



New gTLD Subsequent Procedures PDP

Legal/Regulatory Work Track 2 | 02 March 2017

Agenda

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Welcome &
Admin

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SOIs

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CC2
(Any questions?)

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Closed Generics

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AOB

CC2 Questions

Come up with questions to ask the Community for Community Comment 2 that will assist us in drawing conclusions.

Link to current questions:

https://docs.google.com/document/d/1iZBCVEAJPBVEDg7jLsMHKkNczR_b6-jH2WI5eVH-WWM/edit

CC2 Questions – Topics to Cover

Below are the topics of WT2 with the topics we have actually covered to some extent in green.

Base Registry Agreement

2nd Level RPM's

Reserved Names

Registrant Protections

IGO / NGO Procedures

Closed Generics

Applicant Terms and Conditions

Registrar Non Discrimination & Registry / Registrar Separation

Registry / Registrar Standardization

TLD Rollout

Contractual Compliance

Global Public Interest

CC2 Questions – Topics to Cover

Base agreement: Perform comprehensive review of the base agreement, including investigating how and why it was amended after program launch, whether a single base agreement is appropriate, whether Public Interest Commitments (PICs) are the right mechanism to protect the public interest, etc. Should the Article 7.7 review process be amended to allow for customized reviews by different registry types.

Second-Level Rights Protection Mechanisms: Proposing recommendations directly related to RPMs is beyond the remit of this PDP. There is an anticipated PDP on the "current state of all rights protection mechanisms (RPMs) implemented for both existing and new gTLDs, including but not limited to the UDRP and the URS...". Duplication or conflicting work between the New gTLD Subsequent Procedures PDP and the PDP on RPMs must be avoided. If topics related to RPMs are uncovered and discussed in the deliberations of this PDP, those topics should be relayed to the PDP on RPMs for resolution. To assure effective coordination between the two groups, a community liaison, who is a member of both Groups, is to be appointed jointly by both Groups and confirmed by the GNSO Council. *The SubPro PDP WG, from discussions with the RPMs PDP WG, should be responsible for consideration of the PICDRP and the RRDRP, as these are DRPs that are NOT based on trademark rights.*

Reserved Names: Review the composition of the reserved names list to determine if additions, modifications, or subtractions are needed (e.g., single letter, two letters, special characters, etc.). Evaluate if the implementation matched expectations (e.g., recommendations of the Reserved Names Working Group). Review whether geographic names requirements are appropriate.

Registrant Protections. The original PDP assumed there would always be registrants and they would need protecting from the consequences of Registry failure, although it may not make sense to impose registrant protection obligations such as EBERO and the LOC when there are no registrants to protect, such as in a closed registry. Should more relevant rules be established for certain specific cases?

CC2 Questions – Topics to Cover

IGO/INGO Protections: The PDP for Protection of IGO and INGO Identifiers in All gTLDs and PDP for IGO-INGO Access to Curative Rights Protection Mechanisms are expected to address a number of issues. While no additional work is envisioned, if there are any remaining or new issues for discussion, they could be deliberated in the context of this PDP.

Closed Generics: Should there be restrictions around exclusive use of generics TLDs?

Registrar Non-Discrimination: Are registrar requirements for registries still appropriate?

Registry/Registrar Standardization: Consider whether the registry/registrar relationship should have additional standardization and regulation.

TLD Rollout: Was adequate time allowed for rollout of TLD? When should recurring fees due to ICANN begin?

Contractual Compliance: While no specific issues were identified, contractual compliance as it relates to New gTLDs may be considered in scope for discussion, though the role of contractual compliance (i.e., enforcing agreements) would not be considered within scope.

Global Public Interest: Existing policy advice does not define the application of “Public Interest” analysis as a guideline for evaluation determinations. Consider issues identified in GAC Advice on safeguards, public interest commitments (PICs), and associated questions of contractual commitment and enforcement. It may be useful to consider the global public interest in the context of ICANN’s limited technical coordination role, mission and core values and how it applies specifically to the New gTLD Program.

Terms and Conditions: An addition to the topic area for this WT is looking at the T&Cs of the Applicant Guidebook. When an applicant submitted an application to ICANN, they also signed off on T&Cs. Questions in regards to the validity of those T&Cs has been raised, as seen in several litigations involving ICANN and Applicants.

**Does anyone
have any
questions on the
questions?**

Closed Generics

Closed Generics – Background Information

What is a “Closed Generic”?

- **“Closed Generic”** is referred to in the community as a “TLD string that is a generic term and is proposed to be operated by a participant exclusively for its own benefit.”

(2 February 2013 NGPC Meeting)

Also of importance...

- **“Generic String”** as referenced under the Registry Agreement Specification 11.3. d. in terms of a “Generic String” is defined as “‘Generic String’ means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others. “

Closed Generics – Background Information

What's in writing?

GNSO Policy:

- No reference to Closed Generics.

Applicant Guidebook:

- No reference to Closed Generics.

Registry Agreement:

- Registry Agreement Specification 11.3.d. Refers to exclusive registration in a “Generic String”.

Registry Operator of a “Generic String” TLD may not impose eligibility criteria for registering names in the TLD that limit registrations exclusively to a single person or entity and/or that person’s or entity’s “Affiliates” (as defined in Section 2.9(c) of the Registry Agreement). “Generic String” means a string consisting of a word or term that denominates or describes a general class of goods, services, groups, organizations or things, as opposed to distinguishing a specific brand of goods, services, groups, organizations or things from those of others.

- Specification 9 “Code of Conduct” forbids a Registry or its Affiliates to allocate names in its own right other than names registered through an ICANN accredited Registrar or up to 100 names pursuant to Section 3.2 of Specification 5.

Closed Generics – Background Information

How did we get here?

GAC Advice:

- Government Advisory Committee (GAC) issued Safeguard Category 2 advice in their 11 April 2013 Beijing GAC Communiqué stating that
 - For strings representing generic terms, exclusive registry access should serve a public interest goal.*
- GAC also identified a non-exhaustive list of strings that was considered to be generic where the applicant was proposing exclusive use.

Public Comment:

- ICANN sought public comment from 5 February to 7 March 2013 on the subject of “closed generics” and whether or not requirements should be adopted. Comments were sought to help identifying criteria for:
 - *classifying certain applications as "closed generic" TLDs, i.e., how to determine whether a string is generic, and*
 - *determining the circumstances under which a particular TLD operator should be permitted to adopt "open" or "closed" registration policies.*

Closed Generics – Background Information

Public Comment (Continued):

- As a result, there were a LOT of comments. As there are many, it is difficult to provide an exact overview of the of all the comments, but a highlights of the comments submitted provided for suggestions and questions as outlined in the New gTLD Policy Final Issue Report.
 - *Allowing a single entity to exclusive use of a generic term may allow them to have an inappropriate level of control over that term at the top-level, in particular for industry terms, where that exclusive control could result in anti-competitive behavior.*
 - *Exclusive access is contrary to competition and consumer choice, and may in fact result in user confusion*
 - *Suggestion for defining generic including using principles of trademark law (i.e., a term that could not be trademarked should not be eligible to be operated in a “closed” fashion).*
 - *Suggestion that it may be more practical to define conditions under which a TLD could be operated in a “closed” manner rather than trying generic*

GNSO Council Response:

- Coinciding with the Public Comment undertaken, the GNSO Council sent correspondence on 7 March 2013 to the NGPC that they were unable to establish formal policy in the short time given while encouraging GNSO members to comment in the Public Comment.

Closed Generics – Background Information

Where are we now?

- The NGPC approved an edit to the Registry Agreement in their 2 July 2013 meeting that addressed the Category 2 safeguards (i.e. exclusive use of a “Generic String”).
- This edit to the Registry Agreement came about in the Specification 11 Public Interest Commitment 3(d).
- Applicants that were identified in GAC Category 2 Advice were asked to
 - Change their application,
 - Maintain their current plan where the application would be deferred to the next round of the New gTLD Program, or
 - Withdraw their application.
- The NGPC requested in their 6 June 2015 meeting that the GNSO specifically include the issue of exclusive registry access for generic strings serving a public interest goal as part of the PDP.

Closed Generics – Background Information

Exceptions to the RA that allow for “Exclusive Use”

- Exemption to Code of Conduct granted by ICANN if,

Registry Operator demonstrates to ICANN’s reasonable satisfaction that (i) all domain name registrations in the TLD are registered to, and maintained by, Registry Operator for the exclusive use of Registry Operator or its Affiliates, (ii) Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an Affiliate of Registry Operator, and (iii) application of this Code of Conduct to the TLD is not necessary to protect the public interest.

- Registry qualifies as a “Brand TLD” as defined in Specification 13 as a string where,

(i) the TLD string is identical to the textual elements protectable under applicable law, of a registered trademark valid under applicable law, which registered trademark:

- a. is recorded with, and issued a signed data mark file by, the Trademark Clearinghouse or any successor or alternative trademark validation authority appointed by ICANN, if such trademark meets the eligibility requirements of such validation authority (provided that Registry Operator is not required to maintain such recordation for more than one year);*
- b. is owned and used by the Registry Operator or its Affiliate in the ordinary course of Registry Operator’s or its Affiliates’ business in connection with the offering of any of the goods and/or services claimed in the trademark registration;*
- c. was issued to Registry Operator or its Affiliate prior to the filing of its TLD registry application with ICANN;*
- d. is used throughout the Term continuously in the ordinary course of business of Registry Operator or its Affiliate in connection with the offering of any of the goods and/or services identified in the trademark registration;*
- e. does not begin with a period or a dot; and*
- f. is used by Registry Operator or its Affiliate in the conduct of one or more of its businesses that are unrelated to the provision of TLD Registry Services; and*

(ii) only Registry Operator, its Affiliates or Trademark Licensees are registrants of domain names in the TLD and control the DNS records associated with domain names at any level in the TLD;

(iii) the TLD is not a Generic String TLD (as defined in Specification 11); and

(iv) Registry Operator has provided ICANN with an accurate and complete copy of such trademark registration.

Closed Generics – Million Dollar Question

Question

Should there be restrictions around exclusive use of generics TLDs?

- a. Yes.
- b. No
- c. Other.

「Due to expected high volume of responses, please remember to be concise and courteous of time for responses.」