

Summary and Analysis of Comments: Proposed ICANN Process for Handling Requests for Removal of Cross-Ownership Restrictions for Existing gTLDs

Summary

The comment period was open from 2 May 2011 through 2 June 2011 <<http://www.icann.org/en/announcements/announcement-02may11-en.htm>>. Five comments were received including one that was not relevant to the posting. A sixth comment was received shortly after the close of the comment period and has been included for the important contribution it makes to this discussion. Four of the relevant comments support removal of cross-ownership restrictions, however three of the four (i.e., Momentous, INTA, and AusRegistry) expressed concern about the unfair competitive advantage that might be gained by existing registry operators if they are permitted to select and negotiate specific provisions rather than adopting the entire new gTLD Registry Agreement (once it's approved). The sixth comment supports removal of the cross-ownership restrictions via the proposed amendment process and states that no existing registry operator should be permitted to elect transition to the new gTLD Registry Agreement as some of its provisions (especially URS) are untested and could result in harm to existing gTLD registrants. The comments may be viewed in their entirety at <<http://forum.icann.org/lists/cross-ownership-existing-registries/>>.

1. Rob Hall (Momentous) commented that he supports allowing cross-ownership of registries and registrars provided there are protections against market power and dominance, and that the new gTLD contract should be required. He further suggested that existing gTLD registries should not be allowed to cherry pick clauses from the new contract. Lastly he noted that ICANN should strive to simplify the gTLD registry agreement process as is the case for the Registrar Accreditation Agreement (RAA). (*Rob Hall, Momentous Corp., 31 May 2011*)
2. The comments from the Registries Stakeholder Group (RySG) were primarily on the draft new gTLD Registry Agreement and not the proposed process. The comments on the process included that, "ICANN should commit to reasonable time limits for its own consideration of the request to amend the registry agreement" and "Adding language specifying in which circumstances the registry request to remove cross-ownership restrictions will be approved by ICANN." The comments on the draft new gTLD Registry Agreement will be considered for the new gTLD Program. (*David Maher, Chair, RySG, 1 June 2011*)
3. The International Trademark Association (INTA) suggested that soliciting comments on the proposed amendment process is premature. Further, INTA commented that, "It will be in the public interest for existing gTLD operators to transition to the Proposed New gTLD Registry Agreement." The comment included that if an existing gTLD registry wishes to amend its current registry agreement that they should be required to adopt the Registry Operator Code of Conduct, implement thick whois, and implement certain rights protection mechanisms. INTA stated that without these additional requirements, the playing

field would not be level between existing and new gTLD registries. (*Claudio Di Gangi, INTA, 1 June 2011*)

4. AusRegistry's comments included that existing gTLD registries should be able to transition to the new form of registry agreement and if so that they must be required to adopt all its terms and conditions and that any negotiated changes should be subject to public comment. They further said that existing registry operators should not be permitted to amend their registry agreements by picking and choosing provisions from the new gTLD registry agreement as they would have an unfair advantage over new gTLD registry operators. (*Krista Papac, AusRegistry Group Pty Ltd, 1 June 2011*)
5. The Internet Commerce Association's (ICA) remarks were received after the forum closed and were accepted because they responded to previously submitted comments. The substance of the comments was that allowing or requiring existing gTLD registry operators to adopt the new gTLD registry agreement would not take into account the public interest of millions of registrants who may be exposed to (a) termination of existing price increase limitations in gTLDs with price caps (Mr. Corwin called out .net and .com with this concern); and (b) being subject to the untested rights protection mechanisms for new gTLDs (e.g., Uniform Rapid Suspension (URS)). He further asserted that if an existing gTLD registry is required to adopt the new gTLD Registry Agreement in full and without amendment that they would be incented to seek affiliation with a registrar to for example void that registry's contract price caps. ICA contended that this type of activity would be adverse to the economic interests of registrants. (*Philip Corwin, ICA, 8 June 2011 (Note: Comments were submitted to ICANN leadership on 3 June 2011)*).

Background

The ICANN Board adopted two resolutions that address cross-ownership restrictions for new and existing gTLD registries (see 5 November 2010 at <http://www.icann.org/en/minutes/resolutions-05nov10-en.htm> and 21 April 2011 at <http://www.icann.org/en/minutes/resolutions-21apr11-en.htm#5>).

Since these resolutions were adopted, several existing gTLD registry operators have inquired with ICANN about the process for the removal of the cross-ownership restrictions from their Registry Agreement, and/or their ability to apply to become an ICANN-accredited Registrar. Existing gTLD registry operators maintain that they need their current restrictions on cross-ownership to be removed on a timely basis in order to be able to compete on a level playing field with registrars that are planning to apply to operate new gTLDs. As such, the timing for approval of a process for existing gTLD registry operators to transition to the new form of registry agreement or to request an amendment to their current registry agreement to remove the cross-ownership restrictions is intended to coincide with the Board's planned consideration on 20 June 2011 of the new gTLD Program.

Analysis of Comments

The majority of the commenters expressed concerns that existing registry operators will gain an unfair competitive advantage over new gTLD registry operators if they are able to pick and choose provisions from the new gTLD registry agreement. Moreover, respondents suggested that existing gTLD registries should be required to transition to the new gTLD registry agreement if they wish to obtain the potential benefit from the lack of cross-ownership restrictions in that agreement.

The proposed process does not include that existing gTLD registry operators can pick and choose provisions, but rather the removal of the cross-ownership restrictions may occur if provisions and covenants that have been outlined in the proposed process are adopted and that said removal might not raise significant competition issues as defined in the Registry Service Evaluation Process (see <http://www.icann.org/en/registries/rsep/prelim-competition-issues-en.htm>). The proposed process is intended to level the playing field between existing gTLDs registries, new gTLD registries, and registrars by affording them the same cross-ownership freedoms provided existing gTLD registries adopt the aforementioned contractual provisions and that mechanisms are employed to protect against abuses related to possible market power.

In response to the RySG's comments that ICANN should commit to reasonable time limits for its own consideration of a request to amend a registry agreement and that the proposed process does not establish clear criteria for ICANN's approval of the registry request, proposed language, similar to that in the Registry Services Evaluation Process, will be added.

Mr. Corwin's comments highlight the potential public interest implications for registrants in existing gTLDs if these TLDs adopt the new gTLD registry agreement. As noted in the ICANN Board's 5 November 2010 resolution on cross-ownership issues for registries and registrars, "ICANN will permit existing registry operators to transition to the new form of registry agreement, except that additional conditions may be necessary and appropriate to address particular circumstances of established registries" and "ICANN will have the ability to refer issues to relevant competition authorities." What exactly will constitute the "additional conditions" that might be "appropriate to address particular circumstances of established registries" will have to be defined as particular requests for amendments arise in the future. ICANN could consider possible conditions such as "grandfathering" existing registrants or allowing for extended transition periods in order to address the issues raised by Mr. Corwin and others.

Finally, the proposed process is intended to level the playing field between new gTLD registries, existing gTLD registry operators, and registrars. Something the Board will consider in its deliberations about the process is whether the Board should specify a particular date or milestone on which the removal of the cross-ownership restrictions would be lifted. Based on the most recently published timeline for the launch of new gTLDs, it appears that new gTLDs may not be delegated in the root until the latter part of

2012. If new gTLD registries are not operational until after that time, will the playing field truly be level if existing gTLD registry operators could, upon approval of the new gTLD program and the proposed process, immediately apply to become affiliated with an ICANN-accredited registrar (through an amendment to their registry agreement) and begin offering registrar services perhaps years in advance of any new gTLD registry?

Next Steps

The ICANN Board of Directors will consider public comment in their consideration of the proposed process and whether or not to specify an “effective date” or milestone at which time the cross-ownership restrictions could be lifted to bring existing gTLD operators into parity with new gTLD operators.