Analysis of .NET Registry Agreement

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ALAC Consolidated Policy Working Group (CPWG)

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Agenda

- ICANN Contracting Basics 101

- Is this within ALAC's remit?

- Identify major differences between the baseline Registry Agreement and the current/proposed .NET Registry Agreement

- Is this within ALAC's remit?

- ALAC Options

ICANN Contracting Basics 101

- ICANN's ability to enforce the consensus policies is done through a series of contracts with accredited Registries and Registrars.

- There have been a total of five (5) Registrar Accreditation Agreements (RAA), see https://www.icann.org/resources/pages/registrars-agreements-archive-en

- Historically, there has been a much large iteration of Registry Agreements (RAs). Although these contracts can generally be grouped into the following buckets, see https://www.icann.org/en/registry-agreements

    - .COM, .NET, .ORG (legacy agreements)
    - 2000 Proof of Concept RAs
    - 2004 Sponsored RAs
    - 2012 Baseline RA

Baseline Registry Agreement (RA)

The Base RA was developed to support the new generic top-level domains (gTLDs) being created through the 2012 New gTLD Program. It was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment and aligns with the underlying Generic Names Supporting Organization's (GNSO's) policy recommendations for new gTLDs. Established in 2013, the Base RA now applies to over 1,200 gTLDs. The ICANN org has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements. The Base RA provides additional safeguards and security and stability requirements compared to legacy agreements. Since 2014, several legacy gTLDs have renewed their agreements adopting the Base RA: cat, .jobs, .mobi, .pro, .tel, .travel, and most recently, .asia, .biz, .info, and .org.

See, https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf

Limitations Regarding Baseline RA

Although all new gTLD registry operators must adopt the Base RA (but may request deviations from it), no consensus policy requires a legacy registry operator to adopt the Base RA. All RAs include a presumptive right of renewal clause. This clause provides a registry operator the right to renew the RA at its expiration, provided the registry operator is in good standing (e.g., the registry operator does not have any uncured breaches), and subject to the terms of their presumptive renewal clauses.

Although ICANN org proposes the Base RA as a starting place for the renewal discussions, because of the registry operator's presumptive right of renewal, ICANN org is not in a position to mandate the new form as a condition of renewal. If a registry operator states a strong preference for maintaining its existing legacy agreement form, ICANN org would accommodate such a position, and has done so in at least one such instance.

See https://features.icann.org/consideration-reconsideration-request-19-3-org-renewal

Is this within ALAC's Remit?

ICANN Bylaw Section 12.2(d) - At-Large Advisory Committee

(i)   The role of the ALAC shall be to consider and provide advice on the activities of ICANN, insofar as they relate to the interests of individual Internet users. This includes policies created through ICANN's Supporting Organizations, as well as the many other issues for which community input and advice is appropriate. The ALAC, which plays an important role in ICANN's accountability mechanisms, also coordinates some of ICANN's outreach to individual Internet users.

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"ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the ==global public interest by migrating the legacy gTLDs to the Base RA==."

See https://features.icann.org/consideration-reconsideration-request-19-2-org-and-info-renewal

Deviations Between .NET RA and Baseline RA

- It is not an easy task to provide a detailed analysis of the differences between the proposed .NET RA and the baseline RA

- This is NOT a comprehensive list of all deviations.

- Not <u>all</u> deviations are in favor of Verisign.

Deviation #1

Under the Representations and Warranties clause between the two RAs there is a difference regarding the consequences for

**Baseline RA (2017)
Section 1.3(a)(i)**

all material information provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and such information or statements continue to be true and correct in all material respects as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN;

**.NET RA (2023)
Section 1.2(b)**

The factual statements made in writing by both parties in negotiating this Agreement, were true and correct in all material respects at the time made. A violation or breach of this subsection shall not be a basis for termination, rescission or other equitable relief, and, instead shall only give rise to a claim for damages.

Deviation #2

It appears that the .NET RA has a narrower remit regarding the scope of Consensus Policy (a cornerstone of the ICANN multistakeholder model) based upon conflicting definitions of (S/s)ecurity and (S/s)tability.

Baseline RA (2017)
Spec 1, Paragraph 1.2

Consensus Policies … shall relate to one or more of the following:

1.2.1   issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or Domain Name System ("DNS");

                    . . .

1.2.3   Security and Stability of the registry database for the TLD;

.NET RA (2023)
Section 3.1(b)(iv)

Consensus Policies shall relate to one or more of the following: (1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, Security and/or Stability of the Internet or DNS; (2) functional and performance specifications for the provision of Registry Services (as defined in Section 3.1(d)(iii) below); (3) Security and Stability of the registry database for the TLD;

Deviation #3

The Baseline RA and .NET RA have **almost identical** definitions of Security and Stability. While these definitions in the Baseline RA are subject to future ICANN Consensus Policy work, it appears that Verisign has an effective veto over any future community consensus policy work regarding the definitions of Security and Stability in the .NET and .COM RAs.

Baseline RA (2017)
Section 7.3

For purposes of this Agreement, ==unless such definitions are amended pursuant to a Consensus Policy at a future date==, in which case the following definitions shall be deemed amended and restated in their entirety as set forth in such Consensus Policy, Security and Stability shall be defined as follows:

.NET RA (2023)
Section 1.2(b)

(v) In addition to the other limitations on Consensus Policies, they shall not.

(B) modify the standards for the consideration of proposed Registry Services, ==including the definitions of Security and Stability== (set forth below) and the standards applied by ICANN;

Deviation #4

The Baseline RA includes a Registry Services Evaluation Policy (RSEP) provision that is incorporated by reference (URL) and subject to change by Consensus Policy, whereas the .NET RA RSEP process is hardcoded, and any change is excluded from the Consensus Policy remit.

Baseline RA (2017)
Article 2.1

Registry Operator shall submit a request for approval of such Additional Service pursuant to the Registry Services Evaluation Policy at http://www.icann.org/en/registries/rsep/rsep.html, as such policy may be amended from time to time in accordance with the bylaws of ICANN (as amended from time to time, the "ICANN Bylaws") applicable to Consensus Policies (the "RSEP").

.NET RA (2023)
Section 3.1(d)(iv)

Process for Consideration of Proposed Registry Services. Following written notification by Registry Operator to ICANN that Registry Operator may make a change in a Registry Service within the scope of the preceding paragraph:

See subparagraphs A thru I

Deviation #5

The Baseline RA requires the Registry Operator to cooperate in economic studies, however, Verisign appears to have no similar provision in either the .NET or .COM registry agreements.

Baseline RA (2017)
Section 2.15

.NET RA (2023)
Section 3.1(b)(iv)

If ICANN initiates or commissions an economic study on the impact or functioning of new generic top-level domains on the Internet, the DNS or related matters, Registry Operator shall reasonably cooperate with such study…..

Not Found

Deviation #6

Verisign is proposing to amend its Letter to include reporting security incidents for the .COM and .NET RA, see https://www.icann.org/en/public-comment/proceeding/proposed-renewal-of-the-registry-agreement-for-net-13-04-2023

Baseline RA (2017)	.NET RA (2023) Collateral Documentation
Not Found	To add an agreement that the parties develop mutually agreed upon requirements appropriate for the .COM and .NET TLDs for reporting security incidents to ICANN. This is based on recommendations by the Security and Stability Advisory Committee (SSAC) in its 3 November 2015 Advisory (SAC074) which were approved by the ICANN Board in February 2018.

Deviation #6 – Cont'd

- The Strengthening American Cybersecurity Act (SACA) was signed into law in March 2022 as part of a Consolidated Appropriations Act, See https://www.congress.gov/117/plaws/publ103/PLAW-117publ103.pdf

- Under SACA Sec 2242 Required Reporting of Certain Cyber Incidents Paragraph A:

  A covered entity that experiences a covered cyber incident shall report the covered cyber incident to the Agency not later than 72 hours after the covered entity reasonably believes that the covered cyber incident has occurred.

- SACA Paragraph 5 Exemptions states that

  (C) DOMAIN NAME SYSTEM.—The requirements under paragraphs (1), (2) and (3) shall not apply to a covered entity or the functions of a covered entity that the Director determines constitute critical Infrastructure owned, operated, or governed by multi-stakeholder organizations that develop, Implement, and enforce policies concerning the Domain Name System, such as the Internet Corporation for Assigned Names and Numbers or the Internet Assigned Numbers Authority.

Deviation #7

The Baseline RA has a ten (10) year term whereas the .NET RA has a six (6) year term., although both RAs have similar auto-renewal provisions.

Baseline RA (2017)
Section 4.1

The term of this Agreement will be ten (10) years from the Effective Date (as such term may be extended pursuant to Section 4.2, the "Term").

.NET RA (2023)
 Section 4.1

This Agreement shall be effective on the Effective Date through 30 June 2029 (the "Expiration Date"), subject to extension of such term upon renewal pursuant to Section 4.2 (together, the initial and any renewal terms shall constitute the "Term").

Deviation #8

The Baseline RA contains no price caps, whereas the .NET RA includes pricing and pricing adjustment provisions (see below). This provision is also materially different from the .COM RA. Although the .COM TLD was previously determined by the US Department of Justice Antitrust Division to have "significant market power", there appears to be no such finding in connection with .NET, see https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf

.NET RA (2023) - Section 7.3 (a) & (b)

(a) Pricing. The price to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another, shall not exceed a total fee of US$10.67, which fee consists of (A) a Registry Operator service fee ("Service Fee") equal to US$9.92, and (B) an ICANN fee equal to US$0.75. ……

(b) Adjustments to Pricing for Domain Name Registrations. Registry Operator shall provide no less than six months prior notice in advance of any price increase for domain name registrations and shall continue to offer domain name registrations for periods of up to ten years.

Deviation #9

The Baseline RA has no prohibition on vertical integration, whereas the .NET RA includes such a provision. Although the Cooperative Agreement imposes a prohibition on vertical integration within the .COM TLD there appears to be no such restriction in connection with .NET, see https://www.ntia.gov/press-release/2018/ntia-statement-amendment-35-cooperative-agreement-verisign

.NET RA (2023) - Section 7.1 (c) & (d)

(c) Registry Operator Shall Not Act as Own Registrar. Registry Operator shall not act as a registrar with respect to the TLD. This shall not preclude Registry Operator from registering names within the TLD to itself through a request made to an ICANN-accredited registrar. ….

(d) Restrictions on Acquisition of Ownership or Controlling Interest in Registrar. Registry Operator shall not acquire, directly or indirectly, control of, or a greater than fifteen percent ownership interest in, any ICANN-accredited registrar for the TLD.

Is this within ALAC's Remit?
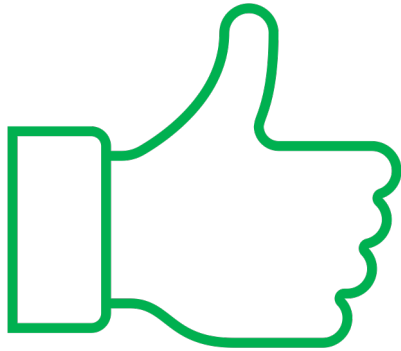
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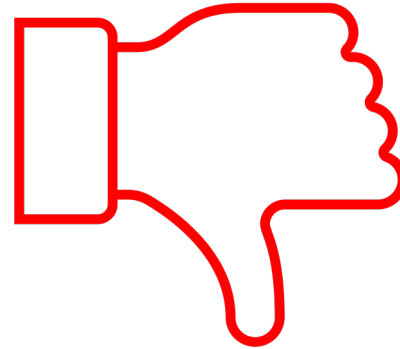
ALAC Options

Submit a public comment to help raise awareness of this issue and its potential impact on **global public interest**.

✓ Request that ICANN Legal provide a redline of the .NET RA versus the baseline RA, along with a detailed analysis of these differences.

✓ Request an extension of the .NET RA for the global internet community to review this more detailed analysis.

✓ Request clarification from ICANN on breach notification involving Security/security and Stability/stability issues under US Law.

✓ Analyze .NET RA's definition of Security and Stability on DNS Abuse negotiations

✓ Request ICANN Org to initiate an Economic Study.

Conclusion

One World, One Internet

One ICANN, One gTLD Registry
Baseline RA