

from Specification 9 (including .Brand TLDs qualified for Specification 13) should also be exempt from Continued Operations Instrument requirements.

**c. New issues raised in deliberations since publication of the Initial Report, if applicable.**

The Working Group is monitoring the work of the second Security, Stability, and Resiliency Review (SSR2) and considered Recommendation 26 included the SSR2 draft report<sup>135</sup> to “Document, Improve, and Test the EBERO Processes.” In preliminary discussions, Working Group members responded positively to Recommendation 26.5 of the draft report, which states: “ICANN org should publicly document the EBERO processes, including decision points, actions, and exceptions. The document should describe the dependencies for every decision, action, and exception.” Noting that the SSR2’s work is ongoing, the Working Group will continue to follow developments from the Review as they are applicable to this PDP.

**d. Dependencies/relationships with other areas of this report or external efforts**

- Topic 27: Applicant Reviews: Technical/Operational, Financial and Registry Services includes recommendations to maintain the substantive technical and operational evaluation. Protections against registry failure, including registry continuity, registry transition, and failover testing continue to be important registrant protections.
- The Working Group is monitoring the work of the second Security, Stability, and Resiliency Review (SSR2) in relation to the EBERO process.

## Topic 23: Closed Generics (also known as Exclusive Generics)

**a. Recommendations and/or implementation guidelines**

No Agreement 23.1: The Working Group notes that in the 2012 round of the New gTLD Program, a decision was made by the ICANN Board<sup>136</sup> to either (a) “submit a change request to no longer be an exclusive generic TLD”, (b) “withdraw their application” or (c) “maintain their plan to operate an exclusive generic TLD,” which would operate to defer their application to the next round of the New gTLD Program, subject to rules developed for the next round, to allow time for the GNSO to develop policy advice concerning exclusive generic TLDs.” All applicants in 2012 chose either options (a) or (b). The result was that no exclusive generic gTLDs (also called “Closed Generic” gTLDs) were delegated in the first round.

<sup>135</sup> <https://www.icann.org/en/system/files/files/ssr2-review-24jan20-en.pdf>

<sup>136</sup> <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-06-21-en#2.a>

It was the expectation of the ICANN Board that the GNSO would “develop policy advice concerning exclusive generic TLDs.”<sup>137</sup> Although the Working Group has had numerous discussions about this topic, and received extensive comments from the community, including members of the Governmental Advisory Committee, the Working Group was not able to agree on “policy advice concerning exclusive generic TLDs.”

Questions within the Working Group arose on the impact of a failure to develop any policy advice concerning exclusive generic TLDs. Following the approach the Working Group has taken on other issues where there is no agreement on changes to the implementation of the new gTLD program, the Working Group would normally recommend applying the status quo (i.e., no changes to 2012 implementation recommended). However, in this unique case, the Working Group was not able to agree on what the status quo actually was given the Board’s expectation that the Working Group would develop policy on this matter. In the absence of agreement on any policy, the Working Group debated, and was unable to come to agreement on, whether the status quo meant that either (i) Closed Generics would be allowed (as there were no provisions in the final Applicant Guidebook that prohibited them), (ii) Closed Generics would not be allowed (noting that none were delegated in the 2012 round), or (iii) Closed Generics would be allowed if they serve a public interest goal (in accordance with the GAC Advice that was accepted by the Board).

#### **b. Deliberations and rationale for recommendations and/or implementation guidelines**

Rationale for No Agreement 23.1: The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013.<sup>138</sup> In the Beijing Communiqué, the GAC advised the Board that, “For strings representing generic terms, exclusive registry access should serve a public interest goal” (the “Category 2.2 Safeguard Advice”). The GAC identified a non-exhaustive list of strings in the current round of the New gTLD Program that it considers to be generic terms where the applicant is proposing to provide exclusive registry access.

On 21 June 2015, the ICANN Board passed a resolution that required applicants for exclusive generic strings to either (a) “submit a change request to no longer be an exclusive generic TLD”, (b) “withdraw their application” or (c) “maintain their plan to operate an exclusive generic TLD,” which would operate to defer their application to the next round of the New gTLD Program, subject to rules developed for the next round, to allow time for the GNSO to develop policy advice concerning exclusive generic TLD. In addition, the Board requested that the GNSO consider this topic in future policy development work for subsequent procedures.<sup>139</sup> The GNSO Council has in turn charged the Working Group with analyzing the impact of Closed Generics and considering future policy.

<sup>137</sup> <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-06-21-en#2.a>

<sup>138</sup> See <https://gac.icann.org/contentMigrated/icann46-beijing-communicue>

<sup>139</sup> <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-06-21-en#2.a>

Although the Working Group generally agrees that some form of policy guidance should be drafted on this topic, at this stage, however, there continue to be different and strongly-held views on the specific policy goals. There also continue to be different and strongly-held views on the alleged harms and merits of Closed Generics. In reviewing public comments on the Initial Report and continuing its deliberations, the Working Group revisited the alleged harms and merits summarized in the Initial Report, which will not be repeated here.<sup>140</sup>

Four options were discussed as part of the early deliberations of the Working Group and were put out for public comment in the Initial Report. As the Working Group developed and deliberated on these options, it took into consideration GAC Advice included in the Beijing Communique on Category 2.2 Safeguards, and specifically the Advice that “For strings representing generic terms, exclusive registry access should serve a public interest goal.”<sup>141</sup> The Working Group was careful to note that the implementation in 2012 was not necessarily representative of the GAC Advice, which appeared to envision a scenario where an exclusive registry (i.e., Closed Generic) could be acceptable. Therefore, four options were considered by the Working Group in initial deliberations that took place prior to the introduction of new proposals:

- Option 1: Formalize GNSO policy, making it consistent with the existing base Registry Agreement that Closed Generics should not be allowed.
- Option 2: Allow Closed Generics but require that applicants demonstrate that the Closed Generic serves a public interest goal in the application. Potential objections process could be similar to community-based objections.
- Option 3: Allow Closed Generics but require the applicant to commit to a code of conduct that addresses the concerns expressed by those not in favor of Closed Generics. An objections process for Closed Generics could be modelled on community objections.
- Option 4: Allow Closed Generics with no additional conditions. Establish an objections process modelled on community objections.

Divergent views were expressed on these options within the Working Group and in the responses received through public comment. There was also a split within the comments received by the Working Group from the Governmental Advisory Committee. In particular, there are some that believe that Closed Generics should not be allowed under any circumstances, and others believe that option 4 is the only acceptable solution, both of which effectively means that options 2 and 3, or any other proposed solution that seeks to either mitigate perceived harms or impose conditions on the use of Closed Generics, are therefore unacceptable.

<sup>140</sup> See Initial Report section 2.7.3 beginning on page 119:

<https://gns0.icann.org/sites/default/files/file/field-file-attach/subsequent-procedures-initial-overarching-issues-work-tracks-1-4-03jul18-en.pdf>

<sup>141</sup> <https://gac.icann.org/content/Migrated/icann46-beijing-communique>

Nevertheless, the Working Group considered possible ways to implement options 2 and/or 3, which could be considered further if the Board selects one of these options.

Specifically, the Working Group reviewed a first round of proposals put forward by some Working Group members regarding treatment of Closed Generics in subsequent rounds that most closely related to option 2 (where Closed Generics could be allowed if the applicant was able to demonstrate that their application for the string served a public interest goal).

- Some Working Group members felt that it may not be possible to define the public interest, but it may be possible to entrust an entity to judge whether a proposed Closed Generic is or is not in the public interest. For example, one Working Group member suggested allowing Closed Generic applications in line with GAC Advice only where the ICANN Board determined that the TLD would serve a public interest goal. Some proposed that the Board could only do this if the Board approved the application by a supermajority for example at least 90% of sitting, non-conflicted, Board members) that the TLD would serve a public interest goal.
  - Some Working Group members expressed different perspectives on whether the decision by the Board should be appealable through the ICANN Reconsideration process or Independent Review Process (IRP) or whether it should be considered final.
  - One possibility to reduce the number of potential applications would be to limit applicants for Closed Generics to non-profit entities, or perhaps public entities and non-profits. This limitation was proposed by one Working Group member as a potentially reasonable way to restrict the applicant pool that is aligned with the objective of serving the public interest.
  - An additional supplemental proposal from a Working Group member suggested additional contractual enforcement provisions in the relevant Registry Agreement (RA) for a Closed Generic TLD that is a generic word, such terms and conditions:
    - (1) to be derived from the applicant's submission on the use of the Closed Generic TLD as being in the public interest;
    - (2) which prohibit any action considered as anti-competitive (eg. discriminatory registration policies in favour of certain parties or against competitors in the applicable industry);
    - (3) which govern any dealings on the disposal and/or future use of the Closed Generic TLDs - that (1) and (2) must be adhered to at all times and by any party which operates or acquires the rights under the RA; and
    - (4) to stipulate that launching for SLD registration for the Closed Generic TLD by the (first) registry operator must take place within 2 years of signing the RA.The breach of one or more of which will constitute cause for termination of the RA.
- Some Working Group members suggested factors that could be considered in developing a framework for evaluating Closed Generic applications if the Board

chooses to allow such applications. Some members suggested examining the meaning and specificity of the word, the extent to which the application serves the public interest, the proposed use of the string, and the parties affected by the TLD being operated as a Closed Generic.

- One Working Group member suggested, and some other Working Group members supported, using the following specific questions as a basis to develop a framework:
  1. Why is the selected string necessary for your registry / Why did you choose this string at the exclusion of others?
  2. How does the proposed closed registry serve the public interest?
  3. How is the proposed use of the string innovative in nature? How does the proposed mission and purpose of the registry support such use?
  4. What is the likely effect on competition of awarding the proposed closed registry for the same or similar goods and/or services? Is it minimal or is it vast?<sup>142</sup> Why must it be closed?
  5. Is there more than one proposed closed registry application for the same string? If so, should the applications be evaluated against each other to determine which one serves the public interest better or should both of them proceed to a mechanism of last resort?
  6. Should there be restrictions on resale of the proposed Closed Registry, and if so, what restrictions?
  7. What specific Registry Voluntary Commitments are proposed by the registry and how can these be effectively monitored and enforced? Would additional fees be due from such a registry in order to pay for enforcement of the RVCs, e.g. by ICANN Compliance staff set up for this purpose?

**c. New issues raised in deliberations since publication of the Initial Report, if applicable.**

For the purposes of the draft Final Report, the Working Group designated the status as No Agreement and has made no recommendations with respect to either allowing or disallowing Closed Generics. However, with widely diverging viewpoints, the Working Group asked Working Group members to contribute additional proposals for consideration, to help identify circumstances when a Closed Generic may be permitted. These proposals were not thoroughly vetted by the Working Group and therefore none of the proposals at this point in time have any agreement within the Working Group to pursue. However, the Working Group is very interested in community feedback

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<sup>142</sup> Some Working Group members expressed that if a proposed Closed Generic effectively eliminates competition by using a term which defines a category, industry, or field of goods or services, it should not be allowed to proceed. Some members suggested that applicants should be required to obtain letters of support or non-objection from potential competitors as evidence that the proposed Closed Generic does not eliminate competition. Other Working Group members suggested that it is not realistic to require such letters. Instead, evaluators should be responsible for assessing the potential impact on competition.

regarding the three proposals received, in regards to both the high level principles and the details (where provided).<sup>143</sup>

- [A Proposal for Public Interest Closed Generic gTLDs \(PICG TLDs\)](#), submitted by Alan Greenberg, Kathy Kleiman, George Sadowsky, and Greg Shatan.
- [The Case for Delegating Closed Generics](#), submitted by Kurt Pritz, Marc Trachtenberg, Mike Rodenbaugh.
- [Closed Generics Proposal](#), submitted by Jeff Neuman in his individual capacity.

Any feedback is appreciated. The Working Group is particularly interested to hear from the community about which proposals, if any, they believe warrant further consideration by the Working Group, and why. The Working Group would also like input on whether there are elements or high-level principles in any of the proposals that are critical to permitting Closed Generics, even if commenters may disagree with some of the details. While the Working Group is not requesting additional proposals at this time, the Working Group understands that additional proposals may also arise from public comments.

The Working Group considered input from the ICANN Board that “Because difficult questions on how to define the public interest and public interest goals have been pending for several years, the Board re-emphasizes that it remains critical for the Subsequent Procedures group to further flesh out these concepts in all proposed options for addressing Closed Generics.”<sup>144</sup> The Working Group discussed challenges associated with defining the public interest and noted that the definition may impact whether it is possible to have Closed Generics that are in the public interest.

The Working Group considered an approach to defining the public interest focused on identifying specific behaviors or practices that policy should prevent. Some Working Group members stated, for example, that anti-competitive behavior should be avoided. Others provided the perspective that this term needs to be more specifically and clearly defined if the Working Group is to design targeted provisions to avoid anti-competitive behavior, and further pointed out that it may not always be possible to identify potential competitors. In further discussing the prevention of anti-competitive behavior, some Working Group members stated that if Closed Generic strings are permitted, there should be requirements that they are used within a specific period of time. The Working Group noted the different perspectives on requirements for the use of a TLD, which are described in further detail under Topic 40: TLD Rollout. The Working Group ultimately did not come to agreement about whether such an approach is appropriate for defining public interest.

Some Working Group members raised the concern that if the Working Group recommended allowing Closed Generics in subsequent procedures, the new policy might be unfair to applicants from the 2012 round who were forced to withdraw or alter their

<sup>143</sup> See <https://community.icann.org/display/NGSPP/Proposals+Included+in+Draft+Final+Report>

<sup>144</sup> <https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/2018q3/000046.html>

applications. For context, it was noted that all of the affected applicants in the 2012 round chose either to convert their applications to open TLDs or withdraw their applications completely. There were no applicants that elected to defer their applications to any future round. Therefore, the Working Group does not believe there are any substantial outstanding issues from the 2012 round that need to be addressed on this topic. The Working Group further agreed that the main focus of the Working Group, for this topic and all others, should be on developing appropriate policy without the consideration of the fairness or unfairness to previous applicants for having different rules. If additional work is needed to address issues of fairness, this can be addressed at a future date by the GNSO Council or another group set up for this purpose.

The GAC's ICANN67 Communiqué<sup>145</sup> included a summary of GAC discussions on the Working Group's draft outputs regarding Closed Generics. The Working Group reviewed the Communiqué. On 4 May 2020, the GAC provided consolidated input from individual GAC members on the topics discussed at ICANN67, including Closed Generics.<sup>146</sup> The Working Group discussed the input received from GAC members on this topic, while also taking into account the other perspectives on this issue put forward by SO/Acs, ICANN community members, and other interested parties.<sup>147</sup> In summary, just as there was no agreement within the Working Group on this issue, there seemed to be no agreement within many of these groups (including the GAC) on the conditions for which Closed Generics could be allowed. The Working Group also reviewed the GAC's ICANN68 Communiqué,<sup>148</sup> which discussed the views of some GAC members on the topic of Closed Generics.

#### **d. Dependencies/relationships with other areas of this report or external efforts**

None identified at this time.

## Topic 24: String Similarity Evaluations

#### **a. Recommendations and/or implementation guidelines**

<sup>145</sup> <https://gac.icann.org/contentMigrated/icann67-gac-communication>

<sup>146</sup> See

[https://community.icann.org/download/attachments/93129620/GAC%20Written%20Consultation\\_%20Input%20Received-%20Updated%209%20May.pdf?version=1&modificationDate=1589186135000&api=v2](https://community.icann.org/download/attachments/93129620/GAC%20Written%20Consultation_%20Input%20Received-%20Updated%209%20May.pdf?version=1&modificationDate=1589186135000&api=v2)

<sup>147</sup> For additional information about these perspectives, see responses to Community Comment 2 (<https://community.icann.org/pages/viewpage.action?pageId=63155738>) the Working Group's Initial Report (<https://gnsso.icann.org/sites/default/files/file/field-file-attach/subsequent-procedures-initial-overarching-issues-work-tracks-1-4-03jul18-en.pdf>) and public comment on the Initial Report (<https://www.icann.org/public-comments/gtld-subsequent-procedures-initial-2018-07-03-en>).

<sup>148</sup> <https://gac.icann.org/contentMigrated/icann68-gac-communication>