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Proposed Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes

Valideus provides new gTLD consultancy and registry management services to prospective and existing new gTLD registry operators. We co-ordinated over 120 applications for new gTLDs on behalf of a number of applicants all of whom are owners of global brands, both for Brand TLDs which qualify for Specification 13, TLDs which have been awarded an exemption to the Specification 9 Code of Conduct, and TLDs which will be operating a more open registry model. Valideus also works with Geo and Community registries to “get the right names into the right hands” through the provisions of registrant validation services.

We welcome the opportunity to comment on the Proposed Measures for Letter/Letter Two-Character ASCII Labels (hereafter referred to as the “2-letter labels”) to Avoid Confusion with Corresponding Country Codes (hereafter referred to as the “Proposed Measures”). The Proposed Measures purport to meet the requirement under the third sentence of Specification 5 section 2 Registry Agreement (“RA”): “The Registry Operator may also propose the release of [the 2-letter labels] based on its implementation of measures to avoid confusion with the corresponding country codes, subject to approval by ICANN”.

We recognise that ICANN has faced repeated GAC Advice on this issue, even after the matter appeared to be closed following the Advice in the LA Communique on 15 October 2014. Nevertheless, we are disappointed that it has taken so long to reach this point. We urge ICANN to proceed without further delay to allow the 2-letter labels to be released.

Brand and Code of Conduct Exempt Registries

We note the Proposed Measures insofar as they relate to Brand TLDs with an executed Specification 13 and those TLDs with exemptions from the Specification 9 Code of Conduct would require:

- a provision in the registration policy requiring that the registrant commit to taking steps to avoid any misrepresentation or false implication of an affiliation with the government or country code manager (the “Registration Policy Measure”); and
- some form of post-registration complaint investigation (the “Post-Registration Complaint Investigation”).

The provisions of Specification 13 already contractually require that the Brand TLD applies measures which, by their very nature, avoid confusion with the corresponding country code, including in particular the limitation of domain registrations to the Registry Operator, its Affiliates and its Trademark Licensees. Those TLDs which have been granted an exemption to the Specification 9 Code of Conduct have likewise contractually committed to a registration eligibility and use policy which precludes against confusion with the corresponding country code since all domain registrations must be registered to the Registry Operator for the exclusive use of itself or its Affiliates. Since unaffiliated third parties are not eligible to register domain names within these TLDs there can be no misapprehension that such domain names are being used by the government or country code manager.

The nature of these TLDs, therefore, must make the risk of confusion extremely remote. Nevertheless, in the interests of drawing this matter to a close and enabling the release of the reserved 2-letter labels, the proposed Registration Policy Measure and Post-Registration Complaint Investigation seem an acceptable way forward, subject to the following comments:

1. The reference to section 2.8 RA in relation to the Post-Registration Complaint Investigation is inappropriate. Section 2.8 is entitled “Protection of the Legal Rights of Third Parties”. Governments and country code managers do not have legal rights to the 2-letter labels at the second level.

Further section 2.8 RA refers to “reasonable steps to investigate and respond” to reports of illegal conduct. “Conduct that causes confusion with the corresponding country code” should not be presupposed to be illegal conduct.

Conflating the treatment of reports of confusion with section 2.8 RA implies legal rights for governments which do not exist at law and serves to encourage the view that a precedent has been set.

2. The standard for investigation, as set out under section 2.8 RA, is “reasonable steps to investigate and respond”. Reports of confusion from governments must also satisfy some standard of reasonableness. Bare assertions of confusion without any explanation or evidence, as we have seen to date in the course of the process for release of the 2-letter labels, do not satisfy the standard of reasonableness.

Other Registries

We support the comments submitted by the RySG. The proposed Exclusive Availability Pre-Registration Period must be a voluntary measure. A few legacy TLDs have voluntarily adopted some form of phased allocation programme. Some new gTLD Registry Operators likewise proposed as their confusion avoidance measure some form of exclusive access period for governments and/or ccTLD operators. Where the adoption of such measures is genuinely voluntary there is no objection. Imposing this as an obligatory measure purports to create rights to ownership for governments over the 2-letter labels, which do not exist at law.

To the extent that the strong objections to an obligatory Exclusive Availability Pre-Registration Period from the Registries and others such as the IPC are ignored, we consider it is essential that any such Exclusive Availability Pre-Registration Period must apply only in relation to those 2-letter labels where objections as to confusion have been submitted by governments and not to all such labels. Where authorisations to release have already been issued by ICANN this approval cannot be retrospectively reopened, and to the extent that some Registry Operators have not yet submitted their requests for authorisation to release (for example where the TLD has been in contention and so has not been eligible to proceed) it would be wholly inequitable for ICANN to treat such Registry Operators and TLDs differently from the majority of others.

Thank you for considering these points.

Yours sincerely,

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