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WHY the proposed measures of competition are economically meaningless

> **The proposed measures naively regard an increase in the number of supposed rivals for the business of a second-level domain registrant as the equivalent of an increase in "competition".**

First, ICANN needs to be clear about what it is proposing to measure. *Competition* is defined by economists as the absence of market power, where "market power" refers to the ability to charge prices above the incremental (or "marginal") cost of producing the good or service at issue. As such, *competition* is the polar opposite of *monopoly*, where the latter consists of a single seller of a product for which there are no substitutes.

A simplistic count of the number of gTLD rivals for a would-be registrant's business is not an economically meaningful measure of the "competition"—if any—among the gTLDs the registrant faces. It follows that an *increase* in the number of such rivals for a registrant's business does not amount to increased "competition".

> **The proposed measures assume that would-be registrants of second-level domains regard all unsponsored gTLDs (as well as some ccTLDs) as actual or potential substitutes.**

This also follows from the proposal to use total counts of the number of gTLDs (and ccTLDs) as the measure of competition.

> **Before undertaking to measure anything, what is needed first is a complete, professional delineation of the "relevant product market(s)" that are at issue, including a determination of which gTLDs (and ccTLDs, if any) are economic *substitutes* and which are *complements*, as seen by would-be registrants.**

In other words, first determine which—if any—of the other gTLDs really do *compete* (as that term is understood by economists, competition authorities and courts) with *.com*, and which are merely *complements* to registrants' primary second-level *.com* domains. Unless this is done first, all of the data-gathering in the world will be of little value.

> **One must recognize that it is the *competitive significance* of the respective gTLDs that is at issue, and that mere "counts" of gTLDs offer no information whatever on that significance.**

Under the measures proposed thus far, gTLDs such as *.com* and *.whatever* would be counted as essentially equivalent. As a first approximation, here are some suggestions for more economically-meaningful measures of a gTLD's competitive significance; others no doubt can suggest additions and improvements:

- The total number of second-level domains registered under that gTLD.
- The total number of second-level domains that are *unique* to that gTLD.
- The total web traffic (measured, say, by the number of unique visitors per time period) that is generated by all of the second-level domains registered under that gTLD.

> **The proposed measures of competition fail to recognize that ICANN's imminent introduction of new gTLDs likely will *increase*—not reduce—the market power of some gTLDs.**

Ironically, rather than dissipating *.com*'s market power by introducing new gTLDs, ICANN likely will be creating new, *additional* pockets of market power that do not compete with (i.e., reduce the market power of) *.com.* This is because some of the applicants for new, unsponsored gTLDs appear to be banking on their ability to extract *defensive* registration fees from existing owners of second-level *.com* domains, by inducing them to *also* register their second-level domains under these new gTLDs.

> **ICANN should follow up on the suggestion by Dennis Carlton—a leading authority on competition economics that ICANN itself hired by ICANN to assess the economic impact of the proposed new gTLDs—that the competitive significance of the new gTLDs should be measured by their success in competition with *.com, .net* and *.org* for *new* registrants of second-level domains, and that this could be done for the gTLDs (such as *.biz*, *.info*, and others) introduced by ICANN since 2000.**

Carlton argued[1] that—because of *switching costs*—the supposed "competition" among gTLDs likely would not lead owners of *existing* second-level domains to cancel their existing registrations under *.com, .net* or *.org* and to move their second-level domains to one of the newly introduced gTLDs. Rather, he argued, the best evidence of the "competition" generated by new

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[1] PRELIMINARY REPORT OF DENNIS CARLTON REGARDING IMPACT OF NEW gTLDS ON CONSUMER WELFARE, March 2009, pp. 10-11.

gTLDs would be their ability to induce *de novo* (i.e., "new") second-level domain registrants to register under one of their new gTLDs, rather than *.com*, *.net* or *.org*.

This is an excellent suggestion, one that should be pursued immediately to test the claims made by ICANN and its adherents regarding the "competition" that would be created and sharpened by the new gTLDs.

> **Paul Twomey has also made an excellent suggestion: The Measures of Competition *should* be expanded to include measurements of the impact of the new gTLDs on innovation and new products.**

This would force ICANN to offer specific evidence—rather than vague, untestable generalizations—in support of the "innovation(s)" that supposedly will be generated by its new gTLDs. Based on Mr. Twomey's rather thin listing of such innovations supposedly resulting from earlier gTLD expansions,[2] it appears likely that a complete identification and enumeration of such "innovations" generated by the latest round of gTLD expansions will not be particularly impressive.

> **In fact, *all* of the Measures of Competition (including Innovation) that finally are adopted should be applied *immediately*—without waiting for the accumulation of one year's experience under the latest gTLDs—to ICANN's two earlier gTLD expansions.**

This would accomplish three things: First, it would provide the "snapshot" of the gTLD system "prior to the launch of the new gTLDs", as proposed by the INTA.[3] Second, it would allow the testing (and refinement, if indicated) of the proposed Measures of Competition (and Innovation), using actual, currently available data on the past decade's new gTLDs (that ICANN also claimed would increase competition and innovation). Third, it would provide immediate evidence bearing on the likelihood that ICANN's claims in support of its most recent gTLD expansion will be vindicated.

> **As a general matter, the proposed Measures of Competition need to be based on a correct understanding of *competition*. Moreover, they need to reflect a recognition of the principles of market definition and the measurement of market power by economists, competition authorities and the courts.**

The Consumer Trust Working Group has proposed that:

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[2] Paul Twomey, "Expand the measure of Competition to include impacts on innovation," February 25, 2012.

[3] Internet Committee of the International Trademark Association, "Comments on Draft Advice Letter," April 17, 2012.

> **Competition** is defined as the quantity, diversity, and the potential for market rivalry of TLDs, TLD registry operators, and registrars.

I have no idea where this came from. But as stated, it's naïve, incomplete and unhelpful. An increase in the number of gTLDs hoping to sell second-level domains to registrants does *not*—in and of itself—amount to an increase in competition. And please, what does "potential for market rivalry" mean?

So what's wrong with the proposed Measures of Competition? Consider the first one in the suggested list:

> **Quantity of total TLDs before and after expansion, *assuming that gTLDs and ccTLDs generally compete for the same registrants*** (emphasis added).

There are a number of problems with this proposed measure, chief among them that it *assumes* that which needs to be proven ("…*assuming that gTLDs and ccTLDs generally compete for the same registrants*").

But it also naively assumes that all gTLDs are equivalent in terms of their competitive significance, that one is as good as another. How else can one explain the suggested metric ("the *quantity* of total TLDs")?

Instead, it would be necessary to properly define the gTLD product market(s) at issue: Starting with *.com*, identify the other gTLDs—if any—that "consumers" (i.e., would-be registrants of second-level domains) regard as actual or potential substitutes for *.com*. Put differently, it first would be necessary to define the boundaries of the relevant product market(s), including a clear specification of which gTLDs (and ccTLDs) are regarded by would-be registrants as actual or potential substitutes.

But even within properly delineated relevant product markets, the mere *number* of ICANN's preferred "rivals" (be they gTLDs, ccTLDs, second-level domains, or whatever) is economically meaningless. Rather, one would need to measure the *competitive significance* of each gTLD or ccTLD, using such possible metrics as the total number of second-level domains registered or the total number of unique visitors attracted per time period by these second-level domains. Finally, for each relevant product market that has been defined at the level of gTLDs (and ccTLDs), one should calculate the change (if any) in the overall degree of *concentration*, both before and after the gTLD expansion at hand, using the Herfindahl-Hirschman Index (HHI). Only with the proper completion of these steps will it be possible to reach economically valid conclusions regarding the effect on competition of the gTLD expansion now under way.

Respectfully submitted,

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