

1.10 Deliberations and Recommendations: Contracting

Contracting		
1.10.1	Base Registry Agreement	Work Track 2
1.10.2	Registrar Non-Discrimination / Registry/Registrar Standardization	Work Track 2

1.10.1 Base Registry Agreement

a. What is the relevant policy and/or implementation guidance (if any)?

Recommendation 10: “There must be a base contract provided to applicants at the beginning of the application process”

Recommendation 14: “The initial registry agreement term must be of a commercially reasonable length.”

Recommendation 15: “There must be a renewal expectancy.”

Recommendation 16: “Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.”

Implementation Guideline K: “ICANN should take a consistent approach to the establishment of registry fees.”

Implementation Guideline J: “The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing marketplace.”

b. How was it implemented in the 2012 round of the New gTLD Program?

A single base Registry Agreement (RA) with one Annex and a number of Specifications, developed with community input over the course of numerous iterations of the Applicant Guidebook, was employed in the 2012 round. Although the base RA was applied uniformly amongst all Registry Operators, there were certain provisions in the main body of the RA that applied only to Registries owned or operated by National or Local Governments and/or International Governmental Organizations. In addition, Annex A contained clauses that were uniform amongst all Registry Operators and others that included proposed Registry Services approved during the application process.

The RA also contained two Specifications which were specific to certain registry types (Specification 12 for community-based applications and Specification 13 for .Brands. The contents of Specification 12 were tailored to each individual community-based registry based on the commitments made by the applicable Registry Operator in its gTLD Application, while Specification 13 for .Brands were uniform for all qualifying Registry Operators.

Finally, Specification 11 contained "Public Interest Commitments" (PICs). There were several types of PICs included in the RA. Mandatory PICs were those applicable to all Registry Operators and which were uniform amongst all Registries. Voluntary PICs based upon commitments made by Registry Operators in response to early warnings issued by one or more Governments were customized to the applicable representations made. With respect to certain sensitive strings, a third type of PIC was included in the applicable Registry Operator's Specification 11 in response to GAC Advice.

c. What are the preliminary recommendations and/or implementation guidelines?

The Work Track continues to support the original policy recommendations and implementation guidelines upon which the 2012 Round was based. However, a clearer, structured, and efficient method for obtaining exemptions to certain requirements of the RA, which allows ICANN to consider unique aspects of Registry Operators, TLD strings, as well as the ability to accommodate a rapidly changing marketplace is needed.

d. What are the options under consideration, along with the associated benefits / drawbacks?

~~None being considered at this time.~~

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e. What specific questions are the PDP WG seeking feedback on?

1. If ICANN were to have a "clearer, structured, and efficient methods for obtaining exemptions to certain requirements of the RA", how can such a process be structured to consider unique aspects of Registry Operators and TLD strings, while at the same time balancing ICANN's commitment to Registry Operators that it treat each Registry Operator equitably?¹
 - a. At a high level, there was a suggestion that for exemptions or exceptions, the proposer could provide the specific problematic provisions, the underlying policy justifications for those provisions, and the reasons why the relief is not contrary to those justifications. Does this seem like a reasonable approach? Why or why not?

¹ See [Section 3.2 of the RA](#) which states: "ICANN shall not apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and shall not single out Registry Operator for disparate treatment unless justified by substantial and reasonable cause."

2. The "Public Interest Commitment (PIC) Standing Panel Evaluation Report" dated March 17, 2017² in the case of Adobe Systems Incorporated et al. v. Top Level Spectrum, Inc., d/b/a/ Registry, LLC et al., states the following:

Second, the Panel notes that PIC (3)(a) of Specification 11 imposes no obligation on Respondent as the Registry Operator itself to avoid fraudulent and deceptive practices. Third, the Panel finds that Respondent's Registry Operator Agreement contains no covenant by the Respondent to not engage in fraudulent and deceptive practices.³

Should this Work Track recommend that ICANN include a covenant in the RA that the Registry Operator not engage in fraudulent and deceptive practices? Please explain.

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f. Deliberations

The Work Track recognizes that its deliberations and outcomes may be dependent on the work in a number of different areas still under discussion. However, the Work Track believes that it can discuss high-level aspects of the RA, recognizing that decisions in other parts of the Working Group may in fact impact the precise language in the agreement instead, a step envisioned to take place during implementation. As such, the Work Track has conducted preliminary discussions on different approaches to the structure of the base RA.

Some of the Work Track's biggest concerns were not about the structure of the RA, but rather the fact that the agreement was modified after program launch. As such, the Work Track believes that the base RA should not be modified after program launch, except in exceptional cases, with substantial community input, and through a consistent procedure. In this regard, the Work Track supported the finding in the Program Implementation Review Report⁴, which suggested that the community should, "Explore the feasibility of finalizing the base Registry Agreement before applications are submitted or establishing a process for updating the Registry Agreement."

Single vs. Multiple Base Registry Agreement(s):

In discussing the RA, the Work Track spent the bulk of its time on considering whether there should be a single base RA with Specifications, as is currently in place, or move to develop multiple base RAs to allow for more specific and tailored registry operating models and needs.

The arguments for a single base RA focused on predictability for applicants and end-users, fairness, especially in relation to existing Registry Operators (ROs) from the 2012 round, and efficiency for ICANN Legal and applicants in executing the agreement. The simplicity and consistency of a single agreement is also seen as more efficient for those reviewing the agreement and ICANN Contractual Compliance for enforcement purposes.

² See Exhibit A of https://www.icann.org/uploads/compliance_notice/attachment/911/serad-to-westerdal-16mar17.pdf.

³ See https://www.icann.org/uploads/compliance_notice/attachment/911/serad-to-westerdal-16mar17.pdf P. 17.

⁴ See report here: <https://newgtlds.icann.org/en/reviews/implementation/program-review-29jan16-en.pdf>

The primary arguments for different agreements focused on the need for ICANN to recognize the different business models for operating TLDs and the fact that exemptions were difficult to obtain in the 2012 round, indicating that it may be beneficial to have different versions from the outset. Some within the Work Track argued that if a base RA for certain types was simpler and with fewer provisions, that could potentially make things easier for the RO, ICANN Legal, and the general public. However, the Work Track noted there was a lack of clear and definitive boundaries around potential categories of TLDs that would make the creation of separate agreements both feasible and warranted. The issue of categories is also being discussed as an overarching issue within the Working Group. Noting the difficulties in reaching agreement on TLD categories, the Work Track acknowledged that creating an exhaustive set of specific and separate agreements in advance of the program launch, intended to support the needs of all types of applicants, was likely to be exceedingly difficult.

In reviewing Community Comment 2 (CC2), much of the feedback was supportive of continuing the single RA model with Specifications. The Registries Stakeholder Group (RySG) suggested that a single RA, where certain clauses are only applicable based on the nature of the registry is functionally the same as a suite of different RAs. However, the RySG noted that practically and operationally, a single RA is far simpler to develop, implement, and execute. Other comments noted that establishing separate RAs for different categories might actually be harmful, using the addition and removal of Specification 13 as an example of the flexibility from a single RA with an exemptions-based model.

While there was initially a fair amount of support for separate agreements, there was eventually convergence within the Work Track and CC2 comments to maintain the single base RA with core provisions, but allow exemptions via specifications. However, the Work Track noted that the time and uncertainty in granting exemptions, as was seen in the development of Specification 13, can be protracted, uncertain, and hard won. There was wide agreement that the process to seek exemptions should be streamlined, though there was no agreement on how this might be practically accomplished and operationalized. At a high level, there was a suggestion that for exemptions or exceptions, the proposer could provide the specific problematic provisions, the underlying policy justifications for those provisions, and the reasons why the relief is not contrary to those justifications.

Other Topics:

The Work Track briefly discussed whether further restrictions might be needed in regards to sunrise periods and landrush, but acknowledged that this is a topic that the Review of All Rights Protections Mechanisms in All gTLDs would consider. From the deliberations, no specific agreements were reached. However, concerns were raised in CC2, noting that in some cases, registries were charging a higher fee for names during sunrise versus general availability. Some felt this was circumventing the intended purpose of rights protection mechanisms. Some comments asked how holders of TMCH-recorded marks might be given first refusal before the name is released from reservation. Others noted that so-called "predatory pricing" might be dealt with by implementing more explicit fraud provisions in Public Interest Commitments (PICs). To the extent there is support within the WG to do so, there may be a connection point with section [1.3.2] on the Global Public Interest, which discusses PICs. There may also be a connection to the Accountability Mechanisms & Post-Delegation Dispute Resolution Procedures, in section 1.8.2, which noted that the Public Interest Commitments Dispute Resolution Procedure (PICDRP) can only enforce what is captured in agreements, which currently does not contain explicit fraud provisions.

One other topic the Work Track discussed was whether the base RA should be available in different languages. It was noted that the RA was indeed provided in different languages, but it needed to be acknowledged that the English version of the RA would control. There was no agreement for suggested changes on this topic.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

The Work Track recognizes that individual provisions of the Registry Agreement may need to be changed to reflect the policies adopted by other relevant PDPs impacting new gTLDs, the results of the CCT-RT Final Report as well as the final recommendations of this Working Group, including those adopted with respect to Geographic Names at the Top-Level in Work Track 5.

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1.10.2 Registrar Non-Discrimination & Registry/Registrar Standardization

a. What is the relevant policy and/or implementation guidance (if any)?

Recommendation 19: "Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars."

The GNSO launched a PDP on the vertical integration of Registries and Registrars for the new gTLDs in 2010 (VI-WG). The VI-WG released an Initial Report on August 18, 2010 which contained a number of proposals to address vertical integration; none of which received consensus support. ICANN recognized that although the then-current contracts with Registries and Registrars allowed Registrars to operate as registries, but disallowed registries from operating or acquiring registrars. It therefore resolved to remove the restrictions on cross ownership between registries and registrars and to create new provisions for the Base RA that protected against the misuse of data and violations of a new registry code of conduct. ICANN also retained the ability to refer any cross ownership issues to relevant competition authorities.

b. How was it implemented in the 2012 round of the New gTLD Program?

As described above, the previous restrictions against registry and registrar cross-ownership from the 2000 and 2005 New gTLD rounds were removed. In its place, ICANN included Specification 9 in the Base Registry Agreement. It contained a Registry Code of Conduct, which required registries to utilize accredited registrars and to maintain separate books and records with respect to cross-owned organization. Certain exemptions to the Code of Conduct were subsequently approved by the ICANN Board of Directors, particularly with Brand TLD Registries (in Specification 13) as well as with respect to entities that restricted their TLDs to only themselves and/or their Affiliates.

c. What are the preliminary recommendations and/or implementation guidelines?

Recommendation 19 should be revised to be made current with the current environment:

Registries must use only ICANN accredited registrars in registering domain names and may not discriminate among such accredited registrars, *unless an exemption to the Registry Code of Conduct is granted*.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None being considered at this time.

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e. What specific questions are the PDP WG seeking feedback on?

- In response to feedback from CC2, Work Track members have suggested that .Brand registries as well as any Registry Operator granted an exemption from the Code of Conduct (as set forth in Specification 9 of the Registry Agreement), should not only be able to limit the number of registrars that they have to use, but should also have the ability to receive a complete exemption from using any ICANN-Accredited Registrars at all in the operation of their TLD by making them equally exempt from section 2.9 of the Registry Agreement. In connection with the above proposal, the Work Track is soliciting feedback on the following:
 - Should a complete exemption be available to these registries? Please explain.
 - If complete exemptions are granted, are there any obligations that should be imposed on .Brand Registries to ensure that any obligations or registrant protections normally found in Registrar Accreditation Agreements that should be included in .Brand Registry Agreements if they elect to not use any ICANN Accredited Registrars?
 - Work Track members have suggested that input from the Registrars Stakeholder Group as well as the Brand Registry Group, on this topic, would benefit further deliberations and any final recommendations. The Work Track makes note that feedback from all parties will be fully considered and contribute to further developments.
- Are there any other additional situations where exemptions to the Code of Conduct should be available?
- There are provisions in the Registrar Stakeholder Group charter⁵ that some feel disfavor those who have been granted exemptions to the Code of Conduct. In the preliminary recommendation above, would it be better to phrase it as, "unless the Registry Code of Conduct does not apply" rather than, "unless an exemption to the Registry Code of Conduct is granted"?

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f. Deliberations

The Work Track addressed and discussed the subject of Registrar Non-Discrimination and Registry/Registrar Standardization in detail. Under these headings the Work Track reviewed the history of how the environment switched from registry and registrar separation to the allowance of Vertical Integration (VI). The Work Track also examined the initially proposed potential

⁵ Charter here: <http://icannregistrars.org/wp-content/uploads/2016/02/rmsg-charter-30may14-en-1.pdf>

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benefits and harms of Vertical Integration. The Work Track reviewed the mechanisms introduced to deter abusive activity in the form of the Code of Conduct and Section 2.9 of the Registry Agreement and then explored whether those mechanisms have fulfilled their purpose or if additional mechanisms are required.

Vertical Integration:

At an early stage, the Work Track agreed that returning to an environment where registrars and registries are completely separate is impractical. However, the potential benefits and harms of VI were reviewed to determine if changes around the edges might be needed.

Potential Concerns and Benefits Anticipated Prior to VI:

Potential Concerns	Potential Benefits
Could hamper competition at the retail level	Allows for economies of scale (can also be seen as a concern regarding competition), which could be passed to consumers
Could result in inequitable access to Registry Services or data	Helpful to Single User Single Registry models or other models with a limited registrant base
Could make compliance more complex	Registries could be their own distribution chain without having to depend on other entities alone to carry their names
Could make domain tasting easier	
Could impact registrant choice	

**Vertical integration is allowed, but non-discriminatory access to Registry Services must be provided to all accredited registrars party to an RRA with the relevant RO. The pros/cons below assume a limited waiver, similar to Spec 13, to the non-discriminatory access clause.*

Pros for allowing exceptions to non-discriminatory access to Registry Services	Cons for allowing exceptions to non-discriminatory access to Registry Services
Consistent with the limited waiver provided by Spec 13	Contrary to existing recommendation 19
Supportive of single registrant ROs	

In continuing with its deliberations, the Work Track started with a series of questions:

- Do the mitigations of harm currently in place work?
- If we did not adequately mitigate these harms, what do we need to do to change that?
- If we did not realize the benefits what do we need to do?
- Has the Registry Code of Conduct hampered the ability of registries or registrars from taking advantage of the potential benefits from the relaxed requirements?
- Does the Registry Code of Conduct need to be adjusted?
- Are the mechanisms for exemptions to the Registry Code of Conduct sufficient?

Through discussions on the above questions, the Work Track determined that it needed to request data from the ICANN Organization:

1. Has Contractual Compliance received any complaints about and related to vertically integrated entities?
 - a. If so, have any been determined to have a foundation?
 - b. If so, are there any statistics or other information you might be able to share?
2. In performing audits of registries and registrars, is vertical integration an element of the reviews?
3. If so, are there any statistics or other information you might be able to share?

ICANN Organization provided responses⁶ and after an initial review of the input, the Work Track developed follow-up questions:

1. How many registry operators are vertically integrated?
2. Of that number, how many operate multiple TLDs?
3. How many complaints were there against Registry Operators (overall - regardless of whether due to vertical integration)?
4. Of the complaints referenced in the 1.b answer, how many Registry Operators were those 10 complaints against? (Does this include complaints dealing with 2.9 of RA?)
5. How many of those Registry Operators own more than one TLD or multiple TLDs?
6. How many of those Registry Operators were required to perform some kind of remediation regardless if they were found to be in breach or not?

ICANN Organization provided responses^{7 8} to these follow-up questions, though the Work Track has not had the opportunity to consider them in full, as they were received recently relative to the drafting of this Initial Report. *To that extent, outcomes contained in this report will not have taken this new feedback into account.*

Most comments from CC2 suggested that there are no significant issues or harms arising from VI, but encouraged ICANN to provide greater flexibility for obtaining exemptions from the Specification 9 Code of Conduct in the Registry Agreement. The Business Constituency (BC)

⁶ See response here: <https://community.icann.org/x/RT2AAw>

⁷ See response from Contractual Compliance:
https://community.icann.org/download/attachments/58735941/New%20gTLD%20Subsequent%20Procedures%20Request%20for%20Data%20%28vertical%20integration%29_mar18.pdf?version=1&modificationDate=1520381396000&api=v2

⁸ See response from Global Domains Division:
<https://community.icann.org/download/attachments/58735941/Sub%20Pro%20PDP%20WT2%20VI%20GDD%203-2018.pdf?version=1&modificationDate=1521848579000&api=v2>

supported exemptions where the Registry Operator can demonstrate that the term comprising the TLD string directly corresponds to a product name of the Registry Operator, though the Work Track was unclear what this meant precisely. The Work Track welcomes additional clarity from the BC on these initial comments. The Registries Stakeholder Group (RySG) identified a potential area of ambiguity, where a registry that has obtained a Code of Conduct exemption is still bound to section 2.9, which states, "Subject to the requirements of Specification 11, Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with the registry-registrar agreement for the TLD."

Regarding the comments for CC2 Question 2.6.3, some Work Track members suggested allowing full integration for .Brand registries and any "single registrant" TLD. In essence, this proposes leaving out the registry/registrar relationship requirement and the other aspects of section 2.9 for Code of Conduct exempt TLDs. The Work Track invites comments on whether this is seen as problematic, especially from the registrar point of view.

In summary, from the deliberations, there appears to be general agreement for maintaining the Vertical Integration mechanism while allowing greater flexibility on granting Code of Conduct exemptions to registry operators that are qualified. Since there is no agreement on what additional mechanisms should be developed in order to determine the sort of exemptions that may be granted, the Work Track welcomes input and intends to consider the topic further.

Although this group has made significant progress in the discussion of Vertical Integration, the theme of Registry/Registrar Standardization, and the issues that arose from an increase in variability of registries and their RRAs with registrars, may warrant additional Work Track consideration in the future. While there are some provisions in the RA that govern the relationship between registries and registrars, some have cautioned that ICANN should be wary of attempting to dictate terms of a contract to which ICANN is not a party.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

None identified at this time.

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