

RESPONSE TO GNSO REGISTRIES STAKEHOLDER GROUP MEMO REGARDING REGISTRY-REGISTRAR CROSS-OWNERSHIP

Thank you for your 26 January 2012 memorandum asking for an update on the issue of registry-registrar cross ownership. This note summarizes current status and ICANN's intended plan for moving forward. ICANN intends to post a draft procedure by April 13, with Board consideration to follow promptly after the close of the public comment and reply period.

Discussion: On 20 June 2011, the Board adopted a resolution that included a provision referencing the process that ICANN developed "for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the new gTLD program" The resolution also stated, "consideration of modification of existing agreements to allow cross-ownership with respect to the operation of existing gTLDs is deferred pending further discussions including with competition authorities."

<<http://www.icann.org/en/minutes/resolutions-20jun11-en.htm>>

As you noted in your memo, two competition authorities have expressed interest in this issue. On 14 June 2011, the United States Department of Justice Antitrust Division sent a letter to the U.S. Department of Commerce on the subject of cross-ownership. Thereafter, in October 2011, ICANN's counsel spoke to the supervising lawyer at the Antitrust Division, who confirmed that there is no active Antitrust Division investigation with respect to the cross-ownership issues at this time. In light of this representation, there have been no other communications with the Antitrust Division, and none are planned.

The other competition authority that has expressed interest is the European Commission (EC). Immediately before the Singapore meeting, on 17 June 2011, the EC sent ICANN a "non-paper" expressing some concerns regarding the removal of cross-ownership restrictions.

<http://www.icann.org/en/correspondence/eu-to-icann-17jun11-en.pdf>. Following the Board's approval of the New gTLD Program, ICANN's counsel sent a note to the EC offering to meet to discuss the "non-paper," and the issues identified in the Board's 20 June 2011 resolution. In response, the EC requested that ICANN respond to the "non-paper" in writing. On 25 October 2011, ICANN provided the EC with a comprehensive response to the "non-paper" and again requested a meeting to discuss these matters.

<http://www.icann.org/en/correspondence/beckstrom-to-kroes-25oct11-en.pdf>.

On 19 January 2012, the EC responded to ICANN's 25 October 2011 letter.

<http://www.icann.org/en/correspondence/de-graaf-mccallum-to-beckstrom-crocker-19jan12-en.pdf>. The EC's most recent letter stated, "we do not oppose the removal of vertical separation as a matter of principle." The letter continues, however, that the EC is "currently not convinced that the full removal of vertical separation for generic Top-Level Domains, particularly for existing ones such as .COM, is the most appropriate solution from a competition point of view." The EC then requested that ICANN furnish the EC with responses to questions seeking additional information.

A comprehensive response to the EC's 19 January 2012 letter will be delivered to the EC shortly, and ICANN will again offer to meet with the EC. ICANN has reminded the EC that ICANN has

obtained comprehensive economic assessments that support the removal of existing cross-ownership restrictions, however, the EC continues to ask for additional assessment. ICANN's letter asked the EC whether it has obtained any economic assessments that assess the issue.

Conclusion: ICANN did undertake communications with the competition authorities as noted in the Board's 20 June 2011 resolution on this topic. The Department of Justice indicated that there is no active Antitrust Division investigation with respect to the cross-ownership issues at this time. Further, the EC has indicated that it is not opposed to the removal of vertical separation as a matter of principle, and ICANN continues to provide the EC with information that will hopefully bring any discussion on this topic to a close. In light of the above, ICANN intends to move forward, working with the registries, to develop a process by which existing registries can request an amendment to their existing contracts to permit vertical integration and cross-ownership with respect to their own TLDs. It seems that the process that was adopted on 20 June 2011 with respect to new gTLDs and existing TLDs not operated by the registry can be amended to provide such a process.

Thank you for your attention. ICANN welcomes further discussion on this topic this week in Costa Rica.