

## BC Comment on Vertical Integration Working Group Initial Report

August 2010

### Executive Summary of Commercial and Business User Constituency (BC) comments on Vertical Integration Working Group Initial Report

This submission is in response to ICANN's call for public comments on the Vertical Integration (VI) Working Group Initial Report. The BC has closely followed the Working Group's discussions and considers VI a priority topic. Several BC members are actively engaged in the VI Working Group (in their individual capacity, not as official representatives of the BC).

The BC developed and posted a position on VI in September 2009 (see Annex A). In this comment filing, the BC restates its September 2009 position and provides two clarifications to ensure that our position is relevant to the VI Working Group's initial report. All other elements of the September 2009 position remain, and the BC asks the WG to take note of these clarifications to the BC position.

First, the BC restates "**The BC thus opposes any change to the status quo for all TLDs intended for sale to third parties (i.e. those unconnected with the Registry).**" Below, we define the meaning of "status quo" at the time the BC took this position and in the context of bi-directional separation.

Second, the BC restates "**The BC believes that uniquely for domain names intended for internal use, the principle of registry-registrar vertical separation should be waived.**" Below, we define the meaning of "internal use" as used in our position.

Finally, the BC request that ICANN continue the policy development process in order to further define the eligibility for and scope of exceptions for Single Registrant TLDs, including a single registrant distributing domain names to its customers, subscribers, and registered users.

The BC expects that its position will evolve as the Working Group continues its policy development efforts.

#### BC Recommendation 1:

The full BC position from September 2009 is included in Annex A. The first recommendation from the September 2009 position is:

The BC believes that removing the existing vertical separation safeguards between registries and registrars may increase the likelihood of the exercise of dominance within the domain name marketplace.

The BC believes that the proponents of change have not satisfactorily demonstrated the likelihood of market place benefits to users.

The BC believes that the proposed 100,000 waiver is likely to effectively remove the principle of separation in that it will apply to the most market-significant names.

**The BC thus opposes any change to the status quo for all TLDs intended for sale to third parties (i.e. those unconnected with the Registry).**

Clarification: In the BC September 2009 position, "status quo" referred to registry contracts for .com, .net, and in the 2001 and 2004 new gTLD rounds, which prohibited a registry from acquiring or controlling more than 15% of a registrar.

In addition, the BC September 2009 position included specific references to "vertical separation safeguards", such as prohibiting registrars from selling names in registries where they had a controlling interest.

The BC is concerned about potential abuses of cross ownership, including access to registrant information that could be used for cross marketing or other purposes for which the data was not collected. Maintaining separation of registrar and registry functions and ownership is viewed by BC as one important 'structural safeguard'.

While the BC position was silent about registrar ownership of registries, the intent of the BC position was to oppose changes in existing structural separation safeguards. Therefore, the BC position is to oppose changes to any separation safeguards, and to maintain the 15% limit on cross-ownership interest between registrars and registries.

**Clarification of BC position on BC Recommendation 2:**

The second recommendation from the BC September 2009 position supports a narrow exception for registries operated by a single registrant that is distributing second level names for internal use:

*BC position (closed markets)*

It is possible that in the forthcoming expansion of domain names there will be proprietary domain names **not for sale to the general public** (eg dot *brand*). In this unique case the BC would accept that it makes no sense for a company owning its own name or trademark in the form of a domain name to be obliged to go to a third party to register its own second-level domain names. Thus an opt-out for this special case of internal use seems appropriate.

Recommendation 2:

**The BC believes that uniquely for domain names intended for internal use, the principle of registry-registrar vertical separation should be waived.**

When the BC developed its September 2009 position, "internal use" was a term used for a range of entities that were under control of the single registrant and "not for sale to the general public". At the time, BC discussions of "internal use" included the following entities:

- divisions and product names for a single registrant (e.g. copiers.canon )
- employees of a single registrant, for use in second level domains and email addresses
- subscribers, customers, and registered users of a single registrant, subject to approval and control by the single registrant.

The range of internal uses discussed by the BC should be considered by the Working Group as it develops consensus principles for single registrant exceptions its final report. The BC will continue its internal discussions on these categories.

**BC Request for continued policy development of single registrant exception within the Working Group**

Finally, the BC requests that ICANN continue the policy development process in order to define the eligibility criteria and conditions for the Single Registrant exception as part of the current round of new gTLDs.

The Working Group Initial Report included a preliminary draft of single registrant exception on pages 32-33 that contemplates a more restrictive definition of internal uses than what the BC has contemplated, listing only "the registry itself, its employees, agents and subcontractors."

The BC requests further exploration of the range of internal entities for which a single registrant may distribute and manage domains within its TLD. As noted above, the BC is interested in flexibility to allow a qualified single registrant to distribute and manage domains for its departments, employees, customers, subscribers, and registered users. However, the BC understands that there would need to be well-defined criteria and enforceable contractual terms.

On all issues regarding vertical integration, the BC expects that its position will evolve as the Working Group continues its policy development work.

Submitted by the BC Executive Committee, 12-Aug-2010

## Annex A

### BC Position on Registry-Registrar vertical separation September 2009

#### **Background**

The principle of the vertical separation of Registry and Registrar was established 11 years ago as a pro-competitive action at the time of the monopoly of one entity (Network Solutions now VeriSign) owning the registry and acting as registrar for .com .org and .net. ICANN created the system we have today, where registrants place orders with ICANN-accredited registrars, who in turn place the orders with ICANN-contracted TLD registries.

In essence there were three pro-competitive benefits:

- a) the splitting of a dominant market player thus avoiding the potential for the exercise of dominance;
- b) the subsequent development of a competitive market with multiple registrars offering consumers a variety of services connected with the purchase of domain names;
- c) the subsequent development of competition at the registry level as ICANN moved to open up the registry market.

The BC supported this principle.

To ensure this structure held, ICANN restricted registries from acquiring a substantial percentage of any registrar, so VeriSign (the .com and .net registry) cannot buy a controlling interest in registrar GoDaddy, for example.

Judged by price alone (as an indicator of a competitive market) the pro-competitive benefits have proved to be real. Today the price of a .com domain name has dropped and there are multiple registrars competing for business with varied offerings.

#### **Developments**

In the subsequent 11 years, the BC has continued to support a cautious expansion of gTLD registries (in pursuit of the competitive benefits) and the continuation of Registry Registrar separation. Some of the largest registrars have become registry operators which also register those TLD names to the public. For example GoDaddy provides the registry for country-code .me (so Montenegro makes the rules, not ICANN). Also certain registries have been affiliated with domain registration companies for some time e.g. HostWay and .PRO, Poptel and .COOP, CORE and .CAT, Verisign and DBMS, GoDaddy and .ME, Afilias and .INFO.

Some registrars, such as eNom, are pressing ICANN to eliminate the restrictions on Registry-Registrar cross-ownership, so that those registrars can compete as registry businesses, sell new gTLD domains directly to the public, and sell them to all other ICANN accredited registrars as well. Other registrars, such as Network Solutions, has called for a continuation of the structural separation requirements between registries and registrars, but some liberalization in the cross-ownership requirements.

ICANN has reacted positively to the proposals to change in a limited fashion by proposing a continuation of the principle of separation BUT with a waiver for the first 100,000 names (described as a *limited lifting* of the requirement):

*"With a limited exception, a registrar should not sell domain services of an affiliated registry. This limit is set to a certain threshold, in this model, 100,000 domain names".*  
<http://www.icann.org/en/topics/new-gtlds/regy-regr-separation-18feb09-en.pdf>

The questions are thus:

- a) 11 years on, do the pro-competitive benefits outlined above continue to exist?
- b) Does the 100,000 waiver effectively remove the principle of separation in that it will apply to the most market-significant names?

### ***The position of the existing market players***

#### **In favour of the status quo of continued separation**

Certain existing registries, such as NeuStar (.biz) and Public Interest Registry (.org) are in support of any entity becoming a registry or registry operator, so long as that entity does not distribute domain names in the same TLD that they operate as a registry. They oppose the proposal to discontinue separation on the basis that registrars have a substantial head start in marketing domain names to the public.

#### **In favour of change and the ending of separation**

Certain existing large registrars argue that only entities with market power which can be exercised for anti-competitive purposes (such as Verisign with .com and .net), should be subject to cross-ownership restrictions. These registrars claim it is in consumers' interests to allow cross-ownership because it would enhance competition and allow for the passing on of operational efficiencies in the form of lower prices.

#### **BC Position (general market)**

Given the uncertainty of the merits of the arguments either way the BC believes that the burden of proof must lie with the proponents of change. Those who favour change must demonstrate:

- a) that the competitive benefits outlined above no longer apply and
- b) that there will be new competitive benefits and no significant adverse effects as a result of such change.

The decision is of course not in the hands of registrars or registries but in the hands of the ICANN Board. The question for the Board is simple: "Will removing the vertical separation safeguards either INCREASE or DECREASE the likelihood of the exercise of dominance within the domain name marketplace?"

#### **Recommendation 1:**

**The BC believes that removing the existing vertical separation safeguards between registries and registrars may increase the likelihood of the exercise of dominance within the domain name marketplace.**

**The BC believes that the proponents of change have not satisfactorily demonstrated the likelihood of market place benefits to users.**

**The BC believes that the proposed 100,000 waiver is likely to effectively remove the principle of separation in that it will apply to the most market-significant names.**

**The BC thus opposes any change to the status quo for all TLDs intended for sale to third parties (i.e. those unconnected with the Registry).**

***BC position (closed markets)***

It is possible that in the forthcoming expansion of domain names there will be proprietary domain names not for sale to the general public eg dot *brand*. In this unique case the BC would accept that it makes no sense for a company owning its own name or trademark in the form of a domain name to be obliged to go to a third party to register its own second-level domain names. Thus an opt-out for this special case of internal use seems appropriate.

**Recommendation 2:**

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