Working Group. We'll certainly have to look at that. Yeşim, are there any more questions that you have?

YEŞİM NAZLAR: Yes, Holly. So, our next question is from Bill Jouris. One second, please. Let me also post it here. Bill says, "But if a company does multiple businesses, they might have a legitimate business of kind X, but be using the site primarily to do business Y."

HOLLY RAICHE: I think we might have two responses to that, and then we really have run out of time. I think, first, Jamie, do you want to take that one?

JAMIE HEDLUND: Again, it comes down to, if I'm understanding the question correctly, whether or not there are registration eligibility restrictions in the agreement. If there are none, then the fact that someone is selling shoes and bananas off of it, and those two things are non-related, then there is no violation.

However, if it's .bank and there is a shoe store on there, and it's not supposed to be there because the eligibility restrictions limit it to registered banks, then there would be a problem.

HOLLY RAICHE: Good, thank you. Laureen, do you want to add something before, I think, we have to wrap this up?

LAUREEN KAPIN: No. Actually, I think Jamie pointed out the key issue is that certain gTLDs, because they're highly regulated, have restrictions. Those need to be enforced. That is not as sensitive as more generic names, which the content may not match the subject area of the name but it's not as sensitive a topic because it's less likely to lead to fraud and deception.

HOLLY RAICHE: Thank you for that. Can I again, first of all, thank Justine Chew for the use of her slide, and can I thank our four panelists, who were excellent? Thank you so much for adding a lot of light to what otherwise has been a fairly confusing topic.

I'm sure that's just the beginning of a very long and interesting discussion. Well, it has to be a short discussion, but an additional discussion. Thank you all for your time. Yeşim, I think we have got to end it now. The time is out. Thank you.

YEŞİM NAZLAR: Thank you very much, Holly. Thank you all for joining today's session. This session is now adjourned and the recording will be stopped. Thank you.

HOLLY RAICHE: Thank you.

[END OF TRANSCRIPTION]