



New gTLD Program Explanatory Memorandum

Discussion Draft: Registry-Registrar Separation

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Background – New gTLD Program

This is one of a series of new Explanatory Memos related to recent consultations between ICANN's Board and Governmental Advisory Committee concerning ICANN's New gTLD Program.

These memos were developed to document the latest position on these topics by taking into account the current thinking, discussions and public comments received. Each memo not only reflects GAC advice but also contains the reasoning and rationale on each of the relevant issues regarding the Applicant Guidebook and the launch of the New gTLD Program.

For current information, timelines and activities related to the New gTLD Program, please go to <<http://www.icann.org/en/topics/new-gtld-program.htm>>.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Current Environment

On 5 November 2010, the ICANN Board adopted a resolution (#2010.11.05.02) <<http://www.icann.org/en/minutes/resolutions-05nov10-en.htm>> instructing staff to incorporate the following principles into the proposed applicant guidebook for posting for public comment:

1. ICANN will not restrict cross-ownership between registries and registrars. Registry operators are defined as the registry operator and all other relevant parties relating to the registry services.
2. Registry agreements will include requirements and restrictions on any inappropriate or abusive conduct arising out of registry-registrar cross ownership, including without limitations provisions protecting against: misuse of data; or violations of a registry code of conduct.
- ...
5. ICANN will have the ability to refer issues to relevant competition authorities.

...

In response to community requests, and in compliance with ICANN's Affirmation of Commitments, ICANN has published a thorough rationale for its 5 November 2010 decision. A [draft of the rationale](#) was posted on 4 February 2011, and the [final adopted version of the rationale](#) was posted on 21 March 2011.

Board-GAC Consultation

On 23 February 2011, the Governmental Advisory Committee provided the following advice in item #5 of [the GAC Scorecard](#):

"The GAC advises the ICANN Board to instruct ICANN staff to amend the proposed new registry agreement to restrict cross-ownership between registries and registrars, in those cases where it can be determined that the registry does have, or is likely to obtain, market power. The GAC further advises the ICANN Board that it considers the absence of a thorough and reasoned explanation of its decision in November 2010 to reverse its earlier decision of March 2010 to maintain 'strict separation of entities offering registry services and those acting as registrars' and that 'no co-ownership will be allowed' to be inconsistent with its commitments under the Affirmation of Commitments."

GAC members indicated that questions still remained as to why the Board departed from its earlier (Nairobi) resolution on registry-registrar separation.

On 4 March 2011, ICANN posted its [Notes on the GAC Scorecard](#), addressing the registry-registrar separation issue as follows:

"ICANN sought to implement a marketplace model that would enhance competition, opportunities for innovation and increase choice for consumers while preventing abuses in cases where the registry could wield market power. While lifting restrictions on cross-ownership, ICANN reserves the right to refer issues to appropriate competition authorities if there are apparent abuses of market power. As previously resolved by the Board, registry agreements will include requirements and restrictions on any inappropriate or abusive conduct arising out of registry-registrar cross ownership, including without limitations provisions protecting against misuse of data or violations of a registry code of conduct."

On 21 March 2011, after receiving the GAC Scorecard comments and considering other public comments, ICANN finalized the rationale for the 5 November 2010 resolution, expanding the section describing the reasons for departing from the earlier resolution. The final adopted version of the rationale is posted on the ICANN website at <http://www.icann.org/en/minutes/rationale-cross-ownership-21mar11-en.pdf>

On 12 April 2011, the GAC forwarded its [Comments](#) on the ICANN Board's response to the GAC Scorecard. On the issue of Registry-Registrar Separation, the GAC stated:

"The Board response is considered insufficient by the colleagues of some GAC members who are responsible for Competition and anti-Trust issues. They have requested that ICANN provide a more reasoned argument as to why they have rejected the GAC's proposal and why the Board feels that ex-ante measures are less preferable to ex-post measures for minimising problems associated with anti-competitive behavior."

ICANN Response

On 15 April 2011, ICANN posted its reply to the GAC Comments. The reply answers as follows:

"ICANN considered several options with respect to the vertical separation issue, including a blanket prohibition against cross-ownership by registries with market power. The problem with such an ex ante prohibition is that it is overly restrictive; that is, a prohibition of vertical integration based purely on market power is likely to deprive consumers of the competitive benefits of cross-ownership. From a consumer welfare perspective, a better approach is to allow generally pro-competitive vertical integration while

referring any potentially suspect arrangements to expert competition enforcement authorities, who can then take action when their ex post expert evaluation determines it is appropriate. This is particularly important because it is difficult to accurately measure market power. Market definition and the evaluation of market power are contentious issues in most antitrust cases and often require complex economic and econometric analysis. Market share can be used as a proxy, but antitrust authorities around the world recognize that it is an imperfect proxy. Moreover, there are various ways to measure market share. Delegating this expert analysis and post ante determination to competition authorities avoids the problem of mistakenly ex ante deterring competitively beneficial vertical integration while also ensuring that consumers are protected when economic conditions merit competition policy intervention."

Rationale for ICANN Position on Registry-Registrar Separation

ICANN has committed to providing a thorough and reasoned explanation of its decisions, the rationale thereof and the sources of data and information on which ICANN relied. The final 17-page rationale document regarding registry-registrar separation is posted on the ICANN website at <http://www.icann.org/en/minutes/rationale-cross-ownership-21mar11-en.pdf>.

The rationale includes:

- a comprehensive section on the "History of the Board's Consideration of Cross-Ownership,"
- a summary of the "Major Cross-Ownership Proposals Considered by the Board"
- the substantive reasons for the adoption of the 5 November 2010 resolution, and
- the reasons for the change from the Board's placeholder resolution adopted in March 2010 in Nairobi.

The following is an excerpt (Section III.G) from the adopted rationale:

The Board's Reasons for Permitting Cross-Ownership Under Certain Circumstances

Some in the community have suggested that the Board's 5 November 2010 resolution relating to registry/registrar cross-ownership was a complete reversal from the Board's position set out in Nairobi on this topic.

However, the default position set forth in Nairobi was not meant to be the Board's final position on cross-ownership. As noted above, the Board's Nairobi resolution was to be a placeholder only. The Board's hope was that setting out an extreme position of strict cross-ownership would help the community arrive at a consensus position on registry/registrar cross-ownership that would be beneficial for all involved.

In the fourth version of the Applicant Guidebook, the Board made clear that the Nairobi resolution was not the final word. Specifically, the Draft Applicant Guidebook included a note that the Board encouraged the GNSO to recommend a policy on this issue, and that the Board would review the cross-ownership issue again if the GNSO did not make recommendations in time for launch of the new gTLD program. See <http://www.icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-28may10-en.pdf> at page 5 (emphasis added).

By the September 2010 Board retreat, the GNSO had failed to develop a consensus policy on the issue of cross-ownership. There, the Board asked the GNSO to state whether consensus was possible (<http://icann.org/en/minutes/resolutions-25sep10-en.htm> - 2.11). On 8 October 2010, the GNSO informed the Board that it was unable to reach a consensus (<http://gns0.icann.org/mailling-lists/archives/council/msg09754.html>.) Accordingly, the Board had to make a final determination on cross-ownership, at least for the first round of the new gTLD Program, and took the matter up during its retreat in November 2010.

In Trondheim, the Board noted that it "had over six months since Nairobi to consider the issue [of cross-ownership], including consideration of the GNSO VI working group's deliberations, and community comment including at the ICANN meeting in Brussels in June 2010." (See <http://icann.org/en/minutes/resolutions-05nov10-en.htm>.) The Board went on to state that it had "carefully considered available economic analysis, legal advice and advice from the community" in making its determination.

During deliberations on the cross-ownership issues, the Board considered multiple reasons for voting in favor of the November resolution. As noted above, the Board considered all the information contained in each of the community proposals, as well as independent economic analysis, public consultations, public comment forums and Board briefings that were provided during the Board's decision making process. In light of the voluminous material and numerous discussions, the Board made is

decision reflected in the 5 November 2010 resolution for the following reasons.

- None of the proposals submitted by the GNSO reflect a consensus opinion; as a result, the Board supported a model based on its own factual investigation, expert analysis, and concerns expressed by stakeholders and the community.
- ICANN's position and mission must be focused on creating more competition as opposed to having rules that restrict competition and innovation.
- Rules permitting cross-ownership foster greater diversity in business models and enhance opportunities offered by new TLDs.
- Rules prohibiting cross-ownership require more enforcement and can easily be circumvented.
- Rules permitting cross-ownership enhance efficiencies and almost certainly will result in benefits to consumers in the form of lower prices and enhanced services.
- Preventing cross-ownership would create more exposure to ICANN of lawsuits, including antitrust lawsuits, which are costly to defend even if ICANN believes (as it does) that it has no proper exposure in such litigation.
- The new Code of Conduct, which is to be part of the base agreement for all new gTLDs, includes adequate protections designed to address behavior the Board wants to discourage, including abuses of data and market power. Data protection is best accomplished by data protection tools, including audits, contractual penalties such as contract termination, punitive damages, and costs of enforcement, as well as strong enforcement of rules. By contrast, market construction rules can be circumvented and cause other harms.
- Case-by-case re-negotiation of existing contracts to reflect the new cross-ownership rules will permit ICANN to address the risk of abuse of market power contractually.
- In the event ICANN has competition concerns, ICANN will have the ability to refer those concerns to relevant antitrust authorities.

- ICANN can amend contracts to address harms that may arise as a direct or indirect result of the new cross-ownership rules.