

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

Namecheap, Inc. (Namecheap) )  
)  
4600 East Washington Street, Suite 305 )  
Phoenix, AZ 85034 )  
)  
**Claimant** )  
)  
v. )  
)  
Internet Corporation For )  
Assigned Names and Numbers )  
(ICANN) )  
)  
12025 Waterfront Drive, Suite 300 )  
Los Angeles, CA 90094-2536 )  
)  
**Respondent** )  
\_\_\_\_\_ )

**ICDR Case No.** \_\_\_\_\_

**REQUEST FOR INDEPENDENT REVIEW PROCESS  
BY NAMECHEAP**

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*Counsel for Claimant*

1. The Claimant, Namecheap, submits this request for independent review ('IRP Request') pursuant to Article IV(3) of the ICANN Bylaws ('Bylaws'), the International Arbitration Rules of the International Centre for Dispute Resolution ('ICDR Rules'), and ICANN's Interim Supplementary Procedures for Independent Review Process. Namecheap has suffered direct harm as a result of ICANN's breaches of its Articles of Incorporation ('AoI', **RM<sup>1</sup> 1**) and Bylaws (**RM 2**).

2. This Independent Review Process ('IRP') arises out of ICANN's breaches of its AoI and Bylaws by the ICANN Board and staff by *inter alia*, making a non-transparent, discriminatory and unfair application of the rules and policies governing the operation of the .org, .info and .biz generic top-level domains. In particular, the dispute relates to ICANN's decision to remove the provisions according to which the operators of .org, .info and .biz were bound by maximum prices they could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another. Namecheap is an ICANN-accredited registrar that is directly impacted by this decision. With respect to .org, the removal of the price cap provision is aggravated by the fact that the operation of .org risks being moved from a non-profit entity to a for-profit entity.

3. Namecheap has been addressing these issues with ICANN and is still seeking to find a solution without the need for adversarial proceedings. However, because of recent events that jeopardize ongoing discussions and that can cause irreparable harm to Namecheap, Namecheap had no choice but to request interim measures of protection. In order to comply with the requirement of Article 6(1) of the ICDR Rules, Namecheap submits this notice of arbitration / IRP Request concurrent with its request for urgent interim measures. It is because of the urgent

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<sup>1</sup> Reference Material

need for interim relief that Namecheap files this request. The Notice of Arbitration is kept succinct not to stymie the negotiations with ICANN. However, Namecheap reserves the right to amend and complete its Notice of Arbitration, should the negotiations be unsuccessful.

## **I. THE PARTIES**

### **A. Claimant**

4. Namecheap, is an ICANN-accredited domain registrar and technology company founded in 2000 by CEO Richard Kirkendall. It is one of the fastest-growing American companies according to the 2018 Inc. 5000 (**Annex 1**). Celebrating nearly two decades of providing unparalleled levels of service, security, and support, Namecheap has been steadfast in customer satisfaction. With over 10 million domains under management, Namecheap is among the top domain registrars and web hosting providers in the world. Full contact details of the Claimant are provided as **Annex 1**.

5. Claimants are represented in these proceedings by:

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### **B. Respondent**

6. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). ICANN is a non-profit public benefit corporation, incorporated under the laws of California. ICANN functions as the global regulator of the Internet's addressing system (the domain name system or 'DNS').<sup>2</sup> Although a private organisation in form, ICANN has

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<sup>2</sup> **RM 3**, paras. 1-2, 10; **RM 4**, para. 125.

extraordinary powers and regulatory responsibilities which are important for its stakeholders throughout the world.

## II. ICANN'S FUNDAMENTAL OBLIGATIONS

7. Its mission and the limits of its authority are defined in ICANN's AoI, Bylaws and agreements. Pursuant to Article III AoI, ICANN '*shall operate in a manner consistent with these Articles and its Bylaws **for the benefit of the Internet community as a whole**, carrying out its activities **in conformity with relevant principles of international law** and international conventions and applicable local law and **through open and transparent processes** that enable competition and open entry in Internet-related markets'* (emphasis added). This commitment is reiterated in Article I(2)(a) Bylaws. Pursuant to Article I(2) Bylaws, ICANN must '*act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values.*' ICANN's Commitments and Core Values include the obligation to '*employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia, and end users), while duly taking into account the public policy advice of governments and public authorities. These processes shall (A) seek input from **the public, for whose benefit ICANN in all events shall act**, (B) promote well-informed decisions based on expert advice, and (C) ensure that those entities most affected can assist in the policy development process.*' Article I(2)(v) and (vi) Bylaws mandate ICANN to '*make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment*' and to '*remain accountable to the Internet community*'.

8. A cornerstone for ICANN's decision-making process that is essential to comply with its commitment to remain accountable, is ICANN's obligation to operate in an open, transparent and fair manner. Article III(1) Bylaws provide that ICANN and its constituent

bodies ‘shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness’ (emphasis added). ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Article II(3) Bylaws provides:

*‘ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.’*

9. The abovementioned fundamental obligations of transparency and non-discrimination exist since ICANN’s incorporation in 1998 and were never changed (**RM 5**, Article III(1) and Article IV(1)(c)).

### III. SUMMARY OF RELEVANT FACTS

#### A. **History of the DNS: from an unregulated market with no competition towards a regulated market that must enhance competition and protect customers in some TLDs**

##### 1. **Creation of ICANN**

10. A key driver leading to the creation of ICANN was to promote competition and consumer choice, as they ‘*should drive the management of the Internet because they will lower costs, promote innovation, encourage diversity, and enhance user choice and satisfaction*’. Pressure of competition should ‘*discourage registries from acting monopolistically*’.<sup>3</sup> It was also required for ICANN’s processes to be ‘*fair, open and pro-competitive*’ and ‘*sound and transparent*’ to protect the Internet user community ‘*against capture by a self-interested faction*’.<sup>4</sup>

11. Before ICANN’s formation in 1998, the gTLD name space contained only three gTLDs which operated upon a first-come, first-served basis: .com, .net and .org (these gTLDs are

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<sup>3</sup> NTIA, Management of Internet Names and Addresses: statement of policy, [https://www.ntia.doc.gov/files/ntia/publications/6\\_5\\_98dns.pdf](https://www.ntia.doc.gov/files/ntia/publications/6_5_98dns.pdf), (White Paper) (**RM 6**).

<sup>4</sup> **RM 6**, p. 31750.

referred to as ‘original gTLDs’). These original gTLDs were all managed by Network Solutions, Inc. (NSI). In the mid-nineties, NSI’s monopoly over domain name registrations gave rise to criticism and there was a growing dissatisfaction concerning the absence of competition and the dominance of NSI (**RM 7**). It is thus not surprising that, in the U.S. Government’s White Paper that led to the appointment of ICANN as the custodian of the DNS, the U.S. Government made clear that the creation of a competitive environment was one of the key tasks for the new custodian.

## 2. Attempts to break NSI’s monopoly and the reassignment of .org

12. During the first years of its existence, ICANN tried to break the monopoly of NSI, while preserving the interests of the Internet users. It did so by (i) separating the registry business<sup>5</sup> from the registrar business<sup>6</sup>, (ii) requiring NSI to develop a Shared Registration System interface for its .com, .net and .org TLDs, which should ensure that competitive registrars could use the registry on the same terms as NSI’s registrar branch, (iii) imposing maximum prices for original gTLDs, and (iv) reassigning the .org gTLD to a new registry operator, Public Interest Registry (‘PIR’), a non-profit created under the auspices of the Internet Society (ISOC).<sup>7</sup>

13. The reassignment of .org to PIR was done following a policy development process to assist in the orderly selection of a successor entity to operate .org. In accordance with the policy developed by the DNSO (**RM 10**), ICANN organized a request for proposals (‘RFP’) and created evaluation criteria for selecting a new registry operator from the proposals that were submitted (**RM 11**).

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<sup>5</sup> *I.e.*, the technical operation of the gTLD.

<sup>6</sup> *I.e.*, the business of registering domain names in TLDs for customers.

<sup>7</sup> See **RM 8; RM 9**.

14. ICANN received 11 proposals and ultimately selected ISOC/PIR (**RM 12-14**). To obtain the reassignment of .org, PIR had made important commitments to comply with the RFP's criteria and the policy requirements (**RM 14-15**). PIR committed to maintain maximum prices to comply with the requirement for the .org registry fee charged to accredited registrars to be as low as feasible consistent with the maintenance of good quality service. PIR also recognized the unique public-interest-focused nature of .org. and committed to institute mechanisms for promoting the registry's operation in a manner that is responsive to the needs, concerns, and views of the non-commercial Internet user community (**RM14-15**).

15. On 2 December 2002, ICANN and PIR entered into a registry agreement ('RA') for the operation of the .org TLD (**RM 16**). The RA was subsequently renewed on 8 December 2006 and 22 August 2013 (**RM 17-18**). To comply with the requirement that the .org registry fee charged to accredited registrars be as low as feasible consistent with the maintenance of good quality service, these RAs contained maximum prices that PIR could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to another (**RM 17-18**).

### 3. The careful expansion of the gTLD name space<sup>8</sup>

16. In mid-April 2000, ICANN's policy-making body<sup>9</sup> recommended that the ICANN Board adopt a policy for the introduction of new gTLDs in a measured and responsible manner. It was suggested that only a limited number of new gTLDs be introduced as a 'proof of concept' for possible future introductions.<sup>10</sup> The ICANN Board eventually selected seven new gTLD

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<sup>8</sup> For a critical appraisal of ICANN's efforts in expanding the gTLD name space, see Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International, pp. 25-38, 45-61, 89-132. With this book, the authors 'have exhaustively canvassed the historical, political and technical processes that made ICANN so central to the administration of the DNS, as well as the administrative, arbitral and other accountability processes that have developed within the ICANN system.' David H. BERNSTEIN, Foreword.

<sup>9</sup> The DNSO, i.e., the predecessor of the GNSO.

<sup>10</sup> ICANN, *ICANN Yokohama Meeting Topic: Introduction of New Top-Level Domains*, 13 June 2000 <https://archive.icann.org/en/meetings/yokohama/new-tld-topic.htm> (**RM 19**).

proposals to enter into contract negotiations.<sup>11</sup> These seven proposals contained applications for both sponsored and unsponsored gTLDs. Sponsored gTLDs (such as .aero and .museum) aimed at serving a defined community rather than obtaining high volumes in domain name registration. Because of the community-purpose, ICANN saw no need to impose maximum prices for the registration and renewal of domain names. In contrast, unsponsored gTLDs such as .info and .biz aimed at higher registration volumes. For those gTLDs, ICANN considered it necessary to impose maximum prices for the registration, renewal and transfer of domain names. As only a small number gTLDs were awarded by ICANN, these new gTLD registry operators obtained a degree of market power, that was somehow constrained by the imposition price caps. Without those constraints, the .org, .biz and .info gTLD registry operators likely could profitably charge even higher fees.<sup>12</sup>

17. After the 2000 proof-of-concept round, ICANN has organized a limited round for introducing new gTLDs that was reserved to sponsored TLDs only.<sup>13</sup> ICANN continued working on the policy development and implementation for a larger expansion of the gTLD name space. This third round for introducing new gTLDs became known as the New gTLD Program and was approved by the ICANN Board on 20 June 2011.<sup>14</sup>

18. ICANN decided not to impose maximum prices for the registration, renewal and transfer of domain names in gTLDs delegated in accordance with the New gTLD Program

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<sup>11</sup> ICANN, *Resolution 00.89 – Minutes of Second Annual Meeting (in Marina Del Rey)*, 16 November 2000, <https://www.icann.org/resources/board-material/minutes-annual-meeting-2000-11-16-en> (**RM 20**)

<sup>12</sup> See, Letter from Deborah A. Garza, Acting Assistant Attorney General (U.S. Department of Justice) to Meredith A. Baker, Acting Assistant Secretary for Communications and Information (NTIA), 3 December 2008, available at <https://www.icann.org/en/system/files/files/baker-to-dengate-thrush-18dec08-en.pdf> (**RM 21**); This letter is attached to a letter from the NTIA to ICANN, requiring that ICANN involve the Internet community in decision on pricing of gTLDs (**RM 21**).

<sup>13</sup> Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International, pp. 51-53.

<sup>14</sup> Flip PETILLION & Jan JANSSEN, *Competing for the Internet, ICANN Gate – An Analysis and Plea for Judicial Review Through Arbitration*, 2017 Kluwer Law International, pp. 53-61; ICANN, *Approved Board Resolution 2011.06.20.01*, 20 June 2011, <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en> (**RM 22**).

(‘New gTLDs’). Price caps for New gTLDs were not deemed necessary according to a report/opinion by Dennis Carlton that commissioned by ICANN. As a matter of fact, the existence of price caps in major legacy<sup>15</sup> gTLDs (such as .com, .org, .biz and .info) was an important factor in Carlton’s opinion that no price caps are necessary for new gTLDs:

*‘[T]he existence of the caps limits the prices that new gTLDs can charge by capping the price that the major registry operators can charge.’ (RM 23, para. 73)*

*‘THERE IS NO BASIS FOR DR. KENDE’S CONCERNS THAT ICANN’S PROPOSAL WILL LEAD TO THE REPEAL OF EXISTING PRICE CAPS*

*As noted above, Dr. Kende suggests that the absence of price caps for new TLDs could result in the elimination of price caps for .com, .net, .org, .info, .biz and others as a result of the “equitable treatment” clause in ICANN agreements.<sup>21</sup> We understand from ICANN that there is no basis for this concern. The language in this clause does not require identical treatment among all registries and recognizes that differences across ICANN contracts with different registries can be “justified by substantial and reasonable cause.” ICANN’s contracts with existing TLDs recognize that different practices may be appropriate for different registries and allow ICANN latitude to implement different procedures. I am aware of no statement either by ICANN or the Commerce Department favoring the elimination of price caps specified in existing registry contracts.’ (RM 24, para. 22)*

19. It is clear from these statements, that Carlton saw no basis from eliminating price caps in existing gTLDs. The existence of those price caps is indeed an important factor that may prevent New gTLD registry operators from acting opportunistically.

20. As from 14 July 2013, ICANN started contracting with New gTLD operators who accepted the terms of ICANN’s base RA for New gTLDs (RM 25-26). On 22 August 2013, ICANN also renewed the RAs with the operators of .org, .info and .biz (RM 18, 27-28). The RAs for the operation of these legacy gTLDs were substantially different from the base RA for New gTLD, as the legacy RAs continued to contain maximum prices that legacy operators could charge to ICANN-accredited registrars for new and renewal domain name registrations and for transferring a domain name registration from one ICANN-accredited registrar to

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<sup>15</sup> Namecheap refers to legacy TLDs when referring to the original gTLDs and those gTLD that have been delegated in accordance with the Proof-of Concept round or the 2004 Sponsored TLD round. Non-legacy TLDs are those gTLDs that were delegated in accordance with the New gTLD Program.

another.<sup>16</sup> Both ICANN and the Internet community understood the substantially different nature of these legacy gTLDs compared to new gTLDs.

## **B. The sudden removal of price caps**

21. On 18 March 2019, ICANN announced that it planned to renew the .org and .info RAs, making it more similar to the terms of the base registry agreement that ICANN used for new gTLDs that were introduced from 14 July 2013 onwards. The newly proposed .org and .info RAs no longer contained maximum prices that PIR could charge to ICANN-accredited registrars. ICANN gave the following explanation for this radical change:

*‘In alignment with the base registry agreement, the price cap provisions in the current .org agreement, which limited the price of registrations and allowable price increases for registrations, are removed from the .org renewal agreement. Protections for existing registrants will remain in place, in line with the base registry agreement. This change will not only allow the .org renewal agreement to better conform with the base registry agreement, but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the base registry agreement.’*  
**(Annex 2)**

22. The same explanation was given for the removal of price caps in .info (**Annex 3**) and in .biz<sup>17</sup> (**Annex 4**). The proposed removal of price caps in .org, .info and .org was not well received within the Internet community. By 29 April 2019, ICANN had received over 3,500 comments rejecting the proposed change. Comments came from small non-profits, international organizations, government agencies, members of government, individuals, families, businesses, entrepreneurs, and people from lesser developed regions. An analysis of the data shows that comments came from a varied cross-section of Internet users and that about 20% of all comments were submitted by Namecheap customers.

23. ICANN rejected all of the comments against removing the price caps with a conclusory statement that is devoid of any supporting evidence. ICANN stated:

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<sup>16</sup> Compare **RM 26** to **RM 18, 27-28**.

<sup>17</sup> For .biz, the announcement was made on 3 April 2019.

*‘There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price cap provisions in the .org Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.’ (Annexes 5-7)*

24. ICANN then went on to state that any price increases would require 6 months advance notice and that registrants could renew for 10 years at that point. These generalisations in ICANN’s analysis ignore significant information that is contrary to ICANN’s conclusions and turn a blind eye to the impact on budget planning for registrars and their customers. For a more detailed explanation, see Annex 8, pp. 5-10 and Annex 9, p. 5

25. On 30 June 2019, ICANN renewed the .org, .info and .biz RAs without maintaining the historic price caps, despite universal widespread public comment supporting that the price caps be maintained (RM 18, 27-28). This controversial decision goes against the interests of the Internet community as a whole and violates various provisions aimed at protecting those interests set forth in ICANN’s Articles of Incorporation, Bylaws, policies, and the renewal terms of the RAs.

#### **C. Namecheap strongly opposed the removal of price caps**

26. On 12 July 2019, Namecheap asked the ICANN Board to reconsider ICANN’s decision to remove the price cap requirement in the .org, .info and .biz RAs. Namecheap’s request is known as ‘Reconsideration Request 19-2’ (Annex 8). Within the framework of Reconsideration Request 19-2, Namecheap pointed out that the decision was made in disregard of ICANN’s fundamental rules and obligations and on the basis of an incomplete and non-transparent record (Annexes 8 and 10).

#### **D. The proposed change of control of PIR**

27. On 13 November 2019, while Namecheap’s reconsideration request was pending, the Internet Society and PIR announced that PIR was sold to the investment firm Ethos Capital for

an undisclosed sum of money. As a result of this transaction, PIR would no longer be a non-profit company. The timing of the proposed transaction raised suspicion, as the likely corporate entity for Ethos Capital to acquire PIR was formed the day after ICANN was due to publish its summary of public comments. The transaction also involved former executives and senior staff of ICANN, including ICANN's former CEO ([Annex 10](#)).

28. When Namecheap raised these issues to ICANN and reminded ICANN of its duty to review Namecheap's concerns, ICANN responded that PIR's corporate structure is not relevant to Namecheap's reconsideration request, which – according to ICANN – concerns the 30 June 2019 renewal of the .org RA ([Annexes 11-12](#)).

29. Namecheap considers, however, that the 30 June 2019 renewal of the .org RA and the proposed acquisition of PIR are related issues that must be addressed jointly. By allowing for the elimination of price caps in .org, ICANN has already failed to apply its policies equitably. By removing the price caps, ICANN has allowed for unstable registration and renewal prices and contravenes established policy that these prices must be as low as feasible consistent with the maintenance of good quality service. This policy violation would only be exacerbated if ICANN were to allow PIR be acquired by a for-profit company.

**E. Namecheap requests transparency and fairness in ICANN's evaluation of and decisions on price caps and the proposed change of control**

30. In an attempt to resolve the issues related to the removal of the price caps and the proposed acquisition of PIR, Namecheap entered into a cooperative engagement process ('CEP') with ICANN on 18 November 2019 ([Annexes 13 and 14](#)). While the cooperative engagement process was ongoing, it became apparent that ICANN was still evaluating the proposed acquisition of PIR by Ethos Capital. However, it became also clear that ICANN would not be open and transparent about the evaluation process *proprio motu*. Therefore, Namecheap asked the ICANN Board to reconsider ICANN's actions and inactions with respect to the removal of price caps in .org, .info and .biz and the proposed change of control of PIR.

Namecheap filed its reconsideration request on 8 January 2020, requesting the necessary openness and transparency from ICANN. This request is known as ‘Reconsideration Request 20-1’ ([Annex 9](#)). Namecheap simultaneously filed a request for document production (‘DIDP Request’) with ICANN, which is known as DIDP Request No. 20200108-1 ([Annex 15](#)).

**F. ICANN remains non-transparent about its evaluation of and decisions on price caps and the proposed change of control**

31. On 8 February 2020, ICANN provided its initial response (ICANN’s DIDP Response) to Namecheap’s DIDP Request ([Annex 16](#)). ICANN’s DIDP Response was largely unsatisfactory and revealed no information about ICANN’s handling of the RAs and the removal of the price caps. ICANN’s DIDP Response nevertheless revealed limited information in connection with its evaluation of the proposed change of control.

32. On 23 January 2020, ICANN had received a request from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC to Ethos Capital ([Annexes 16-18](#)). On 30 January 2020, ICANN sent a letter to PIR informing PIR about the CA-AGO’s request for information and documents. ICANN requested that PIR agrees to extend ICANN’s deadline to provide or withhold its consent to PIR’s proposed change of control ([Annex 19](#)). ICANN claims that PIR’s counsel responded to the letter on 30 January 2020 ([Annex 16](#)). ICANN did not provide a copy of this letter. However, ICANN’s DIDP Response contains a hyperlink to a letter of 3 February 2020 from PIR’s counsel ([Annexes 16 and 20](#)).

33. It appears from PIR’s counsel’s letter of 3 February 2020 that PIR agreed to a postponement of ICANN’s deadline to 29 February 2020 ([Annex 20](#)).

34. However, unless ICANN rejects PIR’s request for a change of control, a postponement to 29 February 2020 will not leave sufficient time to address the concerns expressed by Namecheap in the framework of Reconsideration Requests 19-2 and 20-1, the DIDP Request, and the CEP. Unless PIR’s request is rejected, ICANN must adequately address Namecheap’s

concerns before it can continue with the approval process for PIR's request for an indirect change of control. Therefore, any deadlines in this approval process must be suspended *sine die*.

35. On 14 February 2020, Namecheap raised the issue with the ICANN Board, ICANN's General Counsel and Deputy General Counsel ([Annex 21](#)). With respect to the imminent deadline of 29 February 2020, Namecheap urged ICANN to make clear to PIR that PIR's request for an indirect change of control cannot be processed until (i) the CA-AGO has terminated its investigation and has authorized ICANN to proceed with the process for reviewing the proposed change of control, (ii) all challenges with respect to the renewal of the .ORG registry agreement have been appropriately addressed, (iii) Namecheap and the Internet community are given the necessary transparency with respect to the change of control approval process, and (iv) there are no challenges remaining with respect to the change of control approval process or a possible approval of the change of control by ICANN. If PIR cannot agree to a suspension of its request for approving the change of control, Namecheap wrote that ICANN should make clear to PIR that such approval is reasonably withheld.

36. Namecheap made clear that it expected a response from ICANN at the latest on 18 February 2020 ([Annex 21](#)). On 20 February 2020, ICANN acknowledged receipt of Namecheap's letter of 14 February 2020. ICANN stated that the request is currently under review and that its response will be emailed to Namecheap '*on or before 15 March 2020*' ([Annex 22](#)). With the imminent deadline of 29 February 2020, Namecheap cannot wait for ICANN to come back on or before 15 March 2020.

37. On 24 February 2020, Namecheap read on Ethos' website that PIR had granted ICANN an extension until 20 March 2020 to respond to PIR's request for a change of control. Namecheap inquired with ICANN whether that was correct, asking ICANN to come back the

same day (**Annex 24**). ICANN did not respond. Therefore, given the 29 February 2020 deadline, ICANN gave Namecheap no choice but to file the present request.

38. Not having received a satisfactory response, Namecheap had no choice but to seek emergency interim relief to ensure that its pending CEP, Reconsideration Request and IRP Request are meaningful and not prematurely mooted. It is within this context that Namecheap decided to submit its IRP Request. However, Namecheap still hopes that ICANN will recognize its breaches and remedy the situation *proprio motu* without the need for an order by an IRP Panel.

#### **IV. APPLICABLE LAW**

39. In accordance with Article IV(3) Bylaws, an IRP Panel must determine whether the contested ICANN's actions and inactions are consistent with applicable rules. The set of rules against which ICANN's actions and inactions Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which require compliance with *inter alia* International law<sup>18</sup> and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the DNSO and GNSO policies and commitments ICANN made to the benefit of the Internet community as a whole. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.

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<sup>18</sup> In particular, Article III AoI charges ICANN ‘with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law’ (**RM 3**, Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08, para. 140).

## V. SUMMARY OF ICANN'S BREACHES

40. Below we set out and briefly discuss some of ICANN's breaches in (i) its decision-making process to remove the price caps in the .org, .info and .biz RAs, and (ii) its evaluation of the proposed change of control of PIR.

### A. ICANN failed to remain open and transparent in its decisions leading to the removal of price caps in .org, .info and .biz, resulting in a failure to remain accountable and to act in the interest of the Internet community as a whole

41. ICANN's decision-making process resulting in the removal of price caps is entirely opaque. The removal of price caps in the .org, .info and .biz gTLDs is a clear departure from longstanding practice and policy. Allowing individual registry operators to modify key conditions of registry agreements and/or the modification of their ownership leads to far-reaching new rules and non-transparent policies to the sole benefit of a single entity, without granting the Internet community and those entities most affected with a useful and meaningful opportunity to assist in the policy development process. Allowing such radical changes in undocumented and/or non-transparent processes, undermines ICANN's multistakeholder model and the GNSO policy development process.

42. Proceeding with a removal of price caps, in spite of – and without responding to – the concerns raised, an unprecedented number of public comments coming from an entire cross-section of the Internet community, is contrary to ICANN's commitment to remain accountable to the Internet community. It is also contrary to ICANN's commitment to *'employ open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector'* and to *'make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.'*

43. No analysis whatsoever preceded ICANN's radical decision to remove the price caps and, in rejecting Reconsideration Request 19-2, the ICANN Board rubber-stamped this decision without any analysis of its own. This approach is incompatible with ICANN's

multistakeholder model, that ICANN is committed to and that is based on open debate, reasoned decision-making and consensus between different stakeholders. It is in full contradiction with the approach that has been repeatedly adopted over the last 20 years when it was decided to impose and maintain price caps.

**B. ICANN failed to take due account of specific circumstances of major legacy gTLDs, resulting in discriminatory treatment**

44. Pursuant to Article II(3) Bylaws ICANN *‘shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition’*. To comply with this fundamental obligation to provide for non-discriminatory treatment, ICANN must treat like cases alike and unlike cases differently. This is a general axiom of rational behaviour, that one may expect from an entity with a mission as important as ICANN’s.

45. By removing the price caps for the .org, .info and .biz legacy TLDs, ICANN made abstraction of the specific nature of these TLDs that cannot be compared to any new gTLD or so-called sponsored TLD. They all have had a significant number of domain names under management (DUMs) for several years. The number of DUMs in .org has been rising consistently since the registry was assigned to PIR to reach over 10 million DUMs in 2012. The .org registry maintained well over 10 million DUMs between 2012 and 2019. The .biz and .info registries also benefit from consistent levels of DUMs exceeding 1,6 million for more than a decade. No sponsored TLD comes even close to the levels of DUMs of .org, .info and .biz. Apart from a handful of low priced new gTLDs, the levels of DUMs in new gTLDs are significantly lower than the levels in .info and .biz; all are lower than .org. The new gTLD market is also fluctuating much more than the market of legacy TLDs.

46. Without any analysis of the particularities of the .org, .info and .biz legacy TLDs, ICANN decided to remove the price caps. ICANN provided no justification for the disparate

treatment of .org, .info and .biz as compared to .com and .net (which are deemed comparable). ICANN also provided no justification for treating .org, .info and .biz similarly to non-comparable new gTLDs when it decided to remove the price caps. It is only after Namecheap had challenged ICANN's decision to remove the price caps that the ICANN Board tried to construct a justification in its response to Reconsideration Request 19-2. There are many serious issues with ICANN's after-the-fact justification which is based on a 'Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries'. To name a few:

- Dennis Carlton's report is not a fact-based analysis and only a preliminary report, showing that the final reports were not even considered when ICANN tried to construct a justification;
- The subject-matter of the reports (both the preliminary report and the final reports) is not related to price caps in legacy TLDs; the reports only discuss price caps for new gTLD registries;
- The reports support a conclusion that price caps must be maintained in legacy TLDs. In the final reports, the author made clear that he saw no basis for eliminating price caps in existing gTLDs. He had understood from ICANN that there is no basis for the concern that the absence of price caps for new gTLDs could result in the elimination of price caps for .com, .net, .org, .info, .biz, and others;
- In 2013, the then already four years old report was clearly not an impediment to maintain the price cap when renewing the .org, .info and .biz RAs at that time.

47. ICANN has given no explanation whatsoever that would justify a removal of the price caps.

**C. ICANN violates the renewal clause of the 22 August 2013 RAs, thereby acting contrary to the interest of the Internet community as a whole**

48. The price cap removal violates the renewal clause in Section 4.2 of the 22 August 2013

RAs for .org, .info and .biz. Section 4.2 governs the terms and conditions for Renewal of the RAs. It states *inter alia*:

*‘Upon renewal, in the event that the terms of this Agreement are not similar to the terms generally in effect in the Registry Agreements of the five most reasonably comparable gTLDs (provided however that if less than five gTLDs are reasonably comparable, then comparison shall be made with such lesser number, and .com, .info, .net and .biz are hereby deemed comparable), renewal shall be upon terms reasonably necessary to render the terms of this Agreement similar to such terms in the Registry Agreements for those other gTLDs (the “Renewal Terms and Conditions”). The preceding sentence, however, shall not apply to the **terms of this Agreement regarding the price of Registry Services**; standards for the consideration of proposed Registry Services, including the definitions of Security and Stability and the standards applied by ICANN in the consideration process; the terms or conditions for the renewal or termination of this Agreement; ICANN’s obligation to Registry Operator under Section 3.2(a), (b) and (c); the limitations on Consensus Policies or Temporary Specifications or Policies; or the definition of Registry Services, all of which **shall remain unchanged.**’ (emphasis added, **RM 18, 27-28**)*

49. It follows from this Section 4.2 that the price of Registry Services under a renewed RA shall remain unchanged. This clause is clearly included to protect the interests of the Internet community as a whole. Any departure from the principle that the price of Registry Services remains unchanged should be thoroughly examined and involve the Internet community as a whole. Section 4.2 served as a protection to avoid that a self-interested faction of the Internet community – let alone individual registry operators – can make radical changes to the terms under which they were granted control over a critical resource of the DNS. Also for this reason, ICANN should have reconsidered its decision to eliminate price caps in the .org, .info and .biz gTLDs.

50. Moreover, Section 4.2 of said RAs also provides that .org, .info and .biz must be deemed comparable to one another and to other legacy gTLDs for which price caps are maintained. ICANN provides no explanation whatsoever as to why (i) it failed to comply with Section 4.2 and (ii) it decided to eliminate price caps in the .org, .info and .biz gTLDs, while maintaining price caps in the comparable .com and .net gTLDs.

**D. ICANN violates governing policy with respect to .org**

51. Namecheap has demonstrated that the reassignment of .org to PIR/ISOC in 2002 was not open-ended. This has been recognized by ICANN in a letter to PIR (**Annex 23**). Clear and unequivocal commitments were made by PIR/ISOC, who received an endowment of US\$ 5 million in exchange to operating as a non-profit and its commitment of making the .org registry the ‘true global home of non-commercial organizations on the Internet.’<sup>19</sup> To obtain the reassignment of .org, PIR/ISOC had to commit that (i) the .org registry be ‘operated for the benefit of the worldwide community of organizations, groups, and individuals engaged in noncommercial communication via the Internet’, (ii) the responsibility for the .org administration be ‘delegated to a non-profit organization that has widespread support from and acts on behalf of that community’, and (iii) the registry services fee charged to accredited registrars be ‘as low as feasible consistent with the maintenance of good quality service’.<sup>20</sup>

52. Namecheap fails to see how these commitments are compatible with the operations and aspirations of a private investment firm. Private investment firms typically look to maximize the value of their investment. Such goal is incompatible with the requirement to charge fees that are as low as feasible and with the public-interest, non-profit nature of .org.

53. The mere fact that ICANN is even considering a possible transition of .org’s registry operations to a for-profit entity without involving the community breaches ICANN’s obligation to apply documented policies neutrally, objectively and fairly.

**E. ICANN fails to remain open and transparent in its evaluation of PIR’s proposed change of control**

54. In addition, Namecheap observes that ICANN is not as open and transparent as it should be about its evaluation of PIR’s request for change of control that would change its status as a

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<sup>19</sup> **RM 14**, Section II, point C11, 10.

<sup>20</sup> See ICANN, Report of the Dot Org Task Force Adopted by the DNSO Names Council 17 January 2002 and accepted as guidance by the ICANN Board on 14 March 2002 (**RM 10**).

non-profit. If the requested interim measures are not granted, the request for change of control risks being granted by ICANN without any useful opportunity for Namecheap, or anyone in the Internet community, being able to scrutinize ICANN's approval.

## **VI. PROCEDURAL MATTERS**

55. Pursuant to Article IV(3)(k)(ii) Bylaws, Claimant hereby requests that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.

56. It does not appear that ICANN has established the standing panel described in Article IV(3)(j) Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, Claimants suggest that the parties agree to the following method for appointing the IRP Panel: each party shall appoint one panelist, after which the two panelists so appointed shall jointly select, in consultation with the parties, the third panelist, who shall serve as the Chairman of the Panel.

57. Claimants propose that both Claimants and ICANN simultaneously make their panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of the confirmation by ICDR of the appointment of the respective panelists. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

## **VII. RELIEF REQUESTED**

58. Based on the foregoing, and reserving all rights, including but not limited to the right (i) to amend the relief requested below, *inter alia*, to reflect document production and further

evidence, and (ii) to rebut ICANN's response in further briefs and during a hearing, Claimants respectfully request that the Panel, in a binding Declaration:

- Declare that ICANN has acted inconsistently with its Articles of Incorporation, its Bylaws, and/or the binding commitments contained in policies and longstanding practices;
- Declare that ICANN has violated international law;
- Declare that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must annul the decision that removed price caps in the .org, .info and .biz registry agreements;
- Declare that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that .org remains dedicated to the non-profit sector by adopting measures such as requiring that .org be operated by a non-profit entity that charges registry fees that remain as low as feasible consistent with the maintenance of good quality service;
- Declare that, in order to comply with its Articles of Incorporation and Bylaws, ICANN must ensure that price caps from legacy gTLDs can only be removed following policy development process that takes due account of the interests of the Internet user and with the involvement of the different stakeholders;
- Declare Namecheap the prevailing party in this IRP
- Award Namecheap its costs in this proceeding; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

Respectfully submitted,  
25 February 2020



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- Annex 12 - ICANN, *Approved Board Resolution 2019.11.21.01 – Special Meeting of the Board*, 21 November 2019, <https://www.icann.org/resources/board-material/resolutions-2019-11-21-en#1.a>
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- Annex 19 - Letter from ICANN to PIR of 30 January 2020
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- Annex 23 - Letter from counsel to ICANN to counsel to PIR of 13 February 2020
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