Vertical Integration Between Registries and Registrars

Commentary on the Vertical Integration PDP Working Group Initial Report, 23 July 2010

Christopher Wilkinson, in his Personal Capacity*.

I. INTRODUCTION

The following comments are based on only reading the VI PDP WG Initial Report. I was not able to participate in the meetings, lists and conference calls which preceded the preparation of this report. May I express my admiration for the dedication of many members of the ICANN community to this issue during recent months.

My main impression is that the broad drafting of the WG's Charter and the associated GNSO Resolutions has resulted in a wide range of proposals and counter proposals many of which do not address the primary question which is: whether and, if so, when and how, a new registry should be allowed to act as its own registrar, and subject to what thresholds?

I would recommend that GNSO limit its activity at this stage to answering that primary question. Other matters, and particularly reverse integration between registrars and registries, cross-ownership issues, Single Registrant registries etc. could be dealt with separately and with a more reasonable timescale. It would appear from the Initial Report that there is little prospect of comprehensive consensus on the present basis, within the time lines set by the ICANN Board and the new gTLD procedure.

II. SUMMARY

1. The Working Group was initiated by a request to address the topic of **"Vertical Integration between Registries and Registrars"**. The Initial Report's title is "Vertical Integration between Registrars and Registries". That is not quite the same thing, and opens up a range of issues that would not have arisen if the initial question had been adhered to. The Initial Report suggests that some of the contributory authors are more interested in the question of cross-ownership and reverse integration between Registrars and Registries, than in answering the initial question.[1]

   But the issue that has to be resolved, soon, is whether newly formed TLD Registries, which are likely to be quite small to start with, or which are designed to address specific user communities, should be required *ab initio* to implement full Registry/Registrar separation, conformant to the current ICANN business model, or not?

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* N.B. These comments are offered in my personal capacity. They do not imply any consultation or consent on the part of any of the entities with which I am, or have been, associated.

1 . The first instance of this elision appears to be in the Summary of Public Comment Period (page 74). It could well be an accidental drafting error.

That option does not conform to current ICANN policy, for the very good reason that ICANN policy was designed in the mid-1990's to address the issue of a monopoly registry without a distinct registrar function.[2] However, the integrated business model is not exceptional in the ICANN context. Even today, I believe that there still are ccTLDs which operate on the basis of registering domains directly to registrants.

I would submit that the primary question could be answered now in terms of thresholds for initial numbers of registered domains and/or duration of initial periods of exceptions. Not much more.[3]

Most of the other issues could be dealt with subsequently. It would not be productive – and would be a source of further delay - to link the current round of applications for new gTLDs with fundamental changes in the ICANN business model. Rather, we should be talking about limited exceptions to accommodate initially small start-up registries.

2. ICANN is responsible for the **conditions of competition** and consumer protection in the DNS. In the mid 1990's when ICANN was initially set up, it became clear that the competition authorities in the US and the EU expected ICANN to fulfill that role. As a result, most of the international experience and expertise in this area now resides in the ICANN community. One should not now expect the official competition authorities to take up parts of that responsibility, nor for ICANN to delegate other parts of the responsibility to – yet to be created – external entities.

   More generally, the Initial Report, speaks of determining " ... whether there has been *competitive harm* in the domain name market". (page 5, my emphasis.) That is to set the bar far too low. Competition in the Registry market is intrinsically weak. ICANN should continue to be improving the conditions of competition. To-date this has been undertaken through structural separation and price caps. There may well be other ways of improving the conditions of competition in the registration market but most of the alternative proposals set out in the Initial Report would move the DNS market in the other direction.

3. Some of the contributions to the Initial Report make much of the opportunity for **innovation and new business models** in the DNS market. At one extreme, these may be "unlimited and diverse" (page 58). That would take matters too far. Most business models conform to public company laws and regulations which pre-determine many aspects of business behaviour. The DNS market is not an exception. It is just that, because of the global character of the Internet, the ICANN community enjoys a greater role in determining what the business models should be, which have been generally determined by the ICANN community itself. There may, indeed, be a need for progressive improvements in ICANN's policies, in the first instance because of internationalisation of the DNS. But general transformations of well-understood business models at this time would not be compatible with the efficient launch of the next round of new TLDs.

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2 . Resulting from the US National Science Foundation's prior contracts with Network Solutions (as it then was).

3 . Note that in these cases the BRU2 proposal (among others) to the effect that Registry/Registrar integration is OK provided that the Registrar does not act as their own registrar, is a non-starter. That would defeat the purpose of protecting the new entrant until sufficient scale had been achieved to justify requiring Registry/Registrar separation.

4. The Initial Report does not address the question of **retroactivity** of the various policy proposals which are envisioned. How would the proposed changes be applied to the existing Registry/Registrar businesses?

   At this stage, in view of the short delays and lack of documented facts and experience, all changes in current policy for the purposes of the next round of gTLD applications should be:

   (a) temporary within time lines and thresholds
   (b) reversible and
   (c) when confirmed, retroactive.

III COMMENTS ON THE PROPOSALS

The following specific comments on the proposals documented in the Initial Report are neither comprehensive nor exhaustive. They just illustrate on a "case-in-point" basis, the general themes outlined above.

1. JN2 Proposal

This proposal does not address the primary question which was initially addressed to the GNSO and resulted in the PDP and the creation of the Working Group.

It is not at all clear why permitting cross-ownership between Registrars and Registries is relevant to the issue. Normally one would create a rule and then - as an exception- allow for temporary deviations for a limited period, e.g. 18 months.

This proposal does the opposite: a rule would be created and applied, but after 18 months the Registrars could petition for the rule to be waived!

2. Free Trade Proposal

This proposal effectively abandons Registry-Registrar separation, not just as an exception, but as a general rule. This would impose a disproportionate burden on ICANN's other regulatory instruments (auditing, compliance, etc.) and is rather optimistic as to the resulting behaviour of the Registration businesses (they are not "Authorities") in the public interest. That the proponents of this proposal are sensitive to these shortcomings is evinced by their concerns expressed about the potential for ".. abuse and harms of having integrated control of data." (page 38).

The proposed changes (a) would be permanent and (b) do not address the question of retroactivity (except to suggest that existing ICANN contracts might require "a few adjustments" (sic).

3. RACK+ Proposal

This proposal, which would appear to be close to the Status Quo, maintains the principle of Registry/Registrar separation, but does not address the primary question, either. The question of scale economies for startups and the issue of "orphans" should be addressed.

4. **Competition Authority Model (CAM3)**

Here, ICANN would (a) maintain structural separation in general but (b) allow 100% cross ownership and full vertical integration as exceptions. ICANN is enjoined to delegate its decisions to a new Panel (the CESP) and - in the event of difficulties - to delegate to national competition authorities.

There are several problems with this approach:

(a) For more than a decade ICANN and the ICANN community has held the experience and expertise in the area of competition policy for the DNS.

(b) There is not uniform international coverage of competition authorities with the appropriate powers and competences. Even the competition authorities in the EU and the US have little experience or precedent in this field precisely because ICANN has been doing that job.

(c) The delays demanded for responses from the public authorities concerned are not very realistic: it is not so much that a competition authority needs a lot of time to treat a specific case, it is rather that those authorities have to prioritise their cases in terms of the scale of abuse and the availability of alternative recourse. (e.g. ICANN).

It is disappointing that relevant national competition authorities were apparently not participating in any stage of the PDP.

5. IPC Proposal

This proposal is likely not quite as "clear and simple" (page 61) as it might seem:

(a) The proposal would afford a very high level of global Trademark protection for a comparatively low level of actual registration and recognition of the brands in question. Thus, in certain respects, global protection on the Internet would be acquired as against trademark registration in only nine jurisdictions, world-wide.[4]

Consequently the proposal would in practice expand "intellectual property rights beyond that granted by the national governments ..." (page 63).

(b) On the other hand, for a startup Internet company, the proposal would require trademark registration and the associated costs in nine jurisdictions in three different ICANN regions, even before starting business. I wonder how many startups would be able to do that.

(c) The putative benefits to the trademark owners of such a system are not self-evident. For these to be realised in practice, quite large corporate websites would have to be rebranded and redirected. Has the resulting consumer confusion and administrative cost been evaluated by the entities proposing this far reaching change in policy?

4 . Except that a single registration of an EU TM with OAMI would be valid for the European Region.

(d) The Single User. Single Registry (SUSR) option would justify a separate call for proposals with a different time-line. A separate procedure would have to be in place to verify the respective Trademark claims and to collect audited evidence of the numbers of national or regional registrations. There might well be competing claims – equally substantiated – for the same name that had been trademarked in different jurisdictions or sectors. An appropriate arbitration mechanism might be necessary. Auctions are not an appropriate option because they would bias decisions towards the larger entities which would not support a policy of promoting diversity, choice and competition.

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Such issues illustrate the suggestion made above that by unduly broadening the scope of the PDP, ICANN and the GNSO have raised issues that cannot be resolved within the timescale proposed.

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