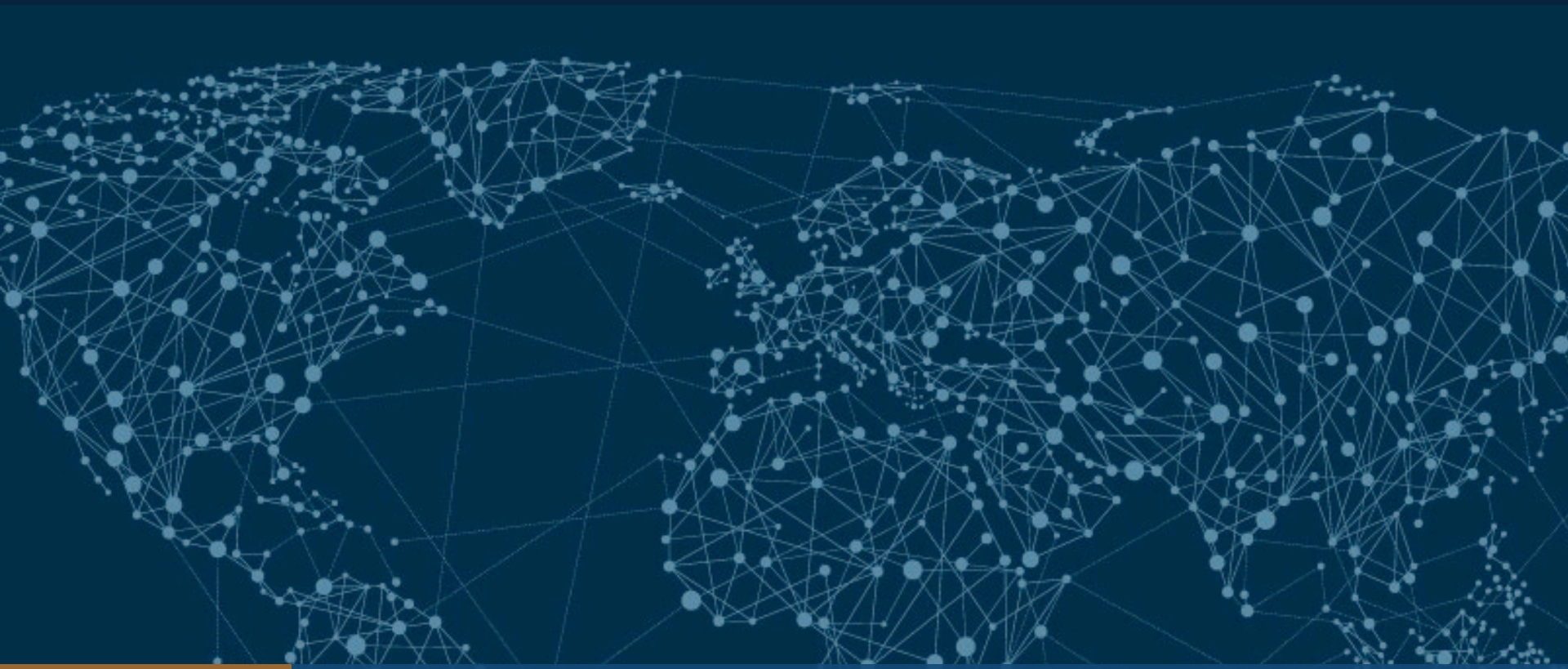

CC2 Discussion: Registrant Protections

WT2 | 24 August 2017

Agenda

1. Welcome and Introduction
2. SOI Updates
3. Discussion Recap
4. CC2 Comments

1. Introduction

- Goal: To move towards deliberations and proposals for steps forward for the initial report.

- Schedule:
  - 24 August 2017 meeting on Registrant Protections.
  - 7 September 2017 meeting on Registrant Protections and also breaking into Closed Generics if we have time.

2. Discussion Recap: Where are we at now?

Our discussion of Registrant Protections has covered several areas and the points of discussion up until now are as below.

COI (Continued Operations Instrument):

- Many complications and limitations are identified with the COI to operate as a funding mechanism for EBERO.
- Alternative methods of funding have been proposed.

EBERO (Emergency Back End Registry Operator) Process:

- While we have discussed and analyzed data about occurrences of EBERO, there has been little support for making changes to EBERO at this time.

Background Screening Process:

- Different requirements for the Background Screening based on TLD type have been explored. For example, different requirements for Closed and Open TLDs.

3. CC2 Questions: 2.3.1

2.3.1 - ICANN has included the following programs to protect registrants: an Emergency Back-End Registry Operator (EBERO), Continued Operations Instrument (COI), Data Escrow requirements, and Registry Performance Specifications in Specification 10 of the base registry agreement? Such programs are required regardless of the type of TLD. Are there any types of registries that should be exempt from such programs? If so, why? Do the above programs still serve their intended purposes? What changes, if any, might be needed to these programs if an RSP pre-approval program, discussed in section 1.1.1., were to be developed?

3. CC2 Questions: 2.3.1 Comments

ALAC and Afilias supported maintaining current protections.

Excerpts:

"Current protections **should remain**. . ." – ALAC

"Insofar as the EBERO is able to support the largest TLDs by registration and usage, e.g., WHOIS, DNS, SRS interactions, the **EBERO model should be sufficient** as defined. . ." – Afilias

3. CC2 Questions: 2.3.1 Comments

Jim Prendergast recommended re-examining the entire EBERO concept.

Excerpt:

"The entire **EBERO concept need to be re-examined**. It is an ICANN created artificial safety net that ensures no registry ever fails. That is not how markets work. ICANN is supposed to be ensuring competition in the registry space. **By not allowing registries to fail, they are preventing full competition from happening**." – Jim Prendergast

3. CC2 Questions: 2.3.1 Comments

John Poole stated that registrant protections should be expanded and no registries should be exempt.

Excerpt:

"[Are there any types of registries that should be exempt from such programs?] NO! [What changes, if any, might be needed to these programs if an RSP pre-approval program, discussed in section 1.1.1., were to be developed?] **Registrant Protections are PATHETIC need to be greatly expanded**—this is one of the BIG failings of ICANN and the 2012 Round." – John Poole

3. CC2 Questions: 2.3.1 Comments

Demys, Nominet, BRG, Valideus, and RySG recommended adjusting registrant protections to provide exemptions for closed TLDs.

Excerpts:
"Brand TLDs should be **exempt from the requirements for an EBERO, COI or Data Escrow**. . . The true purpose of all these measures is to protect an end-user of a domain in the case of the registry business failing to operate. When the only end-user is the RO as well, these measures do not protect anyone." – Demys

"Registrant protection is a proper objective, but these programs appear to have been drawn up on the basis of all new gTLDs being an open registration model. It seems total overkill for a closed .BRAND new gTLD to have such failsafe protections built in as mandatory. . . **Where there are no 'retail' domain registrants EBERO/ COI/ Escrow are all unnecessary and not appropriate in our view**." -- Nominet

3. CC2 Questions: 2.3.1 Comments

"The registrant protection mechanisms were conceived on the basis of applicants replicating traditional models of selling and distributing domains to third parties. **With the introduction of different models, whereby the registry operator (and its affiliates and TM Licensees) is the sole registrant, these safeguards are meaningless**. In effect, they are having to safeguard themselves, which is an unnecessary and unreasonable burden, which should not be required in future." – BRG

"As indicated, these provisions are intended to provide protection for third party registrants. Where a Brand TLD **qualifies for specification 13, or for registries which have been granted an exemption to the specification 9 code of conduct**, the classes of registrant are narrowly defined and limited to the registry operator, or for specification 13 registries, to affiliates and trade mark licensees - in other words to group companies and third parties who have a direct contractual relationship with the registry. **Consequently, these registrant protection provisions seem excessive and unnecessary**. It is possible, of course, that a specification 13 registry operator might have a number of affiliates and trademark licensees, but this possibility does not necessitate all specification 13 registries being subject to these obligations. Consideration could be given to a threshold level of registrants after which the Brand registry would be require de to put these registrant protections in place." – Valideus

3. CC2 Questions: 2.3.1 Comments

". . .**closed TLDs, for which the registry is also the registrant should be exempt from EBERO and COI**. The protection provided to registrants by EBERO is consistency—in the event a registry goes out of business, the registrant will not lose their domain names. This is not necessary for a closed (and particularly brand) TLD as the registrant is the registry. Similarly, the COI's intent is to fund the EBERO in the event it is needed; where a registry/registrant of a closed TLD goes out of business, or decides to fold its registry business for any reason, the registry has, necessarily, already taken into account its own interests." -- RySG

3. CC2 Questions: 2.3.1 Comments

Afilias and RySG suggested that in cases where the Registry Operator is different from the Registry Service Provider, the RO is failing financially but the technology is working fine, it should be possible for customers to remain with the existing RSP.

Excerpts:

". . . streamlining is possible when a **Registry Operator is different from the Registry Service Provider**. To ensure stability, limit any service interruption, and/or remove transition burden to registrars, ICANN should **provide the current RSP the opportunity to continue managing the TLD and become the Registry Operator** (e.g., sign the base registry agreement for the specific TLD[s].)" – Afilias

". . .The EBERO concept makes sense and should be maintained if a Registry Operator serves a technical back-end function in addition to being the RO. In a case of a RO with a different technical back-end, however, it may not. Considering ICANN requirements, transitioning back-ends is a cumbersome process. In the case where the technology is working fine, but the registry operator is failing financially, it would make more sense to **leave the customers on the existing back-end instead of transitioning them to an EBERO and then again to a new Registry Operator and back-end**." -- RySG

3. CC2 Questions: 2.3.1 Comments

RySG, ALAC, and Jannik Skou provided additional comments regarding a potential RSP Program:

Excerpts:

"In the event where a pre-approval process is developed, **whether or not the registry is a closed registry should be taken into account when making the decision to implement EBERO and COI requirements against that registry**. The Escrow requirements and the Performance Specifications in Specification 10 seem fine." – RySG

"On possible development of an RSP program, while the ALAC does not see any benefits from the further expansion of new gTLDs into the domain system, benefits could be achieved by the proposed programme to **develop and enhance the technical and knowledge capacity of RSPs, especially for underdeveloped economies**." -- ALAC

"Am **against RSP Pre-approval Program** (See comments above)." – Jannik Skou

3. CC2 Questions: 2.3.2

2.3.2 - In the working group discussions, it became clear that the EBERO funding model requires review and potential modification. The current COI model is one that has proven to be difficult to implement for many registries, ICANN and even financial institutions. Are there other mechanisms of funding EBERO providers other than through Letters of Credit and/or other Continuing Operations Instruments?

3. CC2 Questions: 2.3.2 Comments

Jannik Skou, Nominet, John Poole, and RySG suggested alternatives to the COI model.

Excerpts:

". . . Generally, I see no need for COI. **Let the surplus cover or increase SLA for all other TLDs** if funds are needed." – Jannik Skou (excerpted from response to 2.3.1)

"Consider **charging 5000 USD in start up SLA – and let ICANN use that money to pay EBERO providers). Then you only contribute (have costs), if delegated**. The COI causes too many problems for non US Applicants (non US bank clients that is)." – Jannik Skou

3. CC2 Questions: 2.3.2 Comments

". . .We **suggest that ICANN does away with COI completely**. The costs of maintaining a hot standby EREBO could be met by **ICANN charging a small surcharge on a per domain basis for new gTLD registries** which require EBERO services by virtue of operating an open registry for 'retail' domain registrants. . . **Over time a contingency fund for EBERO could be built up by ICANN** – perhaps seeded by the surplus proceeds from round 1. . ." – Nominet

". . . each **bidder for a new gTLD would be required to deposit $1,000,000**. If the bidder was awarded rights to operate the new gTLD for a 10 year term, **ICANN would hold the $1,000,000 as a guarantee of performance** subject to charges for any breach or costs incurred by ICANN during the term of the RA. At the end of the term the balance of the $1,000,000 would be refunded or applied against the deposit required if the registry operator wanted to bid again to operate the gTLD." -- John Poole

3. CC2 Questions: 2.3.2 Comments

"The **COI**, which is the EBERO funding mechanism, is entirely **inefficient, complicated and over-kill**. Instead of insurance, where each party pays a certain amount to create a fund that would more than cover the percentage chance of failure, the COI requires each and every registry to fully fund the risk 100%. . ." -- RySG (excerpted from response to 2.3.1)

". . .we think that the COI model should be tossed out in favor of something more efficient and common-sensical. Alternatives to a COI would be **a fund, which would be funded by application fees.** Similarly, an EBERO and **COI should not be necessary if a third party back-end agreed to maintain registrants on its platform for a certain time period as a commercial matter**. Perhaps a certificate from a back-end provider of this requirement would be sufficient to avoid the EBERO requirement and its funding." – RySG

3. CC2 Questions: 2.3.2 Comments

RySG provided additional guidance for ICANN if the COI requirement remains in the future.

Excerpt:

"Should ICANN choose to maintain a COI requirement, **Letters of Credit (LOCs) are the simplest and most effective means of accomplishing the EBERO funding requirement**. . . With that in mind, we encourage ICANN to be more understanding of business realities when calculating the size of LOCs. . . **We suggest a percentage level—a 10% change in estimated DUMs** (not a 10% change in historic DUMs but in estimated and LOC-funded DUMs). We also suggest an **annual review**. Similarly, the **language requested by ICANN for LOCs was untenable** for most banks. ICANN should consider more commercially reasonable language, and ensure that this is provided to applicants in advance, to avoid the issues registries experienced during the 2012 round in endeavoring to secure LOCs. . .For larger registries, especially portfolio registries, there must be a **means of more easily incorporating additional TLDs into an LOC** (and contra-wise, removing them in the event of a sale). . . -- RySG

3. CC2 Questions: 2.3.2 Comments

"The **COI**, which is the EBERO funding mechanism, is entirely **inefficient, complicated and over-kill**. Instead of insurance, where each party pays a certain amount to create a fund that would more than cover the percentage chance of failure, the COI requires each and every registry to fully fund the risk 100%. . ." -- RySG (excerpted from response to 2.3.1)

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3. CC2 Questions: 2.3.3

2.3.3 - ICANN staff, in its Program Implementation Review Report, identified a number of challenges in performing background screening, particularly because there were many different types of entities to screen (e.g., ranging from top twenty five exchanges to newly formed entities with no operating history) and because it is difficult to access information to conduct background screenings in some jurisdictions/countries. Do you think that the criteria, requirements, and/or the extent to which background screenings are carried out require any modifications? Should there be any additional criteria added to future background screenings? For example, should the previous breach by the Registry Operator, and/or any of its affiliates of a Registry Agreement or Registrar Accreditation Agreement be grounds for ICANN to reject a subsequent application for a TLD by that same entity and/or its affiliates? Why or why not? What other modifications would you suggest? Should background screening be performed at application time or just before contract-signing time? Or at both times? Please explain.

3. CC2 Questions: 2.3.3 Comments

RySG supported maintaining the current criteria for background screenings.

Excerpt:

"The **current criteria for background screenings are appropriate** and were developed with the intent to protect registrants. Despite the challenges of performing the background screenings on some of the people and companies involved in the application, they **should continue in substantially the same form**. . ." -- RySG

3. CC2 Questions: 2.3.3 Comments

John Poole supported stricter requirements for background screening.

Excerpt:

"[Do you think that the criteria, requirements, and/or the extent to which background screenings are carried out require any modifications?] No, other than **make much stricter**." – John Poole

3. CC2 Questions: 2.3.3 Comments

Valideus, BRG, and Jannik Skou supported having different requirements for specific categories of applicants.

Excerpts:

As stated in the Application Guidebook: "Applying entities that are publicly traded corporations listed and in good standing on any of the **world's largest 25 stock exchanges** (as listed by the World Federation of Exchanges) will be deemed to have passed the general business diligence and criminal history screening." In subsequent procedures, **new gTLD applicants which satisfy this criteria should not be required to provide detailed information relating to the entity, its officers, directors, and major shareholders** if this will not be subject to background screening. . .As an additional point of review, **consideration should be given to whether such a listed entity should be subject to the same level of information disclosure as is required for private entities (relating to its subsidiary's officers and directors), if it chooses to apply for a new gTLD through one of its subsidiary companies.** Furthermore, there may be other **classes of applicant which are not listed corporations, as described above, where there will nonetheless also have been adequate screening** that would meet or exceed the screening that ICANN would perform. . ." -- Valideus

3. CC2 Questions: 2.3.3 Comments

"The **background check requirements imposed were not appropriate for all the different types of applicants**. In particular, the procedures and criteria should be improved for dotBrands which on the whole were publicly-listed companies. **It was unreasonable for ICANN to demand personal address and DOB information for these publicly-listed companies and it took a great deal of time and effort to persuade ICANN to relax the original demands**. For these entities, it should be sufficient to list the same amount of detail for company directors as appears on corporate websites and company registration offices. A default of the registered office address or that of the Company Secretary should be provided for all directors." – BRG

"Suggest that **GEO TLDs (run by public authorities) and ANY applicant listed on any stock exchange do not go through criminal background checks**, as public authorities already do that." – Jannik Skou

3. CC2 Questions: 2.3.3 Comments

RySG, Valideus, Jannik Skou, and Nominet provided input on facts that should or should not disqualify applicants.

Excerpts:

"Currently, **previous adjudications of cybersquatting** would bar a person or company from participating in a TLD application. This makes sense because of the risk of a "cybersquatting TLD." However, **breach of an RA or RRA may happen for a number of reasons and should not be grounds, de facto, for disqualification**" – RySG

"Anyone who has been found liable for cybersquatting, and registrants who have lost more than two Uniform Dispute Resolution Policy (UDRP) cases, should not be allowed to participate as an officer of a registry." – Valideus

3. CC2 Questions: 2.3.3 Comments

"Also, **remove (or do enforce) any reference to number of lost UDRPs or similar**, as according to various blogs (shold be checked) large and small applicants /RSPs in the 2012 rounds were actually not qualified!" – Jannik Skou

". . . Clearly an applicant who previously ran a failed new gTLD should be scrutinised particularly carefully. But in general **each application and new gTLD contract should be considered as discrete transactions**, and we don't think that performance in one area (such as breach of SLAs where there may be specific one-off reasons for failure) should in principle be relevant in considering an application for another unconnected new gTLD." -- Nominet

3. CC2 Questions: 2.3.3 Comments

Afilias advocated for ensuring that ICANN is aware of changes in management or ownership structure and integrating ICANN Compliance in to the application review process.

Excerpt:

". . . Legal entities should have cleared identified **individuals in management positions**, the very people with whom ICANN will interact and hold accountable. **These are the parties ICANN should evaluate, both from a cursory legal screening as well as other criteria relevant to ICANN's mission of maintaining a secure and stable Internet and promoting competition.** This explicitly demands that **ICANN be made aware of any changes in management or ownership structure** throughout the application review process; changes would be a trigger for additional screening. . . History also provides relevant fitness information for ICANN. . . As noted in our response to 1.1.3 and 1.1.7, **ICANN Compliance should be integrated into the application review process** as they are acutely aware of past and current performance. . ." – Afilias

3. CC2 Questions: 2.3.3 Comments

BRG, John Poole, RySG, and ALAC provided input on timing of the background screening.

Excerpts:

In respect of the **timing** of any due diligence that is required, **this should be performed at an early stage of the application process**, as the findings may disqualify applicants, stopping the entire process from having to be performed. However, **if the application process is lengthy, ICANN may need to repeat some vetting processes** prior to signing the RA, as circumstances and personnel may have experienced changes during the process period." – BRG

"Unless **new facts emerge or more than 2 years have passed since the applicant last qualified, why screen twice**?" – John Poole

3. CC2 Questions: 2.3.3 Comments

"Background screening should be performed **at the time of application** (and upon changes to an application) as well as at any time that the information changes post-contracting. This allows for consistency of result and guards against a disqualified person or company gaining control of a TLD after-the-fact." – RySG

"On timing for screening, the ALAC believes that it should be both **at the time of application** (to immediately weed out unsuitable applicants) **and at time of contract signing** (to ensure there have not been material changes in the application)." – ALAC