

4.3.5 Registrar Non-Discrimination

- 4.3.5.1 Explanation of Subject

The 2007 Final Report required that registries must use ICANN-accredited registrars, which are under contract with ICANN and as such, must fulfill the obligations of their Registrar Accreditation Agreement (RAA). This requirement was consistent with existing practices at that time, which viewed those contractual requirements as supporting the security and stability of the DNS by promoting beneficial behaviors through adherence to the RAA. In addition, Recommendation 19 stated that registries could not discriminate among accredited registrars:

Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars.

Historically, registries were unable to also act as registrars and the 2007 Final Report¹ recommended that this practice be maintained. During deliberations of the policy, the Registry Constituency (RyC) noted that small, specialized registries may encounter issues in finding registrars to offer their TLD if there is perhaps no compelling business reason for registrars to do so. Though registry agreements prevented registries from also acting as registrars at the time, the idea was suggested that a registry owner could act as a registrar for its own TLD to alleviate the issue just described. However, in November of 2012, the ICANN Board approved the removal of the restriction on cross ownership in Registry Agreements², the principles of which were integrated into the AGB, in the base agreement as well as in section 5.1, which states:

The applicant must report: (i) any ownership interest it holds in any registrar or reseller of registered names, (ii) if known, any ownership interest that a registrar or reseller of registered names holds in the applicant, and (iii) if the applicant controls, is controlled by, or is under common control with any registrar or reseller of registered names. ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement if it is determined that the registry-registrar cross-ownership arrangements might raise competition issues. For this purpose "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.

- 4.3.5.2 Questions and Concerns Related to Subject

¹ Ibid

² ICANN Board resolution approving the removal of cross ownership restrictions in registry agreements: <https://features.icann.org/2010-11-05-new-gtlds-cross-ownership-issues-registries-and-registrars>

As noted above, the situation in which registrars may have no business incentive to offer a particular TLD was considered during the policy development process. Concerns similar to those raised by the RyC previously, were again noted by DG Members, particularly in regards to .Brands.

Registries that applied for corporate identifiers, or .Brands, had concerns with the Registry Code of Conduct³, particularly the contractual requirement to use accredited registrars, but more specifically the non-discrimination aspect. As such, the Brand Registry Group engaged with ICANN to develop a solution that would address the concerns of its constituents, which led to the drafting of Specification 13. Specification 13 established a definition for a Brand category of applicants and allowed those that qualified, to designate up to three ICANN accredited registrars to serve as the exclusive registrars for their TLD⁴. Specification 13 also, by default, includes an exemption to the Registry Code of Conduct.

In passing a resolution on Specification 13⁵, the NGPC acknowledged that Specification 13 was contrary to Recommendation 19 and requested consideration of the matter by the GNSO. In its response⁶, the GNSO Council confirmed that the provision was indeed inconsistent with Recommendation 19, but did not object to adoption of Specification 13 in its entirety. A potential PDP-WG on New gTLD Subsequent Procedures may want to consider updating the existing policy recommendation to ensure it is consistent with the current environment, as well as exploring whether other well-defined groups of applicants might warrant an exception.

The DG identified several other items for consideration, including:

- Should registries be able to market directly to or otherwise contact potential customers?
 - Is there a need for more distinct separation of registry and registrar entities?
- *4.3.5.3 Relevant Guidance*
 - Recommendation 19:
- *4.3.5.4 Rationale for Policy Development*

As noted above, Recommendation 19 should be made consistent with the changes resulting from the adoption of Specification 13. If there are additional changes a potential PDP-WG on New gTLD Subsequent Procedures foresees, such as identifying additional situations where

³ Registry Code of Conduct: <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting#conduct>

⁴ Specification 13: <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting#spec13>

⁵ ICANN Board resolution regarding Specification 13: <https://features.icann.org/approval-registry-agreement-specification-13-brand-category-applicants>

⁶ GNSO correspondence to NGPC regarding Specification 13: <http://gns0.icann.org/en/correspondence/robinson-to-chalaby-09may14-en.pdf>

exceptions to the registrar non-discrimination recommendations, it may also require policy development.