

Open Registrar Proposal

The core of the vertical integration debate is ensuring competition, i.e. making sure that an organization that holds a monopoly or, more correct from a competition law point of view, an "essential facility" (the TLD), ensures access to such resource under fair, reasonable, and non-discriminatory terms (the "FRAND" standard);

The choice made in order to ensure such access is to disentangle two roles: the registry (managing the infrastructure) and a registrar (reseller network) providing access to the infrastructure. What's interesting is that although we are talking about "new" gTLDs, the debate is nothing new: we have seen similar issues in telecommunications, the railroad network, energy and mining, and so on;

However, the Vertical Integration Working Group ("VI WG") is still one of a kind: 62 members, 1500 emails on the mailing list and several extremely good and diverse proposals. Having attended all conference calls, read each and every e-mail and examining all documents, we (a group of mid-size European Registrars) respectfully submit the following, with several key principles.

I. A balanced and Realistic view

Years of experience in the ccTLDs space abundantly show that models with cross ownership ("CO") or vertical integration ("VI") between registries and registrars **do not cause consumer harm by themselves** and therefore should not be automatically prohibited in the new gTLD ("nTLD") process.

To the contrary, we believe (along with DM and MMA) that too strict limitations of such models will end up crippling or worse discourage many potential nTLD applications, directly against ICANN goal of stimulating innovation and growth for nTLDs.

We are sympathetic to comments – such as PIR's – which point out some danger in total and unmonitored integration. However, this "danger" as yet to be substantivized with clear and quantifiable examples. Likewise, we believe that although past experiences must be taken into account when shaping this new framework, they should not be the only thing we – as a community – and ICANN – as a whole – listens to. As the name implies, nTLDs will open a new era and rules should allow for that.

A prime example of this “new era” is the strong interest that key consumer brands have shown in participating in the process. This WG is fortunate enough to count at least one of them as its member and we all know of the interest of Canon and HP, to name a few. Since nothing in the ICANN rules prevent them from applying, we believe it is essential for this WG to allow them to pursue their goals.

As a result, we strongly believe the only suitable answer to the above is a strong yet flexible framework of rules to be implemented. It needs to be capable of effectively control CO and VI – and indeed avoid dangers but only those that are clearly identified – yet provide flexibility for innovation while guaranteeing equal access to Registrars.

Because none of us has a crystal ball, the ultimate goal must be to foster innovation. While we are not proponents of pure *laissez-faire* the truth is that the Internet is constantly evolving: our WG has no foolproof way of determining what TLD will or will be a success and it would be quite presumptuous to judge a business model before it is even created. Twitter as become a key service in less than two years and without any “specific service” attached to the .com Top Level Domain. Similarly – and closer to home – the .Tel Top Level Domain is quite successful with only a handful of Registrars promoting it effectively.

II. Fighting the issues, not the potential risks

a) Crisis? What crisis?

There may be risks in nTLDs but it seems unrealistic to want to avoid them all before they happen. To name just a few, UDRP, de-accreditation of a Registrar, whois compliance checks... All remedies that are constantly used in our industry and have one common aspect: they are always used after the fact. Likewise, should VI in specific nTLDs prove to be detrimental to customers, checks and balances are in place, or will be added to rectify it *when it happens*. Similarly, if a nTLD Registry were to violate its “equal access” provision, penalties can and should be enforced... But it is unrealistic to pretend correcting an issue before it arises: if it works, don’t fix it!

b) Competition authorities are not the solution

We note certain proposals have suggested preliminary investigation of all nTLDs applications by competition authorities, but do not hold these to be practical solutions, as many such authorities will not be available for preliminary investigations or too slow

to respond when faced with a deluge of proposed applications. Since many in the ICANN community nTLD process has been delayed significantly already, we would like to avoid waiting unnecessarily for an answer that may never come or be satisfactory.

Besides, many Competition Authorities (in the US or the EU) simply do not have the authority to consider cross-border issues while in most of the cases, any clearance sought will likely fall under the *de minimis* rule, which states that competition authorities cannot consider issues where the impact on the market is less than 5% (again, this rule applies in the US as well as in the EU)

c) Audits are cost-ineffective

Likewise, we hold regular audits to be unnecessary and cost-ineffective, especially for smaller registries and therefore propose audits to be imposed only in case of legitimate complaints of non-compliance. However, we strongly think such an obligation should have more teeth than what was envisioned: an audit bringing unsatisfactory results should trigger financial consequences or even de-accreditation in severe and repeated cases.

III. Specific answers on Cross Ownership and Vertical Integration

a) No magic number

Having read the whole list and consulted with many stakeholders, we do not yet see unpreventable harm that could come from a registrar affiliated with a registry selling domains of a non-affiliated registry. The “15%” quota is a byproduct of the domain name market as it once was, way before there was millions of Domain Names in the world and, more importantly, before ICANN itself decided there should be no finite number of nTLDs available.

We therefore propose that full registry/registrar cross-ownership of 100% should be allowed and can be beneficial to the goal of stimulating innovation and growth for nTLDs. We do not believe in an arbitrary/artificial limitation of ownership as it provides no benefit in itself regarding the concerns raised regarding control. The same level of control is possible regardless if there is full ownership or just 15% ownership, depending on the setup of the owned entity. There is a high risk that such limitations only serve incumbent registry operators by preventing new competitors from entering the market.

b) Vertical Integration is not automatically evil and can be quite useful

The fact that some ccTLDs Registries do act as Registrars for their own Internet Communities should be proof enough that VI is indeed a possibility. .SE, .UK, .DE have been doing it for ages and the German and British market are among the strongest in the world.

Moreover, VI may be needed for fringe TLDs and TLDs in regions with no or few ICANN registrars. Proposals suggesting 7 registries could band together to form one registrar needlessly curtails the economic options of a new TLD registry and disregards basic market requirements.

c) The need for a reasonable and practical “Chinese wall”

While we agree that there may be possibilities for abuse from a registrar affiliated with a registry selling domains of said affiliated registry, we believe such abuse can be effectively curtailed by implementing barriers, checks and balances as well as penalties for offending entities.

We therefore propose to limit the level of control to prevent harm by inserting yet-to-be-defined layers of barriers of information (information firewalls) between the registry and registrar entities, as well as implementing contractual guarantees for other registrars to prevent discrimination. Once again, we believe preventing any and all wrongdoing before it happens is, at best, wishful thinking. Creating enforceable sanctions towards Registries and/or Registrars guilty of clearly defined wrongdoing will be much easier and practical.

This can be achieved by requiring strict financial separation of registrar and registry entities, functional separation of the entities as much as is required, and to a lesser extent, a limitation of market share or market power in the TLD. Further limitation of control will be achieved by strict adherence to so-called “Rec. 19”, by implementing guarantees to ensure equal access for all ICANN accredited registrars (see below), mandating the use of registrars (sale only through registrars), except in the case of SRSUs as detailed below.

IV. Equal Access

In principle, all ICANN accredited registrars must be granted equal access, all registrars interested in carrying the TLD must have the same basic opportunities for registrations and management of a domain name. This includes an equal number of connections to the registry system for all registrars, first come, first serve amongst registrars for general availability/non-auction phases, adequate support levels for all registrars as well as firewalled information of registry data from registrar entity.

Cross-ownership should not prohibit a registrar to sell domains from a registry of which it holds shares, provided equal access to registrations is guaranteed and does not discriminate against other registrars.

V. Single Registrant TLDs

As a consequence of the above, single registrant TLDs will be possible and registries be in general allowed to own or act as a registrar in their own TLD.

As previously suggested in other proposals, a separation can and must be made on the requirement of equal access of registrars depending on the intended and actual use of the SR TLD.

a) SRSU

In cases where the SR is also the single user, no equal access of registrars shall be deemed necessary. Such uses would include dotBrands and organizations where the domain names would only be available for use by that organization in a very narrow sense, and responsibility for each domain name and its use remains with the single registrant. As soon as domain names are distributed, SRSU does no longer apply.

b) SRMU

However, once domain names are to be provided to multiple users, equal access rights for all registrars must once again be ensured to prevent opportunities for gaming. Many non-SR TLDs may otherwise be inclined to apply for SR status just to get around the equal access requirement. For example, a .WEB SR TLD without equal access based on a club membership structure or other creative distribution method shall not be allowed.

To prevent gaming, strict guidelines would need to be defined to limit SRSU TLDs to such proposals without gaming potential. If no such guidelines can be defined by this WG, no exception from the equal access provision shall be made.

VI. Misc: our answers to some issues raised on list

a) Registry Service Providers (RSPs)

The Afilias and Neustar examples show quite clearly that a good RSP can be instrumental in the success of a TLD. The experience gathered for one automatically benefit the others and allow for better investment planning and outreach. Preventing RSP from having an interest in one or more TLD could therefore be counterproductive to the Community.

Thus, we propose that no cap should be implemented on cross ownership between a registry service provider (registry tech provider) and a registrar, but that similar levels of limitation of control be required. Excluding the requirement for annual audits, we see the Neustar proposal as a working model regarding RSPs.

b) Community and “Orphan” TLDs

As registries are able to set up a registrar under the proposed system, no special rules for these types of TLDs are necessary.

c) Compliance monitoring and penalties

As some market players may try to violate their obligations with regard to limits of control and/or equal access, SRSUs may turn out to be SRMUs after all, etc. For such violators, ICANN should put in place a firm and strict penalty system for the offending player, with penalties ranging from financial penalties, imposition of stronger restrictions up to the loss of the registry contract in case of severe and repeated offenses. Compliance should (and will be) monitored by competitors, registrars and registries alike, and complaints be investigated by ICANN and/or contractors of ICANN.

CONCLUSION: the need for VI-CO within reasonable boundaries

Approaching the matter with an open mind at the very beginning of this WG's work, we have never been convinced of any potential danger of some VI or CO for the future nTLDs.

Any innovation carries an inherent level of risk: domain names brought cybersquatting and tasting, to which the community found solutions – similarly the community will find solutions *if and when* issues arise, which has simply not been the case so far.

ccTLDs have used VI/CO with great success while Registrars carrying those still continue growing their market share. It stands to reason then that a Registry offering Domain Name registrations directly is not enough to “capture” the customer who still knows and uses the choice of the market.

nTLDs allow for diversity, which means that .Nokia will not compete directly with .Biz and can be registered (and used) alongside a .Web. As a result, we don't see dotBrand TLDs as a risk for other TLDs and believe the community should understand that some companies need to gather additional control over the way their brand is used on the Internet, through SRSU if necessary. Likewise, a Japanese brand may prefer that its customers in France use their local Registrar while their key market would be “better served” by the brand company directly: it is presumptuous – at best – for this WG to try to guess each and every business model that nTLDs will use.

Privacy and data exchange has evolved tremendously over the last ten years, most of the time for the benefit of the consumer. There is no reason to believe that data is more secure in the hand of a small ICANN accredited Registrar – which may not have adequate redundancy or backup plans – than at the Registry level, as is the case in many ccTLDs.

The necessary safeguards do exist, they will evolve as the market does. In the meantime we should take all the steps necessary to allow this evolution to happen.

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