

Transfer Policy Review

Charter Questions on TDRP



TPR meeting #92 | 16 May 2023

Agenda

1. Welcome and Chair updates
2. Recap Outcomes - Last Week's Call
3. Charter Question g1
4. Charter Question g2
5. Charter Question g3 (time permitting)
6. AOB

Recap Outcomes - Last Week's Call

f1) Is additional data needed to support evaluation of the effectiveness of the TEAC mechanism? If so, what data is needed?

Summary

No new recommendations.

Respond to charter question by:

- Summarizing the data reviewed by the WG
- Identifying other types of information that would potentially support policy making in this group and in future review
- Summarizing limits to obtaining and analyzing this information

f6/f7) The Transfer Policy Review Scoping Team indicated that there are several factors that make a Registry Operator's obligation to "undo" a transfer under Section 6.4 of the Transfer Policy challenging:

- i. Registry Operators do not have access to the designated TEACs for each Registrar, making validation of an undo request nearly impossible.*
- ii. There is no way for Registry Operators to independently verify that a Registrar did not respond within the required time frame or at all since Registry Operators are not a party to, or copied on, communications between the Registrar TEACs.*
- iii. Transfer "undo" requests associated with the failure of a TEAC to respond are unilateral so there is no validation required prior to a Registry Operator taking action. This has, on occasion, led to a "he said", "she said" scenario.*
- iv. Follow on to f6 iii., if the policy were to be updated to allow for some level of validation by the Registry Operator prior to taking action, the requirement to "undo" a transfer within 5 calendar days of receiving an TEAC undo request leaves little to no time to attempt to validate the request prior to taking the action.*

To what extent are changes to the policy needed to address these concerns? Are there other pain points for Registry Operators that need to be considered in the review of the policy in this regard?

Summary

Item i: Policy staff is collecting additional information.

Item ii, iii, iv: Recommend no change. Response to charter question will summarize the deliberations.

TDRP Charter Questions g1, g2, and g3

g1) Is there enough information available to determine if the TDRP is an effective mechanism for resolving disputes between registrars in cases of alleged violations of the IRTP? If not, what additional information is needed to make this determination?

Status:

Information Reviewed:

- Case Decisions listed on TDRP Provider websites
- From the Transfer Policy Status Report:
 - Survey inputs
 - Amount of Transfer Dispute Cases, Won/Lost/No Decision, 2010 - 2017, page 30
 - Transfer Complaints Handled by Contractual Compliance, organized by closure code, pages 37-45
 - Transfer-Related Inquiries Received by ICANN's Global Support Center, 1 January 2015 - 23 May 2018, page 47
 - Global Support Center Transfer-Related Inquiries Received, 2015 - 2018, page 48
 - Examples of Transfer Dispute Cases, pages 83 and 84
- Working group requested and obtained new contractual compliance data – no valid cases related to TDRP reported from 1 September 2020 to 31 December 2022.
- Written early input and early deliberations focus on the fact that it is difficult to make conclusions from the available information about whether TDRP is effective, noting that 1. The TDRP must be viewed in the broader context of whether the Transfer Policy itself and the other available methods of resolution are effective (informal resolution, courts, etc), as well as the volume of problem transfers, which is currently unknown. 2. The small number of TDRP cases make it difficult to draw conclusions about how effectively the TDRP is handling and resolving disputes through that process.

g1 (continued)

g1) Is there enough information available to determine if the TDRP is an effective mechanism for resolving disputes between registrars in cases of alleged violations of the IRTP? If not, what additional information is needed to make this determination?

Additional Data Point:

- Forum reported that it received 11 TDRP filings in total, with 9 decisions and 2 withdrawals. 5 of the 9 decisions were filed prior to December 1, 2016 when publication was first required.

To Discuss

As a reminder, this question focuses specifically on whether there is enough information to evaluate if TDRP is an effective mechanism for resolving disputes between registrars in cases of alleged violations of the IRTP. We will discuss proposed recommendation to improve dispute resolution options as part of a different charter question (g3).

Is it sufficient to answer this charter question but summarizing the information/data that the WG used to support its deliberations on the TDRP, while noting that there are limitations to the available information about the broader context of how issues are resolved (or not) using the available mechanisms?

g2) The ADNDRC reported to the IRTP Part D Working Group that in some of the cases it processed, appellees and appellants failed to provide sufficient information to support arbitration. Is this an issue that needs to be examined further in the context of the policy?

Are the existing informational materials about the TDRP sufficient to ensure that registrars understand the process and the requirements for filing a dispute, including the information they need to give to the dispute resolution provider?

Status

- WG reviewed:
 - Requirements in Section 3.1 and 3.2.1 in the Transfer Dispute Resolution Policy.
 - WG reviewed decisions of cases published on providers' websites.
 - WG reviewed ICANN webpages providing information about dispute resolution related to transfers, including availability and applicability of the TDRP.
- Early written input does not point to any gaps in the policy itself. Some responses indicate that it may be useful as part of implementing updates to the Transfer Policy for ICANN org to review existing informational materials to determine if updates or clarifications may be appropriate.
- Note: Previous conversation of Rec. 27 may change language around documentary evidence - WG to keep this in mind as we discuss.

Discussion Questions

- Is the information in the policy clear? Does it need to be adjusted?
- As noted above, adjustments are expected following conversation of Rec. 27.

g3) If the TDRP is considered to be insufficient:

- i. Are additional mechanisms needed to supplement the TDRP?*
- ii. Should the approach to the TDRP itself be reconsidered?*

Status: Informal Resolution

- Some working group members have identified cost and time necessary to complete a TDRP as limitations to the process. As part of the “gap analysis” discussion, the working group extensively discussed proposals to create new requirements governing informal resolution between two registrars, some of which attempt to create a cheaper and quicker path to resolving disputes compared to the TDRP. To date, none of the proposals have reached agreement by the WG.
- **To ensure a focused discussion, today’s conversation WILL NOT focus on these proposals.**

g3 (continued)

g3) If the TDRP is considered to be insufficient:

i. Are additional mechanisms needed to supplement the TDRP?

ii. Should the approach to the TDRP itself be reconsidered?

Status: Dispute Resolution Mechanisms

- Some working group members have identified limitations to the current options available to registrants when there is a problem with a transfer:
 - Informal resolution: Gaining registrar may refuse to transfer the domain back to the losing registrar unless they are fully indemnified. Losing registrar may not provide that indemnification, resulting in no transfer back.
 - TDRP: The registrar might have different incentives than the registrant in making the decision about whether to initiate a TDRP. The registrant may not be able to convince a registrar to initiate a dispute.
 - Courts: Registrants may not have access to courts of mutual jurisdiction.
- Working group members noted that it may not be appropriate to expand the TDRP to allow registrants direct access, because the TDRP is designed around the assumption that the two parties are registrars. It relies heavily on internal registrar documentation.
- Some working group members have advocated for a recommendation that future work be completed to determine if a new mechanism for registrants should be created.

To Discuss

Is there evidence to support that there is a problem to solve? For example evidence of the following:

- Frequent instances of registrants asking registrars to file TDRP cases, and registrars refusing to do so due to time and cost, despite compelling evidence supporting the registrant's case?
- Frequent instances of attempts at informal resolution where there is compelling evidence of an improper transfer, but the Gaining Registrar is refusing to reverse the transfer absent indemnification, resulting in an unsatisfactory outcome?
- Frequent instances of registrants reporting to registrars that they cannot access a court of mutual jurisdiction to address stolen domains and/or improper transfers?
- Other examples of significant issues that may give rise to discussing a registrant option further?

If there is evidence to support that there is a problem, is a new dispute resolution process the best solution?

- For example, if the working group believes that domain name hijacking is a significant problem that is not being addressed sufficiently, could the need be met by focusing on protections to prevent improper inter-registrant and inter-registrar transfers from occurring?

As a reminder:

- The IRTP Part D recommended not to develop dispute options for registrants.
- The working group must provide a clear rationale if it believes that further work is needed on this issue.