

Date: January 26, 2012
To: ICANN Board of Directors
From: GNSO Registries Stakeholder Group
Subject: Response to Inquiry on Outstanding Communications – Vertical Integration

Thank you for the recent inquiry from the Board Governance Committee regarding any outstanding topics of communication between the Registries Stakeholder Group (RySG) and the ICANN Board.

One key open issue relates to ICANN's official determination on the process by which existing registries are permitted to vertically integrate and become registrars for their own TLDs. The background for this outstanding request is as follows and also available on the ICANN website at

<http://www.icann.org/en/public-comment/cross-ownership-existing-registries-02may11-en.htm>

The RySG formally requests an update on this important issue, so that existing gTLD registries who would like to vertically integrate and distribute their own domains can rely on a predictable and transparent process and timeline that ensures they are not disadvantaged in the new TLD marketplace.

Issue: Proposed ICANN Process for Handling Requests for Removal of Cross-Ownership Restrictions for Existing gTLDs

- On 21 April 2011, the ICANN Board resolved that ICANN develop a process for existing gTLD registry operators to transition to the new form of Registry Agreement or to request an amendment to their Registry Agreement to remove the cross-ownership restrictions. (see <http://www.icann.org/en/minutes/resolutions-21apr11-en.htm>)
- This followed the 5 November 2010 resolution that ICANN will not restrict cross-ownership between registries and registrars for new gTLDs, and that "ICANN will permit existing registry operators to transition to the new form of Registry Agreement, except that additional conditions may be necessary and appropriate to address particular circumstances of established registries." (see <http://www.icann.org/en/minutes/resolutions-05nov10-en.htm>)
- Included in the Board's rationale for their 5 November 2010 decision on cross-ownership is, "So long as certain restrictions were put into place on the conduct of registries and registrars, specifically as they relate to data, and so long as competition review remained available in the event of concerns regarding market power – there was no economic support to restrict, on an across-the-board basis, the ability of registries to hold ownership interests in registrars, and vice versa." (see <http://www.icann.org/en/minutes/rationale-cross-ownership-21mar11-en.pdf>)
- ICANN's formal public comment period opened on May 2, 2011 and closed on June 1, 2011. The RySG submitted substantive written comments on the proposed plan to ICANN on June 1, 2011.

These comments were approved by a supermajority of the RySG and can be found here:
<http://forum.icann.org/lists/cross-ownership-existing-registries/msg00002.html>

- On June 14, 2011 the U.S. Department of Justice sent a letter to the U.S. Department of Commerce, National Telecommunications and Information Administration indicating concern regarding the removal of cross-ownership restrictions for some existing registries. On June 16, the U.S. Department of Commerce, National Telecommunications and Information Administration submitted a letter to ICANN (and forwarded the DOJ letter) recommending that ICANN consult with appropriate competition authorities before removing restrictions on existing registry operators. See:
<http://www.icann.org/en/correspondence/strickling-to-dengate-thrush-16jun11-en.pdf>
- On June 17, 2011 the European Commission submitted a “non-paper” to ICANN and to the U.S. Department of Commerce, National Telecommunications and Information Administration, indicating concern regarding the removal of cross-ownership restrictions for some existing registries. See: <http://www.icann.org/en/correspondence/eu-to-icann-17jun11-en.pdf>
- Following the ICANN Board’s June 20, 2011 determination in Singapore to move forward with new gTLDs but defer action on the process by which existing registries could also vertically integrate, the RySG raised this important issue with the ICANN Board at our July 21, 2011 joint session in Singapore. At that meeting, the RySG advised the ICANN Board and ICANN staff in attendance that, in light of the Board’s decision that week to finalize the Draft Applicant Guidebook and open the application window in early 2012, it was critical that existing gTLD registry operators not be disadvantaged by delays in finalizing these important procedures for incumbents. The RySG requested a timeline for finalization of the procedures. The CEO and other members of the ICANN Board indicated they “heard us loud and clear” and committed to provide such a timeline in a timely manner. (Meeting transcript is attached.)
- At the Dakar ICANN meeting in October 2011, this issue was again raised during the joint meeting between the RySG and the ICANN Board and ICANN Staff on Tuesday, October 25. At that time, ICANN staff indicated they were in contact with various relevant competition authorities and that a new letter would be forthcoming from ICANN. No other updates or progress in developing the timeline and procedures for incumbents was reported. See transcripts: <http://dakar42.icann.org/meetings/dakar2011/transcript-rsg-1-25oct11-en.pdf>
- On October 25, 2011, ICANN responded in writing to the European Commission “non-paper” indicating a commitment to the principles of the promotion of competition and to permitting vertical integration and cross-ownership in exiting TLDs. See:
<http://www.icann.org/en/correspondence/beckstrom-to-kroes-25oct11-en.pdf>

- On January 12, 2012, the application window for new gTLDs was opened on schedule. No further information on the process or timeline for allowing existing registry operators to vertically integrate was included in the final update to the Applicant Guidebook, or in any other communication.
- On January 19, 2012, the European Commission submitted a letter to ICANN stating that they “do not oppose the removal of vertical separation as a matter of principle” and that “there may be a need to revise and to possibly relax the previous set of rules with a view to fostering competition at registry level”. However, the European Commission letter also requests additional information from ICANN so they can “properly assess the competitive impact of a full removal of vertical separation.”
(See: <http://www.icann.org/en/correspondence/de-graaf-mccallum-to-beckstrom-crocker-19jan12-en.pdf>)

As the RySG has stated to the ICANN Board and staff on several occasions, the drawn out process, continued uncertainty, and ongoing lack of clarity on cross-ownership puts all existing registries considering offering their own new or existing TLDs at a clear and distinct disadvantage to new registry operators, who already have the certainty of knowing that they can do so. This ongoing disadvantage translates to potential risk of damage to all our businesses. Specifically, the current lack of clarity and certainty means that new registry operators can plan on the basis of offering their own new TLD, while existing registries cannot plan (or budget, for example) in the same way.

In the new domain name marketplace, with potentially hundreds or thousands of new TLDs, the ability for existing registries to self-distribute may mean the difference between survival and failure of their TLD, because accredited registrars are not required to offer all TLDs, they will continue to pick and choose which it suits them to offer -- and some may even elect to stop offering existing TLDs in favour of new TLDs. If and when that occurs, exiting TLD registries must have the ability to reach the registrant market directly. It might seem to some that this issue is not urgent because new TLDs won't be added to the root for another year, but building the necessary operational systems to sell, bill and support end-user registrants directly will require planning, budgeting and the recruitment of appropriate staff which will take time, particularly when addressing structural changes to the marketplace. All market participants, including existing registry operators and registrars, must be able to rely on a clear and predictable process to address such a major substantial change.

In light of the above, the RySG formally requests a response from the ICANN Board and ICANN staff on this important issue, including a firm timeline for finalization of the process by which existing registries can amend their existing contracts to permit vertical integration and cross-ownership. The RySG strongly urges the ICANN Board to instruct ICANN staff to commit the necessary attention and resources to respond in a timely manner to the 19 January 2012 European Commission request, and that ICANN finalize this outstanding issue as soon as possible and in any event prior to the San Jose ICANN meeting.