

A. Van Couvering's comments on the idea of a "dual call EOI"

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Thanks to Anthony van Couvering for his comments on the contribution I posted on behalf of France regarding a possible "dual call EOI" (first the string, then the applications). Detailed responses are inline below.

However, before getting into the substance of the matter, it is worth recalling general guiding principles contained in seminal documents, to be firmly kept in mind as we collectively undertake the most significant – and irreversible - evolution of the Domain Name Space ever.

- "The Internet Naming system is a public resource in the sense that its functions must be administered in the public or common interest" (Governmental Advisory Committee Principles regarding new gTLDs, March 28, 2007)
- Given that "there is a group of participants that engage in ICANN's processes to a greater extent than Internet users generally", "[ICANN must] ensure that its decisions are in the public interest and not just the interests of a particular set of stakeholders", (Affirmation of Commitments, September 30, 2009)
- "The major concern in selecting a designated manager for a domain is that it be able to carry out the necessary responsibilities, and have the ability to do a equitable, just, honest, and competent job.[]These designated authorities are trustees for the delegated domain, and have a duty to serve the community. [] Concerns about "rights" and "ownership" of domains are inappropriate. It is appropriate to be concerned about "responsibilities" and "service" to the community. (the founding RFC 1591 by Jon Postel)

Moreover, ICANN's Core Values n°5 and 6 recommend : "where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment", and "introducing and promoting competition [] where practical and beneficial in the public interest". In a year 2009 that saw the Nobel Prize in Economics awarded to the theory of "incentives" and the "management of commons", after the 2007 one awarded to "mechanism design", one can expect ICANN to broaden its economic perspective beyond simplistic and limited theories of competition that have proven so detrimental in the last two years on the international scene.

Discussions on Expression of Interest mechanisms can either deepen the growing tension surrounding the new gTLD program or be the turning point bringing the community back together on a consensus to move forward. We hope the responses below contribute to the later.

The exploration of such a "dual call EOI" (first the string, then the applications) is a contribution to a debate that must now be conducted more broadly by the community. And the setting up of an ad hoc cross-community working group would be the best way to rapidly develop a balanced EOI process before Nairobi.

Specific comments are inline below.

- To: eoi-new-gtlds@xxxxxxxx
- Subject: Response to B. de la Chapelle's ideas
- From: Antony Van Couvering <avc@xxxxxxxxxxxxxxxxxxxxxx>
- Date: Fri, 4 Dec 2009 10:33:15 -0500

Bertrand de la Chapelle put forward an interesting idea in his response to the Board's call for comments about expressions of interest for new gTLDs (see <http://forum.icann.org/lists/eoi-new-gtlds/msg00073.html>).

His proposal is that potential applicants should submit just the string, and that anyone could then apply for that string. I quote:

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- During the Expression of Interest (duration to be determined), potential applicants would submit their intended string(s).
- After the closure of the Expression of Interest, the list of strings would be published and only those strings would be considered in the first round of new TLDs.
- Capacity to apply for the delegation of the management of each of these TLDs would however remain open to other candidates during this first round (longer duration period).

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On first glance, this seems appealing. Unfortunately, it won't work, for the following reasons:

1. There is no fee in his proposal, which means that anyone could (and would) submit every possible string to the EOI, in order to preserve their opportunity to apply for whatever string they want.
2. If there were a fee, no-one would submit an EOI, because you would be paying to enable the competition, which is not something anyone wants to do.

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COMMENT : Actors respond to incentives. And mechanisms shape the actors' understanding of their own interest. In the "dual call" described above (first the string, then the applications), the two behaviours envisaged by Anthony would go against the interest of potential applicants and therefore appear unlikely :

- If there is no fee, submitting hundreds of strings in a first EOI would be self-defeating. No actor has enough human and financial resources to apply for, obtain delegation of and operate hundreds of TLDs in the first round. Why then would anyone invite competition from other actors on valuable strings that could be kept for later ? Especially if the process guarantees that one can apply in the formal call for any string submitted in the EOI ?
- Likewise, if there is a fee, not applying for a string just means forfeiting the right to apply in the application call (as only the strings presented in the string call would be considered). Applicants would not be paying to "enable the competition" but to be able to take part in it and any other applicant would of course also have to pay the same amount. So the objection 2 is not valid. In any case, the argument could be reversed : would paying a high fee to prevent competition be acceptable ? That is the potential risk of the currently proposed EOI.

In fact, the "dual call" proposal did not explicitly exclude fees. It just left the issue to later discussion. Moreover, many serious applicants have spontaneously made public their intention

to apply, with the risk of initiating competing bids. Why should the EOI process be different and favour those who have remained in stealth mode and been less transparent ?

The "dual call" is likely to encourage applicants to concentrate on the strings they care most about. This self-stabilizing function could bring to the fore the most useful strings in the first round : those perceived as having the most potential or those with the most structured support.

Finally, if a diversity of applicants for a string is revealed by the application call, they are expected to negotiate to combine forces and present better built proposals in the formal round, in order to avoid auctions. This would be an improvement from the current DAG rules which make combining proposals difficult.

Some actors may rightly fear that a reopening of the application window will encourage deep-pocketed actors to try and blackmail applicants into buying them out. This concern must be addressed but can be solved.

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3. There are multiple new TLD proposals that I have seen where the string itself is not so valuable (as Bertrand puts it, "high-value common names") but the business plan behind it is great. But to publish the string would give away the business plan.

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COMMENT : No such proposal has of course emerged but it seems difficult to imagine a significant example : if the string is not meaningful, can it really reveal the business plan ? If Google at creation had applied for a TLD, who would have guessed the business plan (they did not have one at the time) or even the activity ?

But let's suppose there are such cases : a non-common name string (and non-geographic, non-brand and non-community) that nonetheless reveals so clearly the business plan that it would be unfair to the proponent to make it public. Should the main process be tailored only to accommodate such exceptions ? Why not explore whether a specific request for confidentiality could be made in such rare cases (with appropriate validation procedure) ?

Our common interest is to enable innovative applications leveraging the DNS in useful ways. Innovation will certainly flourish ultimately. But most of the first applications are likely to be in the basic categories mentioned before, because they are the low hanging fruits. And innovations will be in the business plan and second-level registration policies that are not part of the string call.

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So Bertrand's proposal, while attractive, is easily gamed and unjust to some applicants.

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COMMENT : Are we sure that the current proposal does not present more risks of gaming ? As for unfairness to some applicants : let's explore further the reality of the concern and whether it can be addressed.

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I am furthermore disturbed by an insistent theme in Bertrand's post, which I think needs to be addressed before it becomes yet a fossilized term with no meaning, and a touchstone for those who would derail the new gTLD process. I refer to "fairness," especially as it concerns the supposed advantages enjoyed by the "ICANN insider."

We are now laboring under the four (now five?) "overarching issues." These were never referred to in the policy development process, but are an invention of ICANN staff introduced by staff in March 2009 in Mexico, and are now enshrined in the ICANN process for no good reason whatsoever. They are even referred to as "threshold" issues, again with no basis. The "ICANN insider" threatens to become another of these code words. In his post, Bertrand is at pains to make sure that this mythical beast does not have any unfair advantage.

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COMMENT : Comparison with the "overarching issues" is not relevant here. Their appropriateness should be the subject of another thread.

As for the expression "ICANN insider", it was not intended as derogatory and mainly refers to the AoC mention of "a group of participants that engage in ICANN's processes to a greater extent than Internet users generally". The whole issue is the different levels of awareness regarding the process and the risk of giving an undue advantage in these early stages to actors who have followed – and in some cases have actively participated in or influenced – the whole policy development process.

No EOI process should lock a list of applicants before the global communication campaign on the gTLD round is being conducted. (Further comments below on the notion of insiders)

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So far, the only unfair advantage given to anyone are to the ccTLDs, who enjoy protection from the ultimate ICANN insiders, who now wield increased powers -- the Government Advisory Committee. The issues of trademark protection, root scaling, malicious conduct, which weigh so heavily on the gTLD process, were simply ignored with respect to the fast track ccTLD IDN process, even though reason would suggest they apply equally. Personally, I am in favor of expansion of the namespace because it helps consumers, and so I support the new IDN ccTLDs. It is nonetheless disingenuous to speak about fairness in one process and to ignore it in another.

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COMMENT : The qualification of governments as "ultimate ICANN insiders" is an interesting quote, to say the least ☺ More seriously, the IDN ccTLD Fast Track has precisely introduced the distinction between string application and delegation to a specific operator. Furthermore, the "overarching issues" do not "apply equally" to the IDN ccTLDs Fast Track :

- no root scaling issue : the number of applicants in the Fast Track is expected to be in the tens of applications (30-40 or so), not hundreds or thousands,
- ccTLDs seem to offer more guarantees regarding trademark protection and malicious conduct if we judge from the records of UDRPs and various security reports (and any exception should be dealt with), mainly because of the implication of national governments and the existence of national legal systems enabling enforcement
- clear public interest benefit : no market evaluation was needed to demonstrate that the introduction of IDNs serves the user's interest and corrected the privilege enjoyed by Latin languages for 20years

Fairness is not breached when different situations are treated differently, with due respect to proportions. Only gTLDs raise potential root scaling issues, because of their expected high number (think brandTLDs and geographic names), and no international regime guarantees protection and easy compliance in honest second level registration policies. Hence the need for specific safeguards in the case of gTLDs.

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Now, to the supposed "ICANN" insider. Some of those who plan to apply for new gTLDs (such as myself) have been involved in ICANN for some time. But many participants are brand new.

.paris -- Is the City of Paris an ICANN insider? Assuredly not.

.nyc -- Is the City of New York an ICANN insider? No.

.eus -- Is The Basque language community an ICANN insider? No.

.gal -- Is the Galician region of Spain an ICANN insider? No.

.bzh - Is the Breton region of France an ICANN insider? No.

.board, .skate, .ski, .bike, .surf - Is Adrenaline TLD, the group behind these, ICANN insiders? No.

.eco - Is Fred Krueger, my partner, an ICANN insider? No, he wanted to start .eco without knowing anything of ICANN and became involved in ICANN just last year.

This list could be considerably extended. In fact, of all the announced potential TLD applications, only a very few are from people who have participated in ICANN for more than a year. And many of the remainder could only be considered "insiders" because the process has taken so long.

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COMMENT : As mentioned in our previous contribution : "[A bias in favour of ICANN insiders] may barely affect geographic, brand or community-related TLDs. But it would be of major importance for what could be called "high-value common names", that is : relatively short names (no more than 6-7 characters) with high semantic meaning (frequently used dictionary common names in different languages, but particularly in English). No EOI should actually result in enabling ICANN insiders to potentially pre-empt the most valuable resources before the rest of the world even becomes aware of the existence of the gTLD program".

The first examples given above are related to geographic and linguistic TLDs. Here, support/validation from local authorities or relevant communities will be necessary anyway. This guarantees that delegation of the TLD will not be made on a purely first-come/first-serve basis. This limits the risk of pre-emption whatever the modalities of the EOI are.

On the other hand, the Adrenaline TLD example - as you chose to mention it - is a very interesting test case, as a quick online research illustrates. The founder of Adrenaline TLD describes himself on his blog as a "domain name industry expert", has worked successively at major registrars (Register.com and MelbourneIT), MarkMonitor and currently Corporation Services Company (CSC), a "leading authority in domain name management". This is a remarkable qualification in terms of expertise, and something that would definitely be taken into account positively in any evaluation process. But can it be argued that this is not someone aware of ICANN's activity more than most people ? And that the intended strings are "high-value common names" (ski, surf, board, bike, skate) ?

Therefore the example seems only to validate our point. Such applicants are perfectly legitimate and their entrepreneurial drive should be encouraged. But managing high-value common names is not like establishing a simple business activity : can the right to apply for the delegation of such a TLD (especially if it is for ten years with an expectancy of renewal) be limited to a process opened during a mere few weeks before any large-scale communication has been made ?

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When we consider "fairness," we should keep our eye on the prize. The "fairness" we should consider is to the people who use the Internet, the end users. They will benefit from new namespaces. They will benefit from lower prices and increased choice. They will benefit from competition among registries. Fairness to this or that applicant will come from a predictable, timely, and well-administered application process.

A quick glance at the latest DAG -- if the word "quick" can in any way be associated with it -- will convince anyone with an unjaundiced eye that this is not an undertaking for the naive and uninformed. The technical requirements are substantial. The policy requirements are substantial. Anyone who is not an "insider" will quickly need to hire one or more insiders just to understand the DAG, let alone complete the application or run a registry.

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COMMENT : Competition between registries is for a large part a misnomer : a dotParis will not directly compete against a dotSport any more than a dotEus would compete with a dotFacebook. Even within classes, a dotHotel does not compete with a dotMusic nor dotNyc with dotBerlin. Some semantically-related strings may ultimately compose competition clusters : dot Music with dotJazz or dotSoul maybe, or dotSport with dotGolf or dotSoccer. The main competition however will be between the back-end registry services or potentially among actors who intend to constitute portfolios of gTLDs, not mainly between the TLDs themselves.

Opening up the gTLD space will likely create a robust marketplace for consultancy and registry services and this should be welcomed. In that context, applicants hiring outside expertise to handle their complex tasks is not a problem : it is actually enabling more actors to participate.

But this is clearly different from a situation where major domain name industry players would end up being themselves the operators (registries) of most of the highly valuable new TLDs, because they were able to apply in a very early phase. The "dual call EOI" therefore intends to preserve some level playing field for actors without current knowledge of the new gTLD process to be able to take part in it. Service providers that can provide them with the technical or legal expertise they may lack can actually only benefit from it.

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Let us therefore be very careful when talking about fairness and ICANN insiders:

- The new gTLD process has already attracted many new applicants. The DAG is well-publicized and is available for all to see.

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COMMENT : True. It is however not finalized and several contributions have highlighted the legitimate reluctance of many actors to apply before the DAG is complete, especially if there is a fee. Too restrictive rules for an EOI would lock them out.

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- There is no indication that "insiders" are monopolizing the applications. The evidence suggests the contrary.

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COMMENT : In any case, this will only be known after the EOI is completed and proper rules must be designed in advance to make sure this does not happen. Ex-post remediation is not an option here if the community wants a predictable and orderly process.

- Fairness is a far more meaningful concept when applied to the actual users of the Internet

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COMMENT : This does not mean it is not relevant regarding applicants too.
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- It is virtually impossible to apply for a new gTLD without substantial "insider" knowledge

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COMMENT : Of course, it may be virtually impossible to apply for a new gTLD without possessing or hiring substantial expertise. But this should not mean that only those with such "insider" knowledge themselves will de facto have the opportunity to apply in the EOI. This would simply not be a fair process.
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Let's come up with a fair process and stop trying to pick and choose who should get what name, or designate special classes of people who should be disadvantaged. That was the fatal flaw of the previous gTLD rounds and we should not replicate it now.

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COMMENT : The explanations above will have hopefully clarified the approach and helped alleviate the fear that this is intended to disadvantage anybody. An effort to rebalance a process that risks advantaging some actors is not the same as being discriminatory. On the contrary, the most serious applicants, as well as their potential contractors, will actually benefit from the increased transparency and fairness of a "dual call EOI" or an equivalent mechanism.
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