

22 September 2015

Steve Crocker
Chairman, ICANN Board of Directors

Dear Steve,

Re: ICANN Board New gTLD Program Committee Resolutions Concerning Exclusive Registry Access for gTLD Strings Representing Generic Terms

Thank you for your letter of 27 July 2015 requesting that the GNSO include, as part of its policy development processes related to New gTLD subsequent procedures, the subject of exclusive registry access for generic strings serving a public interest goal. I can confirm that the Preliminary Issue Report on New gTLD Subsequent Procedures, which is currently available for public comment (<https://www.icann.org/public-comments/new-gtld-subsequent-prelim-2015-08-31-en>), contains a discreet subject for each of Closed Generics (Section 4.3.11 of the report) and the Global Public Interest (4.3.9 of the report), as each pertains to New gTLDs. Excerpts of each of these sections can be found in Annex A to this letter.

The GNSO Council would, however, like to take this opportunity to note that there are challenges related to the definition or scope of “global public interest”, as well as determining how this should be integrated into the New gTLD Program, especially as it relates to exclusive registry access to generic strings. Therefore, we welcome any input that you or the ICANN Board may have on this subject, which could be returned either via correspondence or perhaps as public comment to the Preliminary Issue Report.

Further, the GNSO Council notes that, within ICANN and associated with ICANN’s Strategic Planning, there is currently an effort to develop and implement a global public interest framework bounded by ICANN’s mission. The GNSO Council intends to keep current with these efforts to determine how they may influence the GNSO’s work, especially as it relates to New gTLDs.

Thank you for your interest in this subject.
Sincerely,

Jonathan Robinson
Chair, ICANN GNSO Council

Annex A

Sections 4.3.9 on Global Public Interest and 4.3.11 on Closed Generics as found in the Preliminary Issue Report on New gTLD Subsequent Procedures¹ are available below:

4.3.9 Global Public Interest

- *4.3.9.1 Explanation of Subject*

One of the governing elements in introducing new gTLDs was that they adhere to ICANN's Mission and Core Values, with the subject of Global Public Interest specifically identified in Article 1, Section 2.6, which states:

Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.

The 2007 Final Report did not attempt to define, or measure the impact of the introduction of new gTLDs on the public interest. Only Recommendation 6 appeared to provide guidance on the subject, though it was limited to the composition of the string, not regarding the behavior of the registry:

Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law.

Examples of such principles of law include, but are not limited to, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination, intellectual property treaties administered by the World Intellectual Property Organisation (WIPO) and the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS).

- *4.3.9.2 Questions and Concerns Related to Subject*

The ICANN Board provided suggestions on areas for possible policy work in Annex A to a resolution passed on 17 November 2014 on Planning for Future gTLD Application Rounds². One of those areas identified was focused on “public interest guidance”, which the DG found to capture their issue sufficiently and succinctly:

The New gTLD Program was developed in the spirit of advancing the public interest; however, existing policy advice does not define the application of “public interest” analysis as a guideline for evaluation determinations on individual applications. Issues such as those identified in GAC advice on safeguards, the development of Public Interest Commitments (PICs), and associated questions of contractual commitment and enforcement may be an area for policy development.

Section 4.4.1 on Applicant Freedom of Expression contains substantial analysis around human rights and the global public interest and may be of some use to the discussion around this subject.

¹ See: <https://www.icann.org/public-comments/new-gtld-subsequent-prelim-2015-08-31-en>

² See: <https://www.icann.org/resources/board-material/resolutions-2014-11-17-en#2.b>

- 4.3.9.3 *Relevant Guidance*

- Annex A - <https://www.icann.org/en/system/files/files/resolutions-annex-a-17nov14-en.pdf>

- 4.3.9.4 *Rationale for Policy Development*

ICANN's mission is primarily of a technical coordination role, though its core values note that in carrying out this mission, it should be done in a fashion that takes into account the public interest. A potential PDP-WG on New gTLD Subsequent Procedures may want to consider the issues identified above for possible policy development.

It should be noted that the discussion of global public interest is not isolated to the New gTLD Program and is possibly beyond the scope of this potential PDP-WG on New gTLD Subsequent Procedures. It may be more appropriate to integrate the definition of global public interest and ICANN's policies towards those interests, which would presumably be developed within the wider community. In particular, the development and implementation of a global public interest framework is part of ICANN's Strategic Plan³ and the work related to this effort should be taken into account during PDP-WG deliberations.

4.3.11 Closed Generics

- 4.3.11.1 *Explanation of Subject*

The 2007 Final Report did not provide guidance related to closed generics (e.g., restrictions on registration policies) and consequently, the AGB did not necessarily provide specific specifications or guidelines on the issue. However, the base agreement did include a provision that allowed an exemption to the Registry Operator Code of Conduct in specific instances:

Registry Operator may request an exemption to this Code of Conduct, and such exemption may be granted by ICANN in ICANN's reasonable discretion, 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 its own exclusive use, (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.

After applications from the 2012 New gTLD Program round were published, concerns were raised in public comments and by the GAC, via Early Warnings and later via GAC Advice, that some registries proposed to use their applied-for generic string in an inappropriately exclusive manner, which some felt created an unfair competitive advantage and was against the public interest. As a result of these concerns, the ICANN Board requested that ICANN staff open a public comment forum on the topic of "closed generic" TLDs⁴. Accordingly, staff opened the public comment

³ See: <https://features.icann.org/plan/objective/9622286347d8ofd5fd89d3b537417aeb>

⁴ See ICANN Board Resolution: <https://features.icann.org/closed-generic-top-level-domains>

period on 5 February 2013 and closing it on 7 March 2013⁵. Coinciding with the closure of the public comment forum on the topic, the GNSO submitted correspondence to the ICANN Board⁶, noting that the GNSO did not have adequate time during the short period to establish formal policy guidance, though GNSO Stakeholder Groups and Constituencies Groups had submitted their views through the public comment forum. ICANN staff compiled and analyzed the public comments, publishing their report of public comments on 8 July 2013⁷.

- *4.3.11.2 Questions and Concerns Related to Subject*

The subject of closed generics is not new, as indicated by the text above. While the DG identified closed generics as a topic of concern, wondering whether they should be allowed, specific concerns were not identified. However, the public comment forum for closed generics received substantial input in identifying a number of key issues, which will be briefly summarized here and can be viewed in their entirety in the staff public comment summary and analysis discussed above.

Some questions, concerns, and suggestions include:

- 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 to define generic.

This list is by no means exhaustive and is intended to be merely illustrative of the types of questions and suggestions that have already been raised and should be taken into account if and when a potential PDP-WG on New gTLD Subsequent Procedures deliberates on this subject.

- *4.3.11.3 Relevant Guidance*

- Closed generics public comment summary and analysis: <https://www.icann.org/en/system/files/files/report-comments-closed-generic-08jul13-en.pdf>
- GAC Advice Safeguards Category 2.2: <https://gacweb.icann.org/display/GACADV/2013-04-11-Safeguards-Categories-2>
- Board Resolution: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-06-21-en#2.a>

- *4.3.11.4 Rationale for Policy Development*

The topic of closed generics, and when exclusive registry access may be appropriate, has been a topic for extensive discussion within the community and there remain many open questions. In a

⁵ See: <https://www.icann.org/resources/pages/closed-generic-2013-02-05-en>

⁶ GNSO Correspondence: <http://gns0.icann.org/en/correspondence/robinson-to-crocker-chalaby-07mar13-en.pdf>

⁷ See: <https://www.icann.org/en/system/files/files/report-comments-closed-generic-08jul13-en.pdf>

resolution⁸, the ICANN Board has specifically requested that the GNSO include this topic in its policy work for new gTLD subsequent procedures, stating:

NGPC requests that the GNSO specifically include the issue of exclusive registry access for generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.

With substantial community interest in the topic, and the specific request from the ICANN board, exclusive registry access for generic strings will likely require policy development.

⁸ Board resolution: <https://www.icann.org/resources/board-material/resolutions-new-gtld-2015-06-21-en#2.a>