

Joint Vertical Integration/Co-Ownership Proposal

By

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Problem Statement: ICANN is on the verge of the greatest expanse of the domain name space since its creation in 1985. However, ICANN's current legal framework was developed to open up a legacy monopoly that existed over a decade ago. That framework lacks the flexibility to promote increased innovation and choice in an increasingly competitive and fluid marketplace while still safeguarding consumers' interests.

Objective: Break away from ICANN's current one-size fits all contracting mentality, and provide a legal framework which can both scale going forward and provide room for innovation and diverse business and organizational models within the domain name eco-system.

Proposed Solution

Registry Operator/Registrar Co-Ownership: Registry Operators would automatically be permitted to own 15% of an affiliated Registrar, and Registrars would automatically be permitted to own 15% of an affiliated Registry Operator. If any Registry Operator or Registrar wanted to increase ownership beyond 15% they would submit a written request to ICANN.

In evaluating any request for ownership in excess of 15%, ICANN would use the following process modeled after the recently published Salop/Wright paper². Any request from either a registry or registrar with a market share in excess of 40%, would be denied in connection with ICANN's first round of new gTLDs (Salop Wright Option 1)³. All other requests would be processed in the following manner. After an initial 30 day comment period, ICANN would

¹ This proposal represents an attempted compromise to reconcile the professional opinions and viewpoints of the three co-authors. While the co-authors believe this proposal provides a foundation for further consensus building within ICANN's Vertical Integration Working Group, there may be certain aspects of this proposal, which the individual authors may not fully endorse.

² See <http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf>

³ While the prohibition against any ownership by a registrar/registry with greater than a 40% market share appeared in all of the initial drafts of this proposal, the authors had considered removing this absolute prohibition in the final draft. The removal was based in part upon: ICANN lacking the skill set to accurately calculate market share, .e.g. national/global, gTLD/ccTLD; the consequences of ICANN making a false positive on market share calculation, e.g. false calculation of market share would prevent a national competition agency or agencies from even evaluating the proposal; and the Salop/Wright proposal strongly recommending against an absolute prohibition. The authors, however, decided to leave this restriction in the proposal and solicit input from the Working Group and other competition experts on how to proceed.

forward the initial request and any comments received to the appropriate governmental competition enforcement agency or agencies for consideration⁴.

ICANN would then place the application on hold for a period not to exceed 45 days.⁵ If the agency or agencies notify ICANN and the registry or registrar during that 45 day period that the acquisition of that entity at the other vertical level may violate its competitions laws, ICANN will place the application on hold for another period not to exceed 60 days following the deadline that agency or agencies has established for the applicant to respond to any information requests for its investigation. At the end of this period, or sooner if notified by the agency or agencies that any issues have been resolved, ICANN will approve the application. (Modified Salop/Wright Option 2).

Pros: Incorporates elements of existing cross-ownership proposals from within the community, while proposing a framework modeled on existing ICANN contractual language that scales both going forward as well as retroactively.

Cons: While the principles of this framework can potentially be agreed upon within the community by the Brussels meeting, the exact legal documents and terms could not be finalized by that time.

Registration by cross-owned Registry-Registrar: Registries and Registry Service Providers (RSP) would be permitted to provide domain name registration services for their TLD through an affiliated Registrar provided that the following rules apply:

- a) In the event the Registry Operator/RSP Controls pricing, policy or the selection of registrars for the TLD, then the restrictions applicable to the Registry Operator/RSP shall also be applicable to any of its Affiliates.
- b) In addition, in the event that Registry/RSP or any of its Affiliates is a Registrar for the TLD, the following restrictions shall apply:
 1. Affiliated Registrar may not receive directly or indirectly preferential pricing from Registry Operator (i.e., direct pricing, rebates, discounts, marketing contracts, etc.).

⁴ ICANN shall engage in no analysis or commentary when forwarding any comments received during the public forum. Unlike the public forum archives that do not display the author's email address, ICANN would provide unredacted email addresses to permit the appropriate governmental competition enforcement agency or agencies to contact the author.

⁵ This is the same waiting period for new registry services that might raise competitive issues.

2. RSP must have strict controls on use of data for any purpose other than acting as the RSP and must have information “firewall” between data in the registry and its Registrar Affiliate.
3. No confidential information of the Registry Operator obtained by the RSP may be shared with registrar Affiliate of RSP except as necessary to perform the Registry Services and only for such purpose.
4. RSP shall not provide any access to any Registry Data to its Registrar Affiliate, and RSP itself will not use confidential user data or proprietary information of an-ICANN-accredited registrar served by Registry Operator, received by RSP in the course of providing Registry Services, except as necessary for registry management and operations.
5. In the case where an RSP has a Registrar Affiliate providing Registrar services in the TLD, such RSP will conduct internal neutrality reviews on a regular basis. In addition, it will agree to cooperate with an independent third party ("Auditor") performing Annual Independent Neutrality Audits ("AIN Audits"), to be conducted each calendar year. All costs of the AIN Audits will be borne by RSP. The AIN Audit is intended to determine whether Back-end Operator has been in compliance, and will utilize such tests and techniques as the auditor deems appropriate to determine that compliance.
6. Strict Penalties/Sanctions will be applied to any entity violating these policies, including monetary as well as temporary and potential permanent prohibition of Affiliate Registrar providing domain name registrations services in the TLD, e.g. Three Strikes Program⁶

Pros: Incorporates elements of existing cross-ownership proposals from within the community that promote innovation as well as existing ICANN contractual concepts, while still safeguarding consumer’s interests.

Cons: While the principles of this framework can be largely agreed within the community by the Brussels meeting, the exact legal documents and terms could not be finalized by that time.

Vertical Integrations and the use of ICANN Accredited Registrars: There shall continue to remain a strong presumption in favor of using ICANN accredited registrars in connection with

⁶ It is proposed that the first material violation would result in the Vertically Integrated / Co-Owned Registrar being prohibited for three months from “adding” any new domain names within the TLD; The second material violation would result in the Vertically Integrated / Co-Owned Registrar being prohibited for six months from “adding” or “renewing” any domain names within the TLD; a third material violation would result in a prohibition in that registrar providing any domain name registration services within that TLD.

domain name registration services. However, it is recognized that innovation and choice within the domain name marketplace can sometimes only be achieved by permitting the Registry Operator to provide domain name registration services for its new gTLD, without the market inefficiencies of that entity having to seek separate ICANN Accreditation as a Registrar. While this flexibility is most likely appropriate in connection with single registrant TLDs, there may also be the need for flexibility in connection with community/cultural/linguistic TLDs. Therefore, Registry Operators shall be permitted to provide domain name registration services in their new gTLDs if they agree to be legally bound to the registrant safeguards set forth in the Registrar Accreditation Agreement (RAA).

Registry Operators shall also have the ability to set up criteria (access requirements) for Registrars in the TLD at its sole discretion; provided that such requirements are reasonably related to the purpose of the TLD and that Registry Operator shall additionally provide equivalent access requirements to all Registrars that meet the access requirements.

Potential criteria that ICANN's Vertical Integration Working Group may wish to consider in implementing this policy include:

For Single Registrant TLDs, the primary considerations in allowing vertical integration would be a) the domain names are assigned to employees, departments, and/or members of that organization, and b) the non-transferability of the domains.

For Community, Cultural and Linguistic TLDs, names would be available to a wider registrant base, and would be transferable. In this case, finding agreement on potential implementation criteria may be more complex. While the transferability of these names creates a strong presumption in favor of the traditional use of ICANN accredited registrars, a Registry Operator should still be permitted the opportunity to provide direct domain name registrations (in addition to ICANN accredited registrars) when such supply does not create excessive switching costs for users or create significant market power for the registry.

Pros: Expands upon existing flexibility ICANN has recognized in connection with the .MUSEUM and .POST agreements, while providing the ability for future Registry Operators to provide innovative new business models.

Cons: Reaching agreement on the conditions and mechanisms under which Vertical Integration will be allowed for a new or existing registry may be complex. These conditions will need to be defined in the final guidebook.

Legal Framework: ICANN should rename/restructure the existing proposed Registry Agreement as currently found in the Draft Applicant Guidebook (DAG) into more modular agreement. The title of the document should also be renamed Registration Authority Master Agreement (RAMA) to reflect the continued blurring between resellers, registrars, registry owners and registry service providers in the existing marketplace.⁷ The chapeau of this agreement would broadly define the relationship between the parties (ICANN and the Registration Authority) and would be modeled in large part after the current accountability framework that ccTLD administrators have entered into with ICANN. This base agreement would then be supplemented through a series of standard addendums/annexes that could reflect a number of business models, e.g. standard Registrar, standard Registry Operator; Sponsor; Registry Operator seeking to provide domain name registrations services to registrants; Intergovernmental and Public Sector Applicants; and restrictions imposed on Registration Authorities (Registries/Registrars) by national competition authorities.

Pros: Provides a legal framework that scales both going forward in connection with new gTLDs, but also has the potential to scale in connection with a variety of existing TLD agreements. Has the potential to dovetail into existing RAA enhancement discussions.

Cons: While the principles of this framework can be largely agreed within the community by the Brussels meeting, the exact legal documents and terms could not be finalized by that time though they would need to be included in the final application guidebook.

Additional Policy Considerations: While the above referenced issues need to be satisfactorily resolved prior to the finalization of the Draft Applicant Guidebook, there are a number of other additional policy considerations that need to be properly addressed if the full range of potential new gTLD business models is to have a chance of being successful.

One issue that requires a broader discussion within the ICANN community is the fees that ICANN charges in connection with domain name registrations. ICANN's current funding model is largely based on a per transaction charge imposed on both gTLD registries and registrars. While this model mostly works in the current marketplace, this funding model does not scale regarding business models in which the registry may wish to give away domain names for free

⁷ The concept of a Master Agreement is commonly used in business to provide an overarching legal framework between the parties.

or a vertically integrated single registrant/brand TLD. Therefore, there is a need for a forum in which ICANN reviews and perhaps revises its pricing models.⁸

While intellectual property protection and access to accurate Whois information are two issues within the ICANN community that usually evoke strong responses from different stakeholders groups, some single registrant/brand TLD may require a re-evaluation as to the appropriateness of these mechanisms or the manner in which they are utilized.

The Post Delegation Dispute Resolution Procedure (PDDRP) and the Registry Restrictions Dispute Resolution Procedure (RRDRP) may provide important safeguard mechanisms in connection with the new gTLD process. Depending upon the final scope of these procedures in the final Applicant Guidebook and any firm co-ownership/vertical integration proposals, it may be necessary to revise these proposals to ensure that the Registry Operator not circumvent the provisions of the RRDRP/PDDRP through the activities of any affiliated parties.

These additional policy considerations are not intended to interject new over-arching issues into the new gTLD process. However, they are intended to serve as clear reminder as to some of the issues that ICANN may not have fully accounted for in the unlimited and diverse business models that may be submitted through ICANN's new gTLD process.

⁸ See <http://forum.icann.org/lists/op-budget-fy2011/msg00011.html>