Backgrounder on Safeguards Applicable to all New gTLDs

Any entity that wants to offer domain name registration services under gTLDs with a direct access to the gTLD registries is required to obtain an accreditation from ICANN. To that end, the interested entity must apply for accreditation and demonstrate that it meets all the technical, operational and financial criteria necessary to qualify as a registrar business. The relationship between ICANN and every accredited registrar is governed by the individual Registrar Accreditation Agreements (RAA), *which set out the obligations of both parties.*

Background on the development of the agreements

On 17 May 2001, ICANN adopted a version of the Registrar Accreditation Agreement, which was in effect for all accredited registrars until 21 May 2009.

On 21 May 2009, the ICANN Board unanimously approved a set of 17 amendments to the Registrar Accreditation Agreement (RAA). The newly revised RAA ("2009 RAA") was the result of an extensive consultation process that engaged all interested constituencies of the Internet community including governments, individual Internet users, and gTLD registrars. The 2009 RAA includes: enhanced enforcement tools to assure full compliance with the ICANN contract and policies, expanded requirements for reseller agreements, additional audit and data escrow requirements, more explicit requirements for providing contact information, and new notice requirements and termination provisions.

The 2014 new gTLD round brought about a new (2013) RAA. The first 2013 RAA was signed in July 2013. At that time, there were 964 registrars under the 2009 RAA, and 24 registrars under the 2001 RAA, which is 988 total ICANN-accredited registrars. As of the end of August 2016, there are 2135 ICANN-accredited registrars: 2084 are signed onto the 2013 RAA, 51 on the 2009 RAA, 0 on the 2001 RAA.

There were a few different streams of change requests to the RAA, that were finally implemented in the 2013 agreement:

1. LEA 12 recommendations on the WHOIS and Data Retention. Within the RAA that will become the 2013 RAA, all 12 law enforcement recommendations are addressed. As you may know, it was the 12 law enforcement recommendations that were outstanding that really brought us to the table in the first place. In parallel to the LEA recommendations there was a GNSO ALAC working group on RAA. Their recommendations where also included in the ICANN + Registries negotiations
2. GAC Advice on the new gTLDs that became substance of the Specification 11 in the RRA.
3. Voluntary PICs submitted by the applicants and subject to their own dispute resolution mechanism

All registrars that are party to the 2013 RAA are required to complete and return to ICANN an annual certificate certifying compliance with the terms and conditions of the registrar's RAA within twenty (20) days following the end of each calendar year

Safeguards

The negotiations between ICANN and Registrars of the “2013 RAA” was not an easy process and it took more than a year of negotiations between ICANN and the Registrars to come up with a new Agreement. The agreement is not the result of the standard ICANN policy development, as it was a direct negotiation on the implementation of many old and new issues, safeguards included. So it can´t be assumed that any group “imposed” any safeguards, as its implementation in the contracts was result of a negotiation. The final draft was subject to a single (?) rather short public comment period.

The first objective at the time was to align the amendment and renewal process for the RAA with the new gTLD registry agreement that's part of the new gTLD program, and to bring the agreement in line with the process for amending and renewing the previous registry agreements. Every new gTLD registry operator is required to sign a standard agreement with ICANN prior to launching the domain for public registration and use. Included in that agreement is Specification 11. Specification 11 is the direct result of advice from the Governmental Advisory Committee of ICANN (GAC), which identified strings that reflected highly regulated or restricted industries (Category 1) and strings made up of generic terms where the applicant intended to operate an exclusive access registry (Category 2). Each category presented different implementation and policy concerns. The GAC offered safeguard advice to protect public interests in these strings. That advice manifested as the Public Interest Commitments, which ICANN eventually adopted and implemented through Specification 11 into the registry agreement for all registry operators. With the long-standing separation between registries and registrars blurred after the 2012 new gTLD round, there is little to be gained keeping registry and registrars agreement separate in terms of its effectiveness in safeguard implementation. For the CCT exercise their impact should be analysed together.

A further difficulty arises with respect to mitigating abusive activity in particular, since registries do not have relationships with registrants and should not be required to determine whether a registrant is in compliance with applicable laws. To address this concern, ICANN included language in the PIC Specification that would obligate registry operators to include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision prohibiting registered name holders from distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.

Last but not least, it is not upon ICANN to decide if the objectives of the safeguards have been correctly implemented by tis agents downstream the DNS value chain. The process also brought about new disputes resolution mechanisms for PICs that have to be initiated by affected parties.

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It is against this background of the GAC public interest recommendations, the negotiated implementation and the use of new rights protection mechanisms, that the CCT RT to analyse and make recommendations about the effectiveness of safeguards and promoting trust trough such a complex structure. So in my suggestion that the CCT RT should discuss a framework of **general questions**, that should help test the effectiveness of the new safeguards over time.

The check list could be structured in the following way:

A. What are the ¨new¨ commitments, as compared to the previous RAAs? Who introduced them and who is responsible for its results?
B. Has ICANN ensured maximum visibility here so that any stakeholder can quickly check, this is what this operator of this domain undertook to do and adhere to, certain principles and safeguards and so on?
C. What is the specific process for submitting a complaint or a concern that those commitments are not being adhered to or being disregarded or amended without anybody being fully aware of it?
D. Between which parties is the dispute resolution going to be worked out and who bears the costs? Is ICANN involved in the process at any point?

And only when there is some experience in the resolution of the PICDRP and the effective suspension of domain names that act against the public interest that it will be possible to make a cost benefit analysis of this effort.

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