



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

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Dr. Stephen D. Crocker
Chairman of the Board of Directors
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

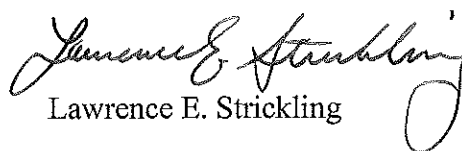
Dear Dr. Crocker:

I am pleased to share the comments of the United States Government (USG) on the various proposals included in the February 22, 2012, draft *Advice requested by ICANN Board regarding definitions, measures, and targets for competition, consumer trust and consumer choice*, prepared by the Generic Names Supporting Organization (GNSO) Council's Consumer Trust, Choice, and Competition Working Group. This initiative will be a constructive contribution to the review of the new generic top level domain (gTLD) program that the Internet Corporation for Assigned Names and Numbers (ICANN) committed to undertake in the *Affirmation of Commitments*. As the Working Group points out the purpose of this exercise is to offer definitions, measures, and targets that could be useful to the Review Team, but this advice does not pre-determine or otherwise limit the scope of the future Affirmation Review Team.

Consistent with longstanding consensus advice of the Governmental Advisory Committee (GAC) that the benefits of new gTLDs must outweigh any costs to consumers and other market participants, we expect the new gTLD Affirmation Review Team effort to examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice. The Affirmation Review Team will also evaluate the effectiveness of the application and evaluation process and the safeguards put in place to mitigate issues involved in the introduction or expansion. In addition to this exercise, the USG expects ICANN to continue its efforts to strengthen registrars' contractual obligations, substantially improving the capacity and operation of the contractual compliance program, and work with registries to implement policies addressing fraud, abuse, or other illegal conduct.

I commend you and the ICANN Board for having the foresight in December 2010 to initiate this work and thank the members of the Working Group for their efforts on this important issue. USG looks forward to continuing to participate in this discussion as part of the ICANN multistakeholder process.

Sincerely,


Lawrence E. Strickling

Enclosure

United States Government Comments on “Advice requested by ICANN Board regarding definitions, measures, and targets for competition, consumer trust and consumer choice”

The United States Government (USG) is pleased to share the following comments on the various proposals included in the February 22, 2012, draft *Advice requested by ICANN Board regarding definitions, measures, and targets for competition, consumer trust and consumer choice*, prepared by the Generic Names Supporting Organization (GNSO) Council Consumer Trust, Choice, and Competition Working Group. This initiative will be a constructive contribution to the review of the new generic top level domain (gTLD) program that the Internet Corporation for Assigned Names and Numbers (ICANN) committed to undertake in the *Affirmation of Commitments*. While these comments address the definitions of consumer trust, consumer choice, and competition separately, in accordance with ICANN’s request for advice and the working group’s draft, we believe that these concepts are intertwined, and that the evaluation should consider all three of these criteria together.

Consistent with longstanding consensus advice of the Governmental Advisory Committee (GAC) that the benefits of new gTLDs must outweigh any costs to consumers and other market participants, we expect this contribution to help focus the data collection that can be used to assess the costs and benefits of new gTLDs and thereby help to show the overall impact new gTLDs have on competition, consumer choice, and consumer trust. This effort should consider data both on the benefits that arise from increased competition and choices for consumers, as well as the costs stemming from cybercrime, fraud, and protection of intellectual property. In addition to this exercise, the USG expects ICANN to continue its efforts to strengthen registrars’ contractual obligations, substantially improve the capacity and operation of the contractual compliance program, and work with registries to implement policies addressing fraud, abuse, or other illegal conduct.

I. Modifications to Definitions

Definition of Consumer Trust

Proposed Modification:

Consumer trust is defined as the confidence registrants and users have in the consistency of name resolution and the degree of confidence among registrants and users that a TLD registry operator is fulfilling its proposed purpose and is complying with ICANN policies and applicable national laws. **Consumer trust** also includes the confidence registrants and users have in the overall domain name system and, in particular, Registry operators’ and Registrars’ efforts to curtail abuse, including respect for intellectual property rights, avoidance of fraud, crime, or other illegal conduct, as well as confidence in ICANN’s ability to enforce requirements imposed on registrars and registry operators. Consumer trust must be assessed together with consumer choice and competition to aid in determining the overall costs and benefits incurred by consumers and other market participants from the expansion of gTLDs.

Revisions to Note 1:

The Consumer Trust definition has ~~two~~ three aspects.

* * * [existing text to remain]

Third, consumers need to have confidence in the overall domain name system, including the willingness of Registry operators and registrars to curtail abuse and to ensure respect for intellectual property rights, prevent fraud, crime, and other illegal conduct, as well as confidence that ICANN will enforce requirements imposed on Registry operators and Registrars to prevent these abuses. If consumers believe that new gTLDs are failing to prevent these abuses, then consumers will lose trust in the domain name system.

Explanation:

The proposed definition for consumer trust takes too narrow a focus, and as proposed looks only at the narrow issue of whether a TLD Registry operator is providing services in accordance with its stated offering and in compliance with relevant policies and laws. Consumer trust, however, appropriately takes account of whether the broader system within which consumers are operating is trustworthy. If consumers believe that new gTLDs are increasingly susceptible to fraud, criminal activity, lack of respect for intellectual property rights, and other deceptive conduct, then consumers will lose trust in the domain name system and may decline to participate, or participate at a reduced rate. Likewise, consumers that continue to participate rather than exit will do so while potentially bearing significant costs.

Consistent with previously stated USG and GAC consensus advice, governments are concerned whether the expansion of gTLDs could create greater opportunities for fraud, crime, intellectual property misappropriation, and other conduct harmful to consumers, and whether new gTLD operators or ICANN will be equipped to curtail such abuses. ICANN has yet to demonstrate a rigorous compliance program to enforce these new contracts. The proposed broader definition thus includes a reference both to new gTLD operators' efforts to minimize such abuses as well as ICANN's ability to enforce requirements imposed on gTLD operators and Registrars. Both of these have an effect on whether consumers believe that bad actors who fail to comply with policies and relevant laws are allowed to act with impunity and, consequently, weaken consumer trust, or whether they are terminated as appropriate. This broader definition is intended to take into account these possible negative effects of gTLD expansion to facilitate assessment of whether expansion of the number of gTLDs has been beneficial to consumers.

Definition of Consumer Choice

Proposed Modification:

Consumer choice is defined as the range of meaningful options (taking into account price, quality, and product diversity) available to registrants and users for domain scripts and languages, and for TLDs that offer choices as to the proposed purpose and integrity of their domain name registrants. Consumer choice must be assessed together with consumer trust and competition to aid in determining the overall costs and benefits incurred by consumers and other market participants from the expansion of gTLDs.

Explanation:

The proposed modification would clarify some of the bases for assessing the range of options available to consumers in order to determine whether consumer choice has increased meaningfully. The USG believes that when consumers have different options across a range of prices, quality, and product diversity, then consumer choice is increased. Merely having more options does not necessarily meaningfully improve consumer choice. Rather, for consumer choice to have been expanded, consumers must have a variety of options offering different combinations of price, quality, and product diversity. This proposed refined definition would help focus the assessment of whether consumer choice has been enhanced through the expansion of gTLDs. The modified definition will also better facilitate the overall assessment of the net benefits of expanding gTLDs, involving a comparison of increased consumer choice with any increased costs.

Definition of Competition

Proposed Modification:

Competition is defined as the quantity, quality, diversity, and the potential for market rivalry of TLDs, TLD registry operators, and registrars as the actual (or potential) market rivalry between various TLDs, TLD registry operators, and registrars, considering such factors as the quantity, quality, price, and diversity of offerings provided by each of those types of entities. Competition must be assessed together with consumer choice and consumer trust to aid in determining the overall costs and benefits incurred by consumers and other market participants from the expansion of gTLDs.

Revision to Note 4:

Note 4. The definition of Competition looks at all TLDs, not gTLDs. The working group recognizes that ccTLDs are potential competitors to gTLDs, particularly where the ccTLD is marketed to registrants around the world (e.g. .me and .co).

Addition of Note 5:

Note 5. Competition leads to more efficient production and provides consumer benefits, such as improvements in pricing, operating quality, service, and consumer choice. However, the proliferation of new gTLDs may also impose costs on consumers and other market participants in the form of cybercrimes, fraud, consumer confusion, and defensive registrations, and it is not yet certain whether competition, or other controls, will eliminate or materially reduce these costs. To determine the net effect of the introduction of new gTLDs, any costs to consumers and other market participants would need to be carefully weighed against estimated benefits that arise from increased competition.

Explanation:

Increasing the quantity of TLDs, TLD registry operators, and registrars does not necessarily increase competition or market rivalry. Accordingly, the proposed modification and the new Note 5 are intended to clarify that competition is the rivalry between market participants, and may be measured by considering data and other information that will help to show the extent to which rivalry has any effect on such factors as the quantity, quality, price, and diversity of offerings provided by those participants. Serious questions exist as to: (1) whether competition

among existing TLDs has effectively constrained the exercise of persistent market power by TLD registry operators and (2) whether market rivalry resulting from the introduction of new gTLDs will prevent, or at least reduce, the ability of operators of existing or new TLDs to exercise market power.¹ The modified definition would ensure that the assessment criteria focus on developing information and data to identify and measure the existence and effect of rivalry among operators of existing and new TLD registries. Based on these factors, as well as others, ICANN may undertake a meaningful assessment of whether the expansion of gTLDs has increased competition, and whether, considering consumer choice and consumer trust, this expansion has been of net benefit to consumers.

Note 4 has been revised to suggest that ccTLDs may be *potential* competitors to gTLDs because it should not be assumed that ccTLDs and gTLDs generally compete for the same registrants. Different TLDs may be attractive to different consumers, and while in some cases a consumer may be equally happy with any of a number of TLDs, others may seek a specific TLD or be willing to use only a few possible TLDs. The degree to which one TLD is a substitute for another can be evaluated empirically, and it is important to be able to assess the degree of competition between TLDs as part of an assessment of whether competition has been increased through the introduction of new gTLDs.

II. Modifications to Measures of Consumer Trust, Consumer Choice, and Competition

The USG believes that without revision, the proposed measures will be inadequate to make a proper assessment under either the original proposed definitions of consumer trust, consumer choice, and competition, or under the definitions as we propose they be modified. The USG therefore recommends the expansion of the metrics in a number of ways explained below. Overall, the metrics for each of the three definitions are interrelated and should be considered comprehensively to determine whether the benefits of gTLD expansion outweigh the costs.

Consumer Trust Measures

The scope of the survey that is proposed in the table of measures on consumer trust should be significantly expanded. First, the survey should not be limited to consumers and should not be limited to information before the new gTLD expansion. Rather, the survey should also include Registry operators, and Registrars, as well as other entities, such as law enforcement entities, which may incur costs as a result of the introduction of new gTLDs. Second, the survey also should request information about the experience of consumers and the other included entities both before and after the introduction of new gTLDs. The survey should seek information about specific costs respondents have incurred because of new gTLDs due to cybercrimes and other

¹ It is also uncertain whether the introduction of new gTLDs will cause any erosion in the persistent market power in some existing TLDs, such as .com. It is important to study this question in connection with the examination of the impact of new gTLDs, so that informed decisions can be made with respect to such issues as the need for continuing price regulation of existing gTLDs. We acknowledge, however, that new gTLDs might provide a net enhancement to consumer welfare even if they have no effect on the persistent market power in .com or other existing TLDs.

fraud, the reduced value of intellectual property, and the expense of actions taken to safeguard intellectual property (including defensive registrations) or protect against crimes. Third, the survey should be expanded to seek information about rivalry among TLDs, registry operators, or registrars that has produced better service, higher quality or more secure products, or lower prices, both before and after the introduction of new gTLDs.

Lastly, the Working Group's draft advice document includes some useful metrics on the incidence of domain takedowns, the quantity and relative incidence of fraudulent transactions caused by phishing sites in new gTLDs, and the quantity and relative incidence of complaints regarding inaccurate, invalid, or suspect Whois records in the new gTLDs, among others. We recommend inclusion of several specific additional measures that will facilitate the evaluation of whether the expansion of gTLDs has improved consumer trust:

- Relative incidence of complaints received by ICANN involving the new gTLDs, as well as for existing TLDs;
- Quantity and relative incidence of malware sites in the new gTLDs, as well as for existing TLDs;
- Quantity and relative incidence of domain names in new gTLDs used in botnets, as well as for existing TLDs;
- Quantity and relative incidence of domain names in the new gTLDs associated with identity theft, as well as for existing TLDs;
- Quantity and relative incidence of domain names in the new gTLDs associated with spam, as well as for existing TLDs;
- Quantity and relative incidence of breach notices, suspensions, and terminations related to legal misconduct of officers of new gTLD registry operators, as well as for existing TLDs;
- Quantity and relative incidence of security breaches in new gTLDs, as well as for existing TLDs; and
- Conducting multiple surveys of consumer confusion (rather than conducting a one-time survey as initially proposed).

With respect to the 3-year targets in most of the measures of Consumer Trust on pages 6 and 7, the USG questions whether the target levels relating to problems or performance issues associated with new gTLDs should be set at rates that are lower than the comparable rates that existed before the gTLD expansion, regardless of the amounts of the reductions. The number of problems or issues that must be addressed could grow with an increase in new gTLDs, which could overload the systems that are designed to deal with these issues. The USG believes that the targets and tolerance for problems or performance issues should decline substantially with a significant expansion of new gTLDs.

Consumer Choice Measures

Consistent with our proposed revisions to the definition of "Consumer Choice," measures of consumer choice should include measures of price, which is an important dimension of consumer choice, as well as quality and diversity of offerings. Seeking information on these factors will help determine whether consumers have meaningfully expanded choices on various dimensions, including price, quality, and diversity of product offerings.

The proposed criteria for evaluating defensive registrations should be modified. First, calculating defensive registrations (page 10) is too narrow to the extent it focuses only on registrations of domains that were previously registered in “legacy TLD” (gTLDs in service before the planned expansion). Defensive registrations could also follow from, among other things, domains that were previously registered in ccTLDs or new gTLDs that were introduced before another new gTLD commences operations; the criteria to quantify defensive registrations should be expanded to include those possibilities. Conversely, the proposed criteria for defensive registrations may be too broad because it is unlikely that every registration in a new gTLD of a domain that is already registered in another TLD will be for defensive purposes. We suggest that the survey proposed in the table on pages 6 and 7 seek data on this issue so that an adjustment might be developed to take account of duplicative domain registrations that are not for defensive purposes.

With respect to the 3-year targets for the various measures of defensive registrations (page 10) proposing that such registrations should not exceed 15% of total registrations, it would be more appropriate to measure the cost of defensive registrations than simply to calculate the quantity of such registrations. Without more information, it is impossible to determine the overall effect of a defensive registration rate of 15% (or, for that matter, any other specific rate) on whether the introduction of new gTLDs will produce benefits in excess of costs.

Finally, the disclosures on Registry and Registrar websites that are listed as Consumer Choice measures of the “*Transparency and clarity of gTLD registry benefits and restrictions, so that registrants and users can make meaningful distinctions when choosing TLDs*”² should clearly disclose the owners of the Registry operator or Registrar as well as the name of each affiliated entity that operates a Registry or conducts business as a Registrar. For Registry operators, the websites should clearly identify each TLD for which the owners or any of its affiliates serve as the Registry operator. For Registrars, the websites should clearly disclose each of the TLDs sold by the Registrar, and for each such TLD, disclose whether the Registrar has an ownership interest in the TLD or is otherwise affiliated in any way with the Registry operator. The foregoing disclosures will assist registrants and other interested parties in learning the full range of consumer choice and whether they are in fact dealing with different parties when they elect to purchase domains in a different TLD or deal with a different Registrar.

Competition Measures

We have proposed that the definition of “Competition” focus on the actual effect of market rivalry between TLDs, TLD Registry operators, and Registrars resulting from the introduction of new gTLDs. We do not believe that any of the proposed criteria included in the table containing measures of Competition will be very useful in measuring such rivalry. The three-year quantity targets are not based on any assessment or prediction of the effect of market rivalry and seem to relate more to the goal of increasing the nominal amount of consumer choice. However, quantity

² We agree that truthful disclosures serve an important function in identifying the choices available to consumers, but we note that, while disclosures may be indicative of whether meaningful consumer choice exists, disclosures do not by themselves create consumer choice.

data alone—without information about price and quality, as well as information about how changes in each of these three factors have been motivated by rivalry among market participants—provide little information about the degree of rivalry and competition among market participants. Without further study and more information, it will be impossible to determine if success in meeting the quantities proposed in the table will produce benefits in excess of costs, which, as we discuss in the introduction, should be the pre-eminent issue in any assessment of the effects of new gTLDs.

Evidence of market rivalry would tend to show that a competitive act by one or a group of competitors had an adverse effect on the demand for another competitor's product. For example, if a Registry operator were to lower its price or introduce a new service, an examination of whether that action resulted in a lower demand for the domains sold by another Registry operator should be conducted. It would also be relevant to learn if other Registry operators lowered their prices or introduced new services in response to the actions of the first Registry operator. To obtain evidence that would permit an evaluation of market rivalry, we would like to see a time series of price and quantity sold data for each TLD. Ideally, the data would cover sales and prices at the Registry and Registrar levels, although we recognize that compiling such information at the registrar level would be more difficult. In addition, data should be collected showing the dates on which new products or services were introduced and sales data for such products and services. These data could be supplemented by survey data in which Registries and Registrars can be asked about the effect on their sales of the conduct of their competitors and the actions they took in response to competitor conduct. A review of the data and survey information could reveal the extent to which competitive conduct serves to constrain the exercise of market power by other firms.

Finally, the measures of "unique" operators should exclude closely related operators, such as subsidiaries, affiliates, and others related through service contracts.

Appendix B

Although we share the concerns that the exchange of price or output information among competitors can facilitate collusion, we disagree with any suggestion that the competitive effects of the expansion of TLDs can be adequately assessed without collecting and studying price data. A properly designed study that includes safeguards on the collection, processing, and publication of the data should allow ICANN to conduct such a study without increasing the likelihood of successful coordination among competitors. Among the safeguards that may be appropriate to prevent misuse of such data by competitors are (1) having a third party manage and collect the data; (2) publishing only data that is not competitively sensitive because it is sufficiently historical as to be of no use in facilitating collusion; and (3) aggregating the results of any study so that pricing by individual competitors cannot be determined. Other safeguards, such as limiting access to the data collected to non-competitors may also be appropriate and help to prevent anticompetitive effects.