

Minds + Machines Comments on Vertical Integration

I am a member of the Vertical Integration Working Group, which has been laboring for months to find a common position. None is to be found: the only agreement of substance is that everyone disagrees. It is therefore likely that the ICANN Board will have to cut the Gordian knot, and these comments are there for them to consider. These comments are adapted from a similar note sent to the Vertical Integration Working Group list on June 20. Nothing has changed since then.

In our view, cross-ownership and vertical integration restrictions are artifacts of 1999 conditions, and should be abolished in their entirety short of an actual showing of market dominance by a specific players. Any restriction is very difficult for small and developing-world registries which don't have the time or money for the regulatory burden or indeed for the lawyers to "fine-tune" their corporate structure to get around whatever rules may be cumbersome. This last point is true in any case except when restrictions are completely abolished. None of the proposals, with the exception of those that call for the elimination of vertical integration and cross-ownership controls, deal with the very real problem of small registries who cannot find a registrar to carry their TLDs.

We strongly oppose the Afiliis/PIR proposal (a.k.a RACK), which we feel is very economical in promoting principles that either advance the Internet, help nascent registries, or reduce harms to consumers, yet quite thorough in advancing the interests of the proposers. We further believe that the CAM model, which envisions an expensive and time-consuming anti-competition review without obtaining any indications that the review authorities are even interested, is fraught with hopefulness and liable to serious unintended consequences, up to and including wholesale governmental intervention in ICANN accreditation processes. Furthermore, we will not support any proposal that includes an arbitrary percentage threshold of either ownership or control (such as the JN2 proposal) just because it is less bad in other ways, or because the proposers seem less motivated by self-interest.

As we see it, elimination of artificial limitations of ownership and/or control is the only principled way forward. We are furthermore very concerned about the restriction of competition by a working group where most of the parties have a very real economic interest. While this may or may not be illegal, the spectacle of registries and registrars deciding together to shape the competitive landscape is nonetheless, in our view, harmful to the Internet, to ICANN, and to the participants in the group.

Competition authorities in Europe and U.S. have been very quick to examine what they consider to be anti-competitive behavior on the Internet, and they are

the proper mechanism to examine and control this problem. We note that these authorities tend to set the bar rather high, and this group should take note of their standards. We reject the argument that various anti-competitive actions must be taken in order to reduce consumer harms and gaming, because these harms have yet to be seen in the new gTLD regime and in our view cannot be convincingly inferred from the current state of affairs. Specific actions to prevent specific harms should be undertaken once these problems reveal themselves. We note that ICANN has been much quicker to address such issues in the recent past.

Therefore we support what is known as the Free Trade model. If instead we are asked to choose between the various other proposals, we prefer that outlined in DAG4. This position at least has the value of not being self-serving, and, because proposed by ICANN, avoids the accusation of this group being anti-competitive, which is awkward not least because there is ample evidence of it being true. We readily acknowledge that the DAG4 proposal is helpful to Minds + Machines, but no proposal on the table is particularly harmful to us. We believe that this group has an obligation to help new gTLDs succeed and to act in the longer-term interests of the Internet. Getting rid of competitive restrictions that hail from another era will do both, while at the same time relieving us of the imputation of trying to manipulate the economic landscape of new gTLDs.

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