

Memorandum

To: GNSO Council, Small team of Council volunteers for implementation of PDP 3.0
From: Flip Petillion
Date: 20 August 2019
Re: PDP Appeals Process and the possible establishment of a panel of volunteer mediators

I. INTRODUCTION

Within the small team of Council volunteers (the 'Team'), for implementation of PDP 3.0, I was asked to lead the following two items:

1. #9. Provide further guidance for sections 3.6 and clarification of section 3.7 (Appeal Process) (Standard Methodology for decision making)

Review current language of GNSO OP in relation to section 3.7 and put forward proposed clarification to indicate a 3.7 appeal does not stop ongoing work. Also consider whether further detail is needed in relation to appeal process?

2. #15. Independent conflict resolution

Consider the establishment of panel of volunteer mediators that can be called upon when appropriate.

On 21 June 2019, I shared my initial thoughts for the team's consideration. The team discussed both items at ICANN65 in Marrakesh and commented on the memo in Google Docs.

On 18 July 2019, I shared (i) my understanding of the Team's shared vision, and (ii) proposed changes to relevant sections in the GNSO Working Group Guidelines.

These issues were discussed during the Team's meeting of 6 August 2019.

The Team agreed to add further rationale explaining the approach and the proposed changes to Sections 3.6 and 3.7. The complaint/appeal processes under Sections 3.6 and 3.7 should be straightforward and aim at preventing that the normal workings of the Working Groups and GNSO Council be impacted by the handling of complaints/appeals.

The present memorandum aims at mapping out how the proposed complaint escalation mechanisms work and how they can be handled in a neutral and efficient manner. The purpose of this exercise is to help the Team agree on the different steps of the process and to identify who

will manage the handling of complaints. Once there is agreement on those aspects, the team can work towards amending the text of Sections 3.6 and 3.7.

There seems to be no consensus about establishing a panel of volunteer mediators at this stage. However, members of the Challenge Committee and the Appeals Committee might be able to take up this role if circumstances require.

II. CHALLENGES TO BE ADDRESSED IN THE NEW APPEALS PROCESS

The present section aims at identifying the challenges that should be addressed by the new appeals process.

The main challenge of the appeals process is to avoid that a complaint or appeal impacts the normal workings of the Working Group concerned and of the CO. Simply agreeing that the appeals process has no suspensive effect may not be sufficient to this purpose. The lack of suspensive effect implies that the Working Group and the CO may move forward with PDP activities. However, extra time must be spent on the handling of the complaint/appeal. Moreover, individuals concerned and/or involved in the handling of the complaint/appeal may self-restrain their PDP activities during the pendency of the proceedings. Finally, as long as the proceedings are pending, the complainant/appellant may have the feeling that its concern remain unaddressed and that further PDP activities suffer from the same underlying errors or concern.

The best way to avoid that complaints/appeals affect the normal course of PDPs is to ensure that they are addressed in a quick and efficient manner. The process as it currently exists requires additional work from the WG Chair, CO Liaison(s) and the CO Chair. Their workload may not always permit a swift handling of the complaint/appeal.

Therefore, the idea was advanced to involve other community members, and potentially staff, in the handling of complaints/appeals. The people involved (the 'Conflict Handlers') should be able to act in a quick manner when called upon, even if the group has been dormant for several years.

To achieve this, the Conflict Handlers should be able to benefit from guidelines and they should have a good understanding of the workings of the CO.

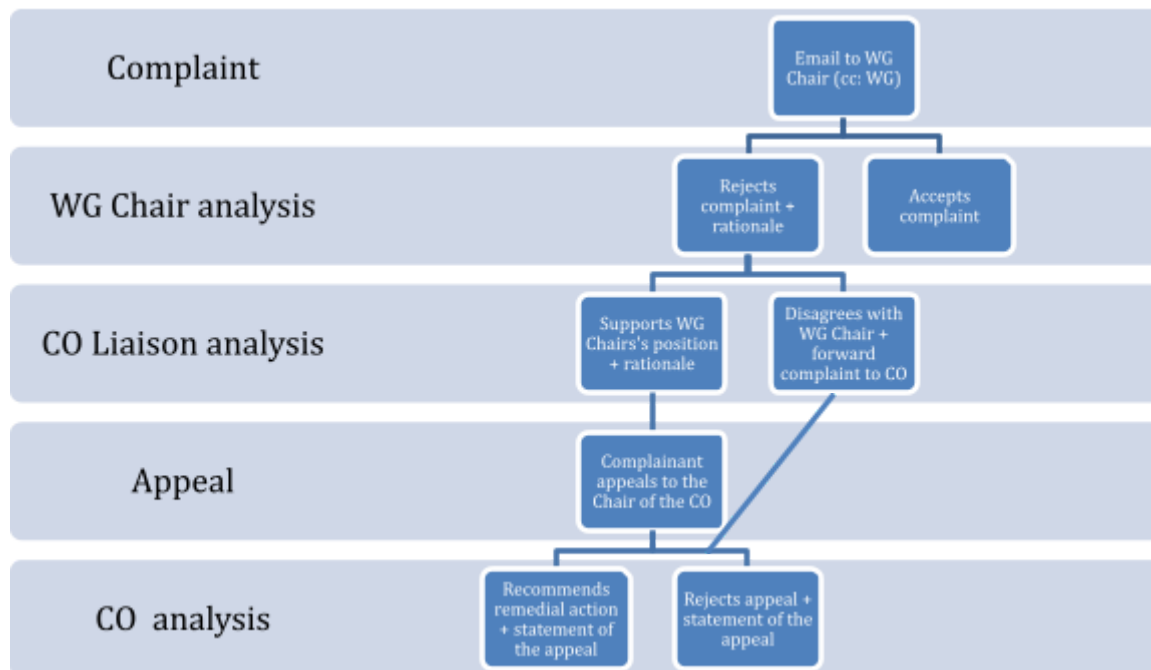
Another challenge that has been previously identified is the distinction between different forms of complaints/appeals that can be raised. There seems to be consensus within the Team that the disagreement of several WG members regarding the designation given to a position by the Chair or any other consensus call should have suspensive effect, whereas other types of appeal should not have suspensive effect.

III. PROPOSAL FOR A COMPLAINT ESCALATION MECHANISM

A. Current status of complaint escalation mechanisms

1. Section 3.6

The current complaint escalation mechanism under Section 3.6 can be summarized as follows:

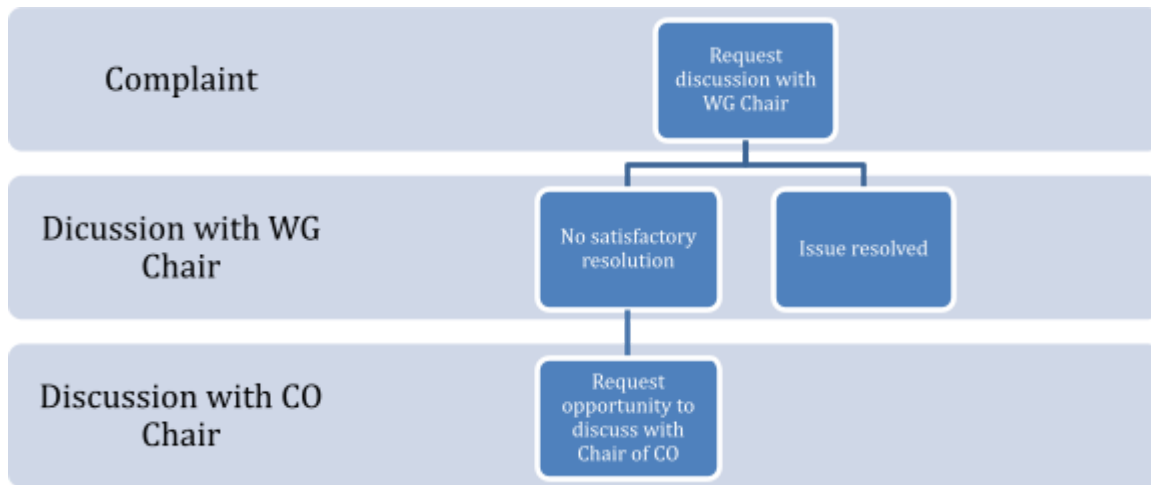


The Complaint must (i) explain why the decision is believed to be in error, and (ii) show the support of several WG members.

The complaint escalation mechanism under Section 3.6 is rather formalized. Complaint handling is done mostly by the WG Chair, the CO Liaison and the Chair of the CO (or the Chair's designated representative).

2. Section 3.7

The complaint escalation mechanism under Section 3.7 can be summarized as follows:



The complaint escalation mechanism under Section 3.7 is currently not formalized and provides virtually no guidance to WG Chairs and CO Chairs.

Without a more formal approach, there is a risk that the wheel be reinvented every time an appeal is filed under Section 3.7.

B. Proposed changes

1. Section 3.6

Section 3.6 provides for a phased approach with distinct steps that may lead to resolution. However, no timing is associated to the different steps. The phased approach may lead to unnecessary delays if the WG Chair and/or CO Liaison need time to develop a rationale. While there is logic in requiring the WG Chair to provide a rationale for his decision to reject a complaint, we fail to see why the CO Liaison should perform its own assessment and provide a rationale. The CO Liaison's is not supposed to issue a final decision. The CO Liaison could however act as Rapporteur in the event an appeal is filed.

The process under Section 3.6 could be streamlined as follows:

1. Impose a time bar for submitting complaints
2. Not require that the CO Liaison reviews the WG Chair's rejection of a complaint *ex officio*
3. Impose a time bar for submitting a challenge to the WG Chair's rejection of a complaint
4. Give the CO Liaisons decision-making power to decide on (i) the timeliness of the challenge, and (ii) the frivolous or vexatious nature of the challenge.

5. Ask that a CO Liaison acts as Rapporteur to the CO Chair or a 'Challenge Committee', composed of members of a standing panel
6. Give decision-making power to the Challenge Committee to:
 - a. give a reasoned decision rejecting the appeal or propose remedial action;
 - b. confirm that a challenge is frivolous or vexatious

Finally, Section 3.6 should clarify that complaints and challenges have suspensive effect, unless frivolous or vexatious.

The Challenge Committee could be composed of three members from a standing panel of:

- CO Councilors and former CO Councilors
- ICANN legal staff
- The CO Chair or his designee

2. Section 3.7

The appeals mechanism under Section 3.7 would benefit from the following:

1. Define the grounds on which an appeal may be filed;
2. Impose a time bar to file the appeal;
3. Impose that the appeal must contain the grounds on which the appeal is based together with a description of the circumstances giving rise to the appeal;
4. Give the opportunity to the WG Chair to transmit the appeal to an Appeals Committee if the WG Chair is of the opinion that no satisfactory resolution will be reached within 20 days following the appeal. No rationale should be required for the WG Chair's decision to transmit the appeal to the Appeals Committee;
5. Give the opportunity to the Appellant to bring the appeal before an Appeals Committee if no satisfactory resolution was found within 20 days following the appeal;
6. Give decision-making power to the Appeals Committee to:
 - a. Give a reasoned decision rejecting the appeal or propose remedial action
 - b. Rule that an appeal was abusive (finding to be confirmed by CO Supermajority to generate effects)
7. Impose sanctions on community members who have filed two abusive sanctions.

The Appeals Committee could be composed of three members from a standing panel of:

- CO Councilors and former CO Councilors
- ICANN legal staff
- The CO Chair or his designee