

Telefonica

**COMMENTS ON THE TELNIC APPLICATION
ON THE NEW
SPONSORED TOP LEVEL DOMAIN .TEL**

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1. THE .TEL APPLICATION DOES NOT SATISFY THE REQUIREMENTS LAID DOWN BY ICANN TO BE A “SPONSORED TOP LEVEL DOMAIN”.

Unlike gTLD, which are open to any individual, sTLD are for exclusive use by a specific "community", and are proposed and managed by one or more authorised members of that community with its backing.

1.1.- The following are the ICANN requirements as regards the meaning of “Community”:

“The proposed sTLD must address the needs and interests of a clearly defined community (the Sponsored TLD Community)... and the applicants must demonstrate that the sponsored TLD Community is precisely defined, so it can readily be determined which persons or entities make up that community and comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community”¹.

The application must also *“provide detail on the community to be served and explain why the defined community to be served is appropriate for the creation of an sTLD”.*

1.2.- As regards how the notion of “community” has been interpreted in practice we need only refer as examples to the existing .aero, .coop and .museum sTLD. The .aero domain, sponsored by Société Internationale de Télécommunication Aéronautiques (SITA), is exclusively reserved for the aviation community. The .coop domain, sponsored by DotCooperation LLC, is restricted to use by bona fide cooperatives and cooperative service organizations that ascribe to the Cooperative Principles of the ICA, such as member ownership and control and, finally, the .museum, sponsored by the Museum Domain Management Association (MuseDoma), was developed exclusively for the museum community.

1.3.- What Telnic's application says about what comprises the .tel community:

“the .Tel Community consists of individuals and/or businesses who wish to have a universal identity, brand or name, in the Internet-Communications space as well as providers of Internet-Communications services and related content. This Internet-Communications namespace covers any form of intercommunications activity (voice, combined voice/data or messaging) between individuals and/or businesses, which is dependent, in part or whole, on the Internet as the means of transport”².

¹ New sTLD Application. Part A. Explanatory Notes. 15 December 2003. Sponsorship information.

² Points 4.4 and 5.1 of the application on “The Community to be served”

1.4.- Obviously, what Telnic understands by “community”, a universal system, for any one interested in a universal name, brand or identity, both for natural and legal persons, for individuals and businesses, for voice, data and message communications and for communications of contents and for all types of services regardless of the networks used, be they fixed, wireless or Internet networks, is absolutely not what an sTLD community should be according to the above-referred ICANN regulations themselves. It actually goes beyond the whole of the Internet community and, what is more, its boundaries amply exceed the entire telecommunications sector and any other related sector. In short, what this “community” ends up becoming is, without any exaggeration whatsoever, precisely the entire world.

1.5.- Furthermore it is well-known that *“a key requirement of a sTLD proposal is that it demonstrates broad-based support from the community it is intended to represent, that is to say, an important level of support from the community and evidence of broad-based support from the sponsored TLD community for the sTLD, for the Sponsoring Organization, and for the proposed policy-formulation process”*³.

We must express our **doubts in this respect as to any support the proposal may have received in view of the confusion which Telnic itself has generated by very mixed messages about the .tel.** Undoubtedly Telnic currently describes itself as *“pioneers in universal naming and navigation technology for the Internet Communications World”*⁴. However, confusion has been created by the fact that until only a few days ago, even up to March, it was still describing itself as *“pioneers in universal text-addressing technology for the mobile world”* and the main content of its site consisted of arguing the need to create a specific domain name for mobile operators which would meet the particular needs of those mobile services (“mTLD”), to promote the “mTLD Alliance” and to proceed with creation of the “.mobile” TLD.

1.6.- If as we have suggested, the application is not strictly a proposal for a new TLD, it outside the scope of the competence of ICANN and is not in any event an sTLD, **Telnic cannot be allowed to develop delegated policies from ICANN over many matters concerning the TLD even affect the legal rights of others.**

³ New sTLD Application. Part A. Explanatory Notes. 15 December 2003. D. Level of support from the Community

⁴ <http://www.telnic.org/>

2. THE .TEL/TELNIC APPLICATION IS NOT A SIMPLE APPLICATION ON A NEW TLD. IN VIEW OF ITS CONTENT AND OBJECTIVES, ITS APPROVAL GOES BEYOND THE PURPOSE, FUNCTION, ROLE AND COMPETENCE OF ICANN.

In order to reach this conclusion it suffices to compare the implications of the terms of the proposal and the objectives and function of ICANN as we shall do below:

2.1.- What is the new sTLD .tel/Telnic application?

.tel is “a text-based naming and navigation sTLD that addresses the unique needs of the fixed-line and wireless Internet-Communications namespace. This namespace covers any form of intercommunications activity (voice, combined voice/data, or messaging) between individuals and/or businesses, which is dependent, in part or whole, on the Internet as the means of transport. Hereinafter, this environment is referred to as the “Internet-Communications” namespace.”

This new sTLD will be, amongst other things, “a catalyst and enabler for new innovative voice/data communications services, products, and related content for this namespace”, “A unifying naming structure for Fixed/Mobile Convergence (FMC) that will provide seamless voice, data and value added services for both the wireless and fixed-line networks” or the “key to broad end user acceptance and growth for Internet-Communications services and related content”⁵.

.tel solves the need to migrate from the conventional telecommunications system to the new Internet-centric communications world. “The advance of the Internet and Internet Protocol (IP) technology in telecommunications is resulting in the Internet playing a more important role in the creation and delivery of voice/data services. Increasingly, new services and applications in the communications field are looking to the Internet for growth”⁶.

2.2.- What is ICANN?

“Is a nonprofit public benefit corporation... organized under the California Nonprofit Public Benefit Corporation Law for charitable and public purposes”. “,,, the Corporation shall, ..., pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain system (“DNS”), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv)”⁷.

⁵ Point 2.3 of the application

⁶ Point 2.4 of the application

⁷ Articles of incorporation of Internet Corporation for Assigned Names and Numbers as revised November 21, 1998

Its mission is *“to coordinate, at the overall level, the global internet’s systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems”*⁸.

Its roll *“is responsible for coordinating the management of the technical elements of the DNS to ensure universal resolvability so that all users of the Internet can find all valid addresses”*⁹.

2.3.- It is obvious that the “.tel” application is not just another application for a new domain name. One merely needs to read the sections of the application we have selected to realize that having a new domain is merely a means, a tool, and not even the most important one, for developing the proposal, and that **its content and objectives go far beyond approval of a new domain name and therefore, as we have observed, beyond the purpose, function, role and competence of ICANN.**

Indeed, ICANN is just a domain name technical coordination body; it is not the telecommunications and Internet regulatory policy world authority which Telnic is seeking in order to give the green light to a proposal that appears more like a search for a fraudulent alternative means of becoming a provider of telecommunications services and contents than a proposal for an sTLD in the proper sense of the term.

Admittedly, domain name and Internet address management includes technical and coordination tasks for which private bodies such as ICANN, with the assistance of other organizations¹⁰, can be responsible, but these must not under any circumstances relate to or include, as they indisputably do in the case of .tel's proposal, *“matters of public interest (in particular stability, freedom of use, protection of individual rights, competition rules and fair access for all) which are the responsibility of governments or intergovernmental organizations and to which competent international bodies contribute”*¹¹. In the .tel instance one should add to the aforementioned public issues a long list such as IP telephony, universal services, prices, interconnection matters, numbering, impact on PSTN and other telecommunication service providers, impact on telecommunications networks, competitive environment, security, requirements in cases of emergency, intellectual property rights or data, privacy and consumers protection. In discussion and decision-making on any of these issues one cannot overlook either the role of the

⁸ Section 1 of the Article 1 from Bylaws for ICANN as amended effective 13 October 2003

⁹ <http://www.icann.org/general/>

¹⁰ See Document CO2/46-S of 12 April 2002, Report of the General Secretary of the ITU Council on domain name and Internet address management

¹¹ In this vein see ITU Resolution 102 (Rev. Marrakesh, 2002) on domain name and Internet address management

sectors involved nor the competence of States or of the relevant supra and international organizations .

2.4.- It remains only to mention that any decision by ICANN, exceeding its powers, which approves the .tel application would be particularly serious, taking into account the fact that its future effects would be irreversible.

3. THE .TEL APPLICATION FAILS TO TAKE INTO ACCOUNT NATIONAL AND INTERNATIONAL REGULATIONS AND THE NEED FOR CONSENSUS ON KEY ASPECTS AMONGST THE INTERNATIONAL COMMUNITY.

The nature of the proposal and the extent of its subject-matter and of the intended services affect, if not encroach upon, aspects which are the responsibility of established international organizations, primarily the ITU, and of both national telecommunications services regulators (States) and supranational regulators. Successfully implementing the proposal would also require the consensus of the international community (regulators, service providers, consumers ..) on key aspects of the proposal, which has categorically not been obtained.

We are speaking about matters such as: network security and integrity, universal service (directory of directories), operator selection, tariff rebalancing and pricing mechanisms, policies for routing and Internet use incentivization, commercial agreements between operators, server location and application legislation, call identification services, emergency services and in particular about issues relating to numbering, interconnection and voice services over IP.

3.1.- The ENUM initiative¹² is a good example of the need to observe the competence granted to organizations and States, to obtain the consensus of the

¹² ENUM is a protocol that is the result of work of the Internet Engineering Task Force's (IETF's) Telephone Number Mapping working group. The charter of this working group was to define a Domain Name System (DNS)-based architecture and protocols for mapping a telephone number to a Uniform Resource Identifier (URI) which can be used to contact a resource associated with that number. The protocol itself is defined in the standards track document "E.164 number and DNS" (RFC 2916) that provides facilities to resolve E.164 telephone numbers into other resources or services on the Internet. ITU-T Recommendation E.164 is the international public telecommunication telephony numbering plan. The syntax of Uniform Resource Identifiers (URIs) is defined in RFC 2396 (1998). ENUM makes extensive use of Naming Authority Pointer records defined in RFC 2915 in order to identify available ways or services for contacting a specific node identified through the E.164 number. The Internet Architecture Board (IAB) and ITU-T Study Group 2 are discussing collaboration on the operational, administration and delegation issues related to deployment of ENUM protocol-based

international community and what a proper “modus operandi” for success might consist of, and is in striking contrast to the .tel application. Much good work has been done on ENUM since 1998 and, whilst acknowledging that it is not exactly the same proposal as Telnic's, the correlation between the two proposals is nonetheless undeniable.

3.2.- Telnic is aware of this significant shortcoming in the application since it was one of the grounds on which its previous proposal, submitted to ICANN in 2000 and substantially the same as the current proposal, was rejected. The General Secretariat of the ITU has already spoken against the proposal in its **“letter on Telephony-Related TLDs” of 1 November 2000 to ICANN.** We draw attention to the following paragraphs from that letter, because they are of special interest and because we believe they are still relevant to the new proposal:

“...We have taken note of multiple applications to ICANN for telephony-related TLDs that involve mapping of the E.164 numbering plan into the DNS. As a general remark, the ITU suggests that careful reflection is given by ICANN as to the advisability of allocating TLDs corresponding to Uniform Resource Locator (URL) scheme names as defined in various RFCs and assigned by IANA. As URL scheme names are typically associated with widely-deployed protocols or existing naming/addressing resources, control over a corresponding TLD may suggest control over the corresponding protocol or naming/addressing resource.”

“...A great deal of work on technical standards for IP Telephony is currently underway in many forums and standardization bodies such as the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF) and the ITU Telecommunication Standardization Sector (ITU-T)...”

“...The issues surrounding the intersection between telephone numbering and the DNS are very complex and currently under discussion between experts in the IETF and ITU as well as with governments responsible for numbering plans. As I am sure you are aware, the E.164 international public telecommunication numbering plan is a politically significant numbering resource with direct implications of national sovereignty. It is subject to a multitude of national approaches, regulatory provisions, and, in some cases, multilateral treaty provisions. Considering this, governments should be given the opportunity to fully reflect upon how their particular numbering resource responsibilities relate to DNS-based telephony resources.”

“...In this regard, the ITU is working with the IETF to progress a careful exploration of these complicated issues in the context of its joint work concerning the ENUM protocol. As there are still considerable areas of coordination work needed at this time, until there is an opportunity to further explore the issues within the context of joint work underway and with national governments; it is the view of ITU that it would be premature for ICANN to grant any E.164-related TLD application as this may jeopardize these cooperative activities or prejudice future DNS IP Telephony addressing requirements.”

services. This requires extensive consultation with administrators of resources derived from the international E.164 numbering plan including national and integrated numbering plan administrators

3.3.- At the same time, as regards numbering, although the proposal states that *"The .tel will not...conflict with any national or international telephone numbering plan"*, there are in fact references¹³ in the text of the proposal itself which confirm the **undeniable close relationship between the proposal and numbering plans**, their current standards and those being developed and the powers and responsibilities for the assigning and management of numbering resources, which also includes the potential inclusion of those resources in the DNS. These, as is well-known, are the powers and responsibilities of specific international organizations and of the States as the bodies invested with the majority of powers related to numbering.

The ability to dial via .tel conflicts with the provisions of the National Numbering Plans which are the instruments which indicate for which particular services the numbering should be used, how it should be used and both the rights and obligations of the operator and those of users, and it should be recalled that any unauthorized use may incur an administrative penalty.

It is clear that numbering powers are affected in any event since, in order for a subscriber to access an address-based IP network from the PSTN it is necessary, whether one so wishes or not, to prepare, put in place or abide by some form of world numbering/address allocation plan between the PSTN and the address-based IP networks, and one of the main problems in doing so, which must be familiar to Telnic, is that the numbering plans may not be affected in any way by the new TLD-based communications. This is the direction towards which the international community is working, primarily in the ITU, and options are being explored such as the possibility of allocating E.164 numbering resources to IP devices or of applying the IETF's ENUM protocol¹⁴.

3.4.- At the same time, proposals, such as that under analysis, which seek to use the capacity of the IP networks and their capacity to integrate all services raise the common problem of how to distinguish between what is voice traffic and what is data traffic, an issue which **has a bearing on sensitive issues such as what, in this context, national and international interconnection obligations should be, new**

¹³ Thus it states that *"Digits are to be restricted to maintain the integrity of a letters/words based top level domain and to avoid interference with established or future national and international telephone numbering plans"* (2.2) and that *"a dedicated namespace that restrict numeric registrations is essential"*

¹⁴ See the Report of the Secretary General on IP telephony of 31 January 2001, World Telecommunications Policy Forum, Geneva, 7-9 March 2001

criteria for routing and cross-border communications, what should be the impact on the new commercial interoperability and transmission agreements or on possible new systems for the payment for services or how the operator providing a universal service can gauge networks and sufficient capacity and meet its quality obligations.

The international consensus required in this regard is desirable but not easy to achieve, as well illustrated by the diversity of approaches in the legislation of various States and the difficulties in acquiring total technical standardization for voice and IP telephony.

As regards legislation, some states permit IP telephony with no restrictions whatsoever, some regulate it as a public service, and others prohibit it¹⁵.

In terms of technical standardization there are many sector and regional bodies working on IP telephony - the European Telecommunications Standards Institute (ETSI), the Internet Engineering Task Force (IETF) and the Telecommunication Standardization (ITU-T) and Radio-communication (ITU-R) Sectors of the ITU. Specifically the work of the latter and the ITU-T and ITU-R Study Groups has included the preparation of standards for interfunctioning between PSTN and IP networks, numbering, names and address allocation.

3.5.- Lastly, in the event that the proposal is successful, **Telnic would indisputably be an information society service provider and as such should clarify and define, on the basis of the services it provides, the supervisory system to which it is subject**, which it has to do, as a provider of access, host or data storage services and as the enabler, where applicable, of links to content or to search engines¹⁶. Nothing whatsoever is clarified.

3.6.- In short, it is not possible, by means of mere, and hypothetical, approval by ICANN of a new domain name, to dispense with the regulations and work of the regulators, States, organizations and the international community.

¹⁵ 1.9 Report of the Secretary General on IP telephony at the World Telecommunications Policy Forum, Geneva, 7-9 March 2001 on IP Telephony

¹⁶ Thus, as regards the European Union, see Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

4. SHORTCOMINGS OF THE APPLICATION AS REGARDS INTELLECTUAL PROPERTY.

4.1.- As is customary in the telecommunications sector it is desirable in the development of new platforms and services to acquire a standard with the consensus of regulators, service-providers, consumers and the sectors affected to ensure the interoperability of the various platforms and the legal certainty of access to their use at affordable cost, avoiding proprietary technology and, in particular, preventing any problems concerning intellectual property rights, since such rights would otherwise inevitably give rise to captive markets and real barriers to entry for potential competitors.

We obviously take the view that the best “standard” for Telnic is its Telname system *“a single, new and unifying sTLD is the natural solution”*¹⁷. However, that conclusion can only be reached, as we have explained, after discussion by the international community working with the regulators.

4.2.- The absence of such analysis and consent undoubtedly suggests that ICANN should be aware of the possibility that there may be third party claims for the infringement of intellectual property rights. This possibility should not be discounted given that the work carried out by the ITU on the basis of and in relation to ENUM (E.164) is well-known, that there are patents relating to it, that other patents, not connected with ENUM, have been granted in relation to telecommunications directories and services, and that there are also other initiatives under way which even used the term “Universal Communication Identifier” before it was used by Telnic, as is the case with certain projects at ETSI.

4.3.- Likewise, from the point of view of trademark law there is reason to ask some searching questions about some of the responsibilities which the proposal reserves not to ICANN but to Telnic's PAG:

- A).- In section B of the proposal, *“Protect the rights of others”*, when it proposes setting a Sunrise Period, it states that *“The exact definition of who is a trademark holder with respect to .Tel domain registration in the Sunrise period and other procedures relating to the*

¹⁷ Point 15.2 of the proposal

*Sunrise period will be clearly defined by the "Interim PAG" before the launch of the Sunrise period"*¹⁸.

What a trademark is and the rights conferred by holding a trademark are perfectly defined in, amongst other instruments, the TRIPS agreements approved by the WTO¹⁹, essentially in Articles 15 and 16, and require no clarification whatsoever by Telnic's PAG which, moreover, would not be competent to do so²⁰.

- B).- Section C. Paragraph 17.3. of the proposal states that *"The SO will compile a set of rules for reserved names and a list of specific names to be reserved from registration"* and later provides *"Registry reserved name list as will be agreed between the SO and ICANN"*. On the basis of what criteria? It is fine for it to be agreed with ICANN but that organisation, which is indeed the authority for the global coordination of "DNS" policy, has no powers whatsoever in relation to trademarks.
- C).- In section 17.5 it states that *"In light of ICANN's Working Group B findings that the creation of a famous names list was not feasible...However, the SO will follow ICANN policies with respect to the protection of famous names"*. We do not know what *"famous names"* are. What should be understood to be *"famous trademarks"* is indeed a widely-debated and unresolved issue, but obviously not to be debated and resolved at ICANN, which neither has nor should set policies in this field since it is not competent to do so.

The debate about policies and criteria as to what should be treated on a world level as famous trademarks is the competence of and is being led by the WIPO²¹. However, given the attendant difficulties, to date only recommendations have been made. The organisation has not drawn up any list of famous trademarks. What criteria, therefore, would Telnic use? Would it once more be decided by its PAG? Everything suggests that this would be the case.

4.4.- We are aware that trademarks are governed by the principles of territoriality and speciality whilst domain names are univocal and universal irrespective of their territory

¹⁸ Point 16.2.3 of the proposal

¹⁹ World Trade Organization

²⁰ Article 15 provides that "Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark" and Article 16 that "The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion"

²¹ World Intellectual Property Organization

and use, and that this situation has given rise to well-publicized conflicts between the two figures and to ICANN adopting, following in part WIPO recommendations, a "Uniform Domain Name Dispute Resolution Policy" ("UDRP").

It should be remembered, however, that the UDRP is not a panacea. It only governs certain domain names (.com, .net, .org .biz, .info and .name) and only decisions on certain practices deserving of special criticism (registration and use of domain names identical or similar to trademarks, bad faith) and it is therefore **not sufficient merely to refer to the UDRP as a solution for any problem which might arise between trademark and domain name holders** which is precisely what the proposal does *"Any registration will be a subject to a UDRP procedure under the ICANN existing policy" (17.1).*

It is even less sufficient if we take into account that Telnic's proposal goes beyond the creation of a new sTLD and seeks to set itself up as a veritable Universal Communication Identifier (2.4.3.2), "home telephone numbers, mobile telephone numbers, home fax numbers, personal email addresses, pager numbers, work telephone numbers, work telephone extension numbers, work email addresses, work fax numbers, instant messaging addresses and other contact information", with the effect that the current problems will no doubt increase many-fold.

4.5.- Indeed, if the numbering system is a scarce commodity which for that reason needs national and international regulation, what can be said about its scarcity if instead of numbers, we use names and trademarks? What can be said if it is furthermore a universal identifier for all types of telecommunications services and is not used simply as just one more domain name? It is clearly not sufficient to refer to the UDRP provisions in the event of a conflict. Since it is an STLD one might think that the problem would be confined to a specific community, served by the domain, but as we have seen in section II, STLD .tel's proposal does not satisfy this requirement.

5. SHORTCOMINGS OF THE APPLICATION AS REGARDS DATA, PRIVACY AND CONSUMER PROTECTION

5.1.- The database required to implement Telnic's proposal, a true directory of directories, presents numerous lacunae if not real problems in terms of data, privacy and consumer protection deriving primarily from failure to identify the applicable rules and legal arrangements. These problems relate to key aspects,

i.e., how to enforce users' rights to access, rectification, opposition and cancellation of their data, data quality control, which provisions and rules would govern file security, which specific uses of that data would be permitted and which not and, lastly, before which authority (national, international, ICANN, Telnic, etc.) can these rights be validly and effectively enforced.

We are aware that ICANN is beginning to address some, and only some, of these issues, and that some, and only some, of them are common to any domain name.

The efforts we are aware ICANN is making deserve our sincere recognition but unfortunately these are still embryonic initiatives which have not yielded concrete answers. Evidence of this is the draft position document, issued this month, from ICANN's Commercial and Business User Constituency Statement Regarding WHOIS, from which we take a few sentences which need no further explanation from us, such as *“The Business Constituency recognizes the complexity of this issue and will continue to discuss mechanisms to ensure such accuracy and reliability”*, *“The BC also notes that the previous WHOIS TF provided extensive data and interviews with stakeholders, which should be taken into account in the consideration of policy recommendations”* of *“the BC notes that a complete and thorough examination of the feasibility of such a change must be studied, including the cost impact on registrars.”*

5.2.- As regards the suggestion that some of these lacunae and problems are common to any domain name, it must be stressed that in the case of Telnic's proposal this is not so and that they take on very serious proportions for the following reasons, amongst others:

- A).- We do not know where the Registry will be based, where the servers will be and in short where the database will be located, which is crucial in ascertaining which legal provisions will apply to that data.

In this regard, that is, the rights of users and the stringency of legislation in this field in the European Union²² are very different from those prevailing in the USA and even more in other countries where there is no protection whatsoever.

- B).- Telnic's proposal clarifies nothing whatsoever in this regard.

²² Represented essentially by the following directives: Directive **95/46/EC** of the European Parliament on the protection of individuals with regard to the processing of personal data and on the free movement of such data, Directive **97/66/EC** concerning the processing of personal data and the protection of privacy in the telecommunications sector and Directive **2000/31 CE** on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market

Section E of the proposal, *“Provision of ICANN-Policy compliant WHOIS service”*, the only section which addresses the issue, confines itself in practice to stating generally that, as is of course the case, users are obviously entitled to have access to and to rectify their data and that no unauthorized use will be made of the data. Naturally, and here it is very clear, it does not omit to make sure of the part about *“indemnify in the event that SO is investigated or prosecuted by a national data protection or other authority as a result of the subscriber's use of the database”*. Nor is anything stipulated regarding the policy it would apply to manage its responsibility in respect of telecommunications secrecy and, in particular, in relation to court-ordered access or interception of such communications.

- **C).- The data, privacy and consumer protection problems inherent to the .tel proposal are not comparable in the slightest to those of any other domain in use, and would expand and multiply those problems to an unprecedented degree.**

This is undoubtedly so because we are dealing with a directory of directories, because what is being sought is precisely a universal communication identifier and above as a result of the extremely long list of personal data, not shared with any other domain name, which will be in Telnic's possession, once again, *“including home telephone numbers, mobile telephone numbers, home fax numbers, personal email addresses, pager numbers, work telephone numbers, work telephone extension numbers, work email addresses, work fax numbers, instant messaging addresses”* and even more *“other contact information”*²³.

6. SHORTCOMINGS OF THE APPLICATION AS REGARDS COMPETITION

Nor is the proposal clear on competition issues and raises problems in this regard:

6.1.- The hypothetical grant of the .tel domain which is in fact merely a tool around which to formulate the proposal, is nevertheless vital in terms of ensuring not only that Telnic has a position merely of significant power in the market in question but that it has a veritable monopoly in that market, an issue quite clearly not resolved by the fact that there could be different Registrars.

6.2.- Its exclusive ownership of such a powerful database would be an insuperable barrier to entry for any other potential competitor, all the more so since that exclusivity would be guaranteed by the "sui generis right" of any maker of a database to prevent the extracting and/or re-utilization of all or a substantial part of its contents by any third party. See, accordingly, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

6.3.- To the extent that Telnic might also, even if only indirectly, manage telecommunications traffic, it would render meaningless the right of users to freely choose the operator through which to make their telephone calls or any other telecommunications service and would give rise to enormous confusion on issues as fundamental as whether the customer will still be the customer of the operator or will in fact become a Telnic customer.

6.4.- If to the foregoing we add on the one hand the **uncertainty** caused, as we have said in section V, referring there to data and privacy protection, by not knowing where the Registry will be based, where the server will be and, in short, **where the database will be located, which is crucial to ascertaining which provisions of competition law will apply** and, on the other, the fact that **history has shown that merely having effective control over the issuing of names, numbering and addresses very often implies control of communications systems** and an obstacle to competition and exercise of the rights of consumers, **we have to conclude that there are sufficient grounds, in this regard too, for questioning the proposal.**

7. CONCLUSION

In accordance with the foregoing, ICANN should reject the .tel proposal on the following summarised grounds:

1. The .tel proposal does not satisfy the requirements laid down by ICANN to be an sTLD, most particularly because it does not comply with the strict limits on what should be the "community" in any proposal for an sTLD.

The extent of the "community" to which the proposal relates is so totally general as to be broader than the entire global Internet community, and this, according to ICANN rules, is expressly prohibited and infringes the requirement that any proposal for an sTLD "*must*

²³ Point 2.4.3.2 of the proposal

address the needs and interests...and provides detail of a clearly... and precisely defined community”.

2. Approval of an sTLD such as .tel is not within the competence of ICANN.

ICANN is not and cannot be a kind of world-wide regulatory authority for all types of telecommunications, Internet and information society services, as Telnic self-servingly claims.

3. It fails to take into account national and international regulations and the need for consensus among the international community. Accordingly:

- As early as 2000 the ITU ruled against the first .tel proposal which is substantially the same as the current proposal, in terms which are still pertinent today to the new 2004 proposal.
- The .tel proposal is closely and unambiguously linked to numbering plans and would require a future review of national and international interconnection obligations and new routing and cross-border communications criteria, of what should be the impact on the new commercial interoperability and transmission agreements and on possible new systems for the payment for services or how the operator providing a universal service can gauge networks and sufficient capacity and meet its quality obligations. In short, it infringes areas of competence vested in specific international organizations and of States themselves.

4. It has shortcomings in relation to intellectual property, as follows:

- Some of the powers which the proposal reserves to Telname's PAG are contrary to trademark law and it is not sufficient to refer to the UDRP provisions as the sole solution for any conflict between trademark and domain name holders, particularly since .tel is a “Universal Communication Identifier”, which fact increases many-fold the conflicts traditionally present in this regard.
- It is very likely that there will be claims against ICANN for infringement of the intellectual property rights of third parties.

5. It has shortcomings as regards data protection and the law relating to consumers and users as a result of the failure to identify which rules and legal provisions would apply and of the vast database, totally incomparable to any known domain, which would be needed to implement the proposal.

6. It has shortcomings in terms of competition. Accordingly:

- ICANN's approval of .tel would in fact create a monopoly on the provision of this kind of service, further reinforced by the fact that it would have exclusive rights over the database, and exacerbated by uncertainty, here too, as to which legal provisions are applicable.
- Were Telnic to manage telecommunications traffic, even if only indirectly, the right of users to freedom of choice of operator would be rendered meaningless.

Madrid, 28 April 2004