ICANN Board-GAC Consultation: Registry-Registrar Separation

EXPLANATION OF ISSUE/HISTORY

The following is background on the issue of "registry-registrar separation," which is one of the issues identified by the GAC for the forthcoming Board-GAC consultation on new gTLDs.

The GAC's Comments on v4 of the Draft Applicant Guidebook (23 September 2010) noted:

> "… Governments generally support restrictions on vertical integration and cross-ownership as important devices for promoting competition, preventing market dominance and averting market distortions. The GAC notes in this regard the Salop and Wright report and recognizes that vertical separation may be warranted where a market participant wields, or may in the future wield, market power.
>
> However, the GAC also recognises that if market power is not an issue, the ability of registrars with valuable technical, commercial and relevant local expertise and experience to enter the domain names market could likely lead to benefits in terms of enhancing competition and promoting innovation.
>
> An important additional benefit which the GAC expects would flow from such an exemption would be that community-based TLD applicants would be able to cast their net more widely in securing partners with the necessary expertise and experience in the local market to undertake what would be relatively small scale registry functions.
>
> The GAC therefore urges ICANN to resolve the current debate about registry-registrar separation with a solution that fosters competition and innovation in the DNS market by allowing exemptions, subject to some form of regulatory probity that ensures a level playing field, for certain registrars as potentially valuable newcomers to the registry market. ICANN may find it useful to consider the experience of competition regulators around the world in addressing this issue."
> <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>

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.

3. These provisions may be enhanced by additional enforcement mechanisms such as the use of self-auditing requirements, and the use of graduated sanctions up to and including contractual termination and punitive damages.

4. 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.

5. ICANN will have the ability to refer issues to relevant competition authorities.

6. ICANN will have the ability to address possible abuses that may arise out of registry-registrar cross-ownership through the consensus policy process.

REMAINING AREAS OF DIFFFERENCE

The GAC considers that there are still outstanding issues regarding the current procedure which include the absence of a detailed explanation and rationale for the decisions taken to date on the new gTLD program, exemplified by the recent Board decision on vertical integration.

At its meeting in Cartagena, the ICANN Board adopted a resolution committing ICANN "to provide a thorough and reasoned explanation of ICANN decisions, the rationale thereof and the sources of data and information on which ICANN relied." <http://www.icann.org/en/minutes/resolutions-10dec10-en.htm>

A copy of the draft rationale document regarding registry-registrar separation is attached as an annex below here. The draft rationale has been posted on the ICANN website at <http://www.icann.org/en/minutes/draft-cross-ownership-rationale-04feb11-en.pdf>. (That link was posted as part of the Preliminary Report of the 25 January 2011 meeting: <http://www.icann.org/en/minutes/prelim-report-25jan11-en.htm>.)

RELEVANT GUIDEBOOK SECTIONS

The following is the wording of the "use of registrars" provision in the most recent version of the proposed registry agreement for new gTLDs:

2.9 Registrars.

(a) Registry Operator must use only ICANN accredited registrars in registering domain names. Registry Operator must provide non-discriminatory access to Registry Services to all ICANN accredited registrars that enter into and are in compliance with Registry Operator's registry- registrar agreement for the TLD. Registry Operator must use a uniform non-discriminatory agreement with all registrars authorized to register names in the TLD, provided that such agreement may set forth non-discriminatory criteria for qualification to register

names in the TLD that are reasonably related to the proper functioning of the TLD. Such agreement may be revised by Registry Operator from time to time; provided, however, that any such revisions must be approved in advance by ICANN.

(b) If Registry Operator (i) becomes an Affiliate or reseller of an ICANN accredited registrar, or (ii) subcontracts the provision of any Registry Services to an ICANN accredited registrar, registrar reseller or any of their respective Affiliates, then, in either such case of (i) or (ii) above, Registry Operator will give ICANN prompt notice of the contract, transaction or other arrangement that resulted in such Affiliation, reseller relationship or subcontract, as applicable. ICANN reserves the right, but not the obligation, to refer any such contract, transaction or other arrangement to relevant competition authorities in the event that ICANN determines that such contract, transaction or other arrangement might raise competition issues.

(c) For the purposes of this Agreement: (i) "Affiliate" means a person or entity that, directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the person or entity specified, and (ii) "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise.
<http://icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-12nov10-en.pdf>

[DRAFT] ANNEX: RATIONALE FOR ICANN POSITION ON REGISTRY-REGISTRAR SEPARATION

I. Introduction

When ICANN was formed in 1998, one of its primary purposes was to promote competition in the domain name system, which, prior to that date, consisted of a single entity (Network Solutions, Inc.) that operated the .COM, .NET, and .ORG registries and also was the sole registrar for those entities. The memorandum of understanding that ICANN signed with the United States Department of Commerce contained the following provision:

> This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.

http://www.icann.org/en/general/icann-mou-25nov98.htm. ICANN's Bylaws and other foundational documents articulate that the promotion of competition in the registration of domain names is one of ICANN's core missions. *See* ICANN Bylaws, Article 1, section 2.6.

ICANN has created significant competition at the registrar level, which has resulted in enormous benefits for consumers. Until recently, however, ICANN had not taken steps toward fostering meaningful competition at the registry level. The material below summarizes the Board's significant actions on cross-ownership of registries and registrars and the major proposals the Board considered. Below also describes the Board's analysis and reasons for deciding to permit cross-ownership under the circumstances described in the 5 November 2010 resolution. *See* http://www.icann.org/en/minutes/resolutions-05nov10-en.htm.

II. History of the Board's Consideration of Cross-Ownership

This section sets forth a history of significant Board consideration of the subject of cross-ownership of registries and registrars.

- Prior to 2010, the ICANN Board considered the issue of cross-ownership on numerous occasions, recognizing, however, that no official policy was ever developed by the ICANN policy development making bodies. Whether ICANN permitted cross-ownership of registries and registrars, and to what degree, was therefore determined contractually. The contractual provisions were not uniform, though some barred registries from owning more than 15% of any ICANN-accredited registrar. The original 15% limitation was the product of negotiation as opposed to any policy development process. Throughout the period that ICANN was limiting for some registries the ability to have ownership

interests in registrars, ICANN never restricted registrars from owning interests in registries and, in fact, several registrars did own interests in registries.

- Over time, and as ICANN's development of new gTLDs presented the need for more diverse business models in the domain name marketplace, and the community expressed interest in revisiting cross-ownership contractual limitations, the Board began to consider the issue of registry/registrar cross-ownership.

- ICANN initially commissioned an economic study to address issues relating to Vertical Integration and the effects of eliminating restrictions. *See 2*3 October 2008 Report from CRA International http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf

- At the 22 June 2009 ICANN meeting in Sydney, Australia, the ICANN Board conducted a lengthy workshop entitled "Vertical Integration Between Registries and Registrars – The Economic Pros and Cons," which included presentations by economists and outside legal counsel. http://syd.icann.org/files/meetings/sydney2009/presentation-vertical-separation-22jun09-en.pdf.

- At the 27 October 2009 ICANN meeting in Seoul, South Korea, the Board again discussed cross-ownership. http://sel.icann.org/node/6768.

- On 28 January 2010, in response to a request from the community, the Generic Names Supporting Organization (the "GNSO") Council decided to initiate a policy development process on cross-ownership between registries and registrars on an expedited basis. http://gnso.icann.org/resolutions/#201001.

- At the 12 March 2010 ICANN meeting in Nairobi, Kenya, the Board passed a resolution (http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5) indicating that, as a default position, no cross-ownership would be allowed in the new gTLD program but that if the GNSO were to develop a policy recommendation on the subject prior to the launch of new gTLDs, the Board would consider that policy. This "default" position was intended to encourage the community to develop a policy so that the Board would not have to address the issue on an implementation level.

- In May 2010, ICANN published version 4 of the Draft Applicant Guidebook, which included a note that the Board encouraged the GNSO to recommend policy on this issue, and that the Board would review and revisit the issue again if the

GNSO did not submit recommendations in time for launch of the new gTLD program. http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm.

- At the 22 June 2010 meeting in Brussels, Belgium, the Board again discussed cross-ownership. http://brussels38.icann.org/node/12470.

- On 12 August 2010, the public comment period on the GNSO's initial report on cross-ownership ended. https://st.icann.org/data/workspaces/vert-integration-pdp/attachments/vertical_integration_pdp:20100818171812-0-28944/original/Summary%20of%20public%20comments%20for%20Initial%20Report%20on%20VI_rev%204.pd.

- On 18 August 2010, the GNSO submitted an initial report, offering the Board multiple proposals on cross-ownership that were diametrically opposed. https://st.icann.org/data/workspaces/vert-integration-pdp/attachments/vertical_integration_pdp:20100818172144-0-27930/original/Revised%20Initial%20Report%20Vertical%20Integration%20PDP%20WG%2018%20Aug%202010%20Final.pdf.

- In response to the Board's request per its resolution passed on 25 September 2010 (http://www.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 on any of the proposals it had submitted. http://gnso.icann.org/mailing-lists/archives/council/msg09754.html.

- On 5 November 2010, the Board adopted its final resolution on the issue of cross-ownership. http://www.icann.org/en/minutes/resolutions-05nov10-en.htm. The Board concluded that – 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.

- On 12 November 2010, ICANN published the Proposed Final Applicant Guidebook including language conforming to the Board's 5 November 2010 resolution. (http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf.). Further, part of the Proposed Final Applicant Guidebook is the November 2010 Draft gTLD Agreement, which includes a new Specification 9 entitled the "Registry Operator Code of Conduct.) *See*

http://www.icann.org/en/topics/new-gtlds/draft-agreement-specs-clean-12nov10-en.pdf.

III. The Board's Analysis of Cross-Ownership

A. Why the Board is addressing this issue now.

- ICANN's mission statement and one of its founding principles is to promote competition. ICANN has created significant competition at the registrar level, which has resulted in enormous benefits for consumers. To date, ICANN has not created any meaningful competition at the registry level.

- The Board sought to permit diversification of business models, especially for the new gTLD program.

- Community members sought re-evaluation of cross-ownership limitations in light of new gTLD program.

- The Board wanted to create greater certainty in the domain name marketplace by encouraging the bottom-up policy development process to develop policy on cross-ownership, but no such policy has been developed or proposed.

B. Major Cross-Ownership Proposals Considered by the Board

The GNSO considered a large number of proposals on cross-ownership, which it distilled into six proposals that it submitted to the Board. https://st.icann.org/data/workspaces/vert-integration-pdp/attachments/vertical_integration_pdp:20100818172144-0-27930/original/Revised%20Initial%20Report%20Vertical%20Integration%20PDP%20WG%2018%20Aug%202010%20Final.pdf. Those six proposals are summarized in sections A-F below, and are listed in order from the most restrictive on cross-ownership to the least restrictive. Economists Salop and Wright submitted a seventh proposal to the Board, which is summarized in section G below. None of the proposals reflect a consensus opinion.

1. DAGv4

The DAGv4 proposal represents a per se prohibition against cross-ownership of registries and registrars, with only limited exceptions. For example, a registrar or an affiliated entity is allowed up to a 2% ownership stake in a registry. A registrar or its affiliate may not hold a registry contract, nor may a registry entity control a registrar or its affiliates. Further, registries may not distribute names in any TLD. *See* GNSO's Revised Initial Report, pages 18-19.

- A registrar entity or their affiliate (another company with whom the registrar has common control) may not directly hold a registry contract. This applies regardless of the TLD(s) in which the registrar is accredited.

- A registrar entity or their affiliate may have beneficial ownership of up to 2% of the shares in a registry company. Beneficial ownership is a form of ownership in which shares have: (a) voting power, which includes the power to vote, or to direct the voting of the shares; and/or (b) investment power, which includes the power to dispose of or to direct the disposition of the shares.

    - In no circumstance may a registry entity control a registrar or its affiliates, or vice versa.

    - Affiliates of the registry entity may not distribute names in any TLD -- as either a registrar, reseller or other form of domain distributor.

    - No registrar, reseller or other form of domain distributor (or their affiliates) may provide registry services to a registry entity. Registry services are defined in Specification 6 to the registry contract.

    - Names can only be registered through registrars.

    - Registries can set accreditation criteria for registrars that are reasonably related to the purpose of the TLD (*e.g.*, a Polish language TLD could require registrars to offer the domain via a Polish language interface).

    - Participating registrars must be treated on a non-discriminatory basis.

    - Registries can register names to themselves through an ICANN-accredited registrar.

2. **IPC**

The IPC proposes three models of .brand exceptions to restrictions on cross-ownership of registries and registrars. Under the .brand SRSU, the .brand Registry Operator (the "bRO") is the registrant and user of all second-level domain names. Wholly-owned subsidiaries and otherwise affiliated companies could register and use second-level names. Under the .brand SRMU, the bRO is the registrant for all second-level names and may license them to third parties that have a pre-existing relationship with the brand owner (*e.g.*, suppliers) for other goods/services. Under the .brand MRMU, the bRO and its trademark licensees are the registrants and users of all second-level names. *See* GNSO's Revised Initial Report, pages 59-66.

Seven additional criteria for these .brand exceptions to cross-ownership apply, including:

- The trademark must be identical to the .brand string and the subject of registrations of national effect in at least three countries in three ICANN regions;
- Trademark owners whose principal business is to operate a domain name registry, register domain names, or resell domain names are ineligible;
- Under MRMU, the bRO delegates second-level names subject to trademark license agreement quality control provisions that allow at-will termination of registrations; and
- Brand TLDs with second-level names registered to unrelated third parties are ineligible.

A new gTLD registry that satisfies the criteria: (a) could control an ICANN-accredited registrar solely for registrations in that TLD; (b) would not need to use an ICANN-accredited registrar for registrations within the TLD; and/or (c) could enter into arrangements with a limited number of ICANN-accredited registrars for registrations in that TLD.

3. **RACK+**

The RACK+ proposal permits cross-ownership between registries and registrars, as long as co-owned entities possess less than 15% ownership interest in the other. *See* GNSO's Revised Initial Report, pages 45-48.

- This cross-ownership approach allows both registry operators and registrars to invest in domain name wholesale and retail businesses. The rationale is to avoid creating ownership positions that provide access to registry data for registrars.
- This group does not recommend that a new contract regime be established between ICANN and registry backend services providers. Rather, ICANN could enforce this cross-ownership rule through the registry operator contract.
- Cross-ownership caps should be supported by appropriate provisions addressing "affiliation" and "control" to prevent gaming against the caps.
- Registries must use only ICANN-accredited registrars in registering domain names and may not discriminate among accredited registrars.
- Equivalent access and non-discrimination principles should apply to all TLD distribution.

4. **JN2**

The JN2 proposal permits cross-ownership between registries and registrars, as long as cross-owned entities are not in a position of controlling the other or possessing a greater than 15% ownership interest in the other. The JN2 proposal contains a definition of affiliation, which includes both ownership (> 15%) and control (direct or indirect) and allows exceptions for single registrant TLDs, community TLDs and orphan TLDs. *See* GNSO's Revised Initial Report, pages 34-38.

- It restricts registry operators and their affiliates from distributing names within the TLD for which the registry operator or its affiliate serves as the registry operator.

- It allows registrars (and their affiliates) to be registry operators provided they agree not to distribute names within a TLD for which they or their affiliates serve as the registry operator.

- Restrictions do not apply to back-end registry service providers (RSPs) that do not control the policies, pricing or selection of registrars.

- After 18 months, any restricted RSP may petition ICANN for a relaxation of those restrictions depending on a number of factors.

- Cross-ownership limitations extend to registrar resellers for 18 months. After that, market protection mechanisms must be in place.

- Registry operators may select registrars based on objective criteria and may not discriminate among the ones they select.

5. **CAMv3**

The Competition Authority Model ("CAMv3") prohibits cross ownership between registries and registrars as originally set forth in the ICANN Board's Nairobi resolution, but allows up to 100% cross ownership under the rules of a waiver/exemption process. It allows referral to national competition authorities to resolve questions about market power and consumer protection. *See* GNSO's Revised Initial Report, pages 49-58.

- Those entities that wish may request an exemption/waiver. These would be forwarded to a standing panel entitled the Competition/Consumer Evaluation Standing Panel (the "CESP"). This panel would be given a set of guidelines for evaluating the applications. If the CESP "quick look" or initial analysis raises no competition or consumer protection concerns, the exemption/waiver would be granted.

- If the CESP initial analysis raises competition or consumer protection concerns or indicates a need for a more detailed or extended review, then ICANN shall refer the matter to the appropriate national competition and/or consumer protection agencies.

- For those entities that are granted a waiver/exemption, ICANN will amend registration authority agreements to include rules designed to prevent self dealing or harm to third parties such as registrants and Internet users.

- The CAM model proposes a three tiered approach toward contractual compliance: (1) ICANN's normal compliance efforts; (2) an annual audit; (3) an expanded Post Delegation Dispute Resolution Procedure (the "PDDRP") for third parties to initiate their own administrative remedy, coupled with a strict three strikes rule for repeat offenders.

6. **Free Trade**

The Free Trade Model proposes to discard limits on cross-ownership entirely. *See* GNSO's Revised Initial Report, pages 39-44.

- It discards cross-ownership restrictions on registrars, registries, and registry service providers ("RSPs").

- Equivalent access for registrars is required with registries allowed to self distribute so long as they are bound by the RAA and pay required registration fees.

- RSPs are required to be accredited by ICANN for technical sufficiency. RSPs will be bound by terms, conditions, and restrictions similar to those imposed on registry operators through their contractual agreement with each registry operator.

- This model removes the need for exceptions like Single Registrant – Single User ("SRSU"), Single Registrant – Multiple Users ("SRMU"), and Orphan TLDs.

- This proposal assumes ICANN's funding of contractual compliance resources will match the demands of the new gTLD expansion.

- Requirements to monitor, enforce and ultimately prevent malicious or abusive conduct are directed at the conduct at issue rather than cross-ownership limitations.

7. Salop & Wright

The Salop and Wright Model permits cross-ownership, but if the share of the registrar or the registry that applies to acquire a significant ownership interest in any new or existing entity at the other vertical level exceeds the relevant market share threshold, then ICANN will notify the appropriate governmental competition agencies. *See* http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf. ICANN will place the application on hold for a period not to exceed 45 days. This matches the existing waiting period for new registry services that might raise competitive issues. *See* http://www.icann.org/en/registries/rsep/rsep.html. Salop and Wright recommend two possible next steps:

- If the agency or agencies notify ICANN and the registry or registrar during that 45 day period that the acquisition of the entity at the other vertical level may violate its competition laws, ICANN will place the application on hold for another period not to exceed 120 days to allow the agency or agencies and the applicant to resolve any concerns. At the end of this period, or sooner if notified by the agency or agencies that any issues have been resolved, ICANN will resume processing the application; or

- At the end of that 45-day period, ICANN will continue to process the application, and the registrar or registry will bear the risk of any subsequent enforcement action.

C. What Stakeholders or Others Were Consulted?

- Economists
  - CRA International
  - Salop & Wright
- Legal Counsel/Staff
- The GNSO
- The GAC
- All other Stakeholders and Community members through public comment forum and other methods of participation.

D. What Concerns or Issues Were Raised by the Community?

- ICANN should quickly resolve the issue of cross-ownership, even though no consensus is likely to be reached by the community/the GNSO.
- There was no consensus in support of any of the six proposals submitted by the GNSO in its initial report.
- There is general support for certain exceptions to restrictions on cross-ownership (certain new gTLDs, single registrant single use TLDs), which may be considered on a case-by-case basis.
- There is general recognition of the need for enhanced compliance efforts.
- There is general concern about involvement of national competition authorities that may not understand or have experience with the domain name marketplace.

E. What Significant Materials did the Board Review?

- Reports from Economists
  - 23 October 2008 Report from CRA International: http://www.icann.org/en/topics/new-gtlds/crai-report-24oct08-en.pdf.
  - 22 June 2009 ICANN Board workshop entitled "Vertical Integration Between Registries and Registrars – The Economic Pros and Cons," which included presentations by economists Salop & Wright and outside legal counsel: http://syd.icann.org/files/meetings/sydney2009/presentation-vertical-separation-22jun09-en.pdf.
  - 28 January 2010 Report from Salop & Wright: http://www.icann.org/en/topics/new-gtlds/registry-registrar-separation-vertical-integration-options-salop-wright-28jan10-en.pdf.
  - 12 September 2010 Report from Salop & Wright, evaluating the six major proposals submitted by the GNSO:

http://www.icann.org/en/minutes/board-briefing-materials-2-25sep10-en.pdf (pages 34-50).

- 18 August 2010 Revised Initial Report from the GNSO: https://st.icann.org/data/workspaces/vert-integration-pdp/attachments/vertical_integration_pdp:20100818172144-0-27930/original/Revised%20Initial%20Report%20Vertical%20Integration%20PDP%20WG%2018%20Aug%202010%20Final.pdf.

- Comments from the Community

  - The Public Forum: http://icann.org/en/public-comment/#vi-pdp-initial-report.

  - Summary of Comments: https://st.icann.org/data/workspaces/vert-integration-pdp/attachments/vertical_integration_pdp:20100818171812-0-28944/original/Summary%20of%20public%20comments%20for%20Initial%20Report%20on%20VI_rev%204.pd.

- Comments from the At Large Advisory Committee (the "ALAC"): http://www.atlarge.icann.org/announcements/announcement-10sep10-en.htm.

- Comments from the Governmental Advisory Committee (the "GAC"): http://www.gac.icann.org/press-release/gac-comments-new-gtlds-and-dagv3.

- Board Briefing Materials

  - 25 September 2010: http://icann.org/en/minutes/board-briefing-materials-1-25sep10-en.pdf.

  - 28 October 2010: http://www.icann.org/en/minutes/board-briefing-materials-1-28oct10-en.pdf (pages 137-142); http://www.icann.org/en/minutes/board-briefing-materials-2-28oct10-en.pdf (pages 69-100).

- Board Meeting Minutes & Transcripts: http://www.icann.org/en/minutes/.

F. What Factors the Board Found to Be Significant

The Board considered numerous factors in its analysis of cross-ownership. The Board found the following factors to be significant:

- the risk of data abuse, including front running, privacy violations, and domain tasting, and the availability of contractual and legal tools to manage that risk (recognizing that data abuses occur regardless of whether cross-ownership is permitted);
- the risk of increasing exposure to litigation;
- the risk of abuse of market power, and the availability of contractual, regulatory and legal tools to manage that risk (recognizing that abuses of market power occur regardless of whether cross-ownership is permitted);
- the principle that the Board should base its decision on solid factual investigation and expert analysis;
- the lack of reported problems with ICANN's historical practice of permitting registrars to own registries;
- the recognized benefits of vertical integration in other industries; and
- the goal of promoting equal access to registries for registrars.

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

During deliberations on cross-ownership issues, Board members considered multiple reasons for voting in favor of the November resolution. The Board considered all the information contained in each of the proposals referenced above, as well as public consultations, public comment forums and Board briefings that were provided during the Board' decision making process. In light of the numerous material and 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.

IV. Are there Positive or Negative Community Impacts?

The Board thinks that its decision to allow Cross-Ownership of registries and registrars in the new gTLD Program with have a positive Community impact as it will, at a minimum, help foster competition and innovation.

V. Fiscal impacts.

The Board does not think that its decision will have a fiscal impact on ICANN's strategic place, Operating Plan or Budget, except to the extent that compliance efforts to enforce the new Registry Code of Conduct may impact the Contractual compliance budget. Additional contractual compliance staff and resources may be required, but the precise amount is

unknown at this time. The Board may be in a better position to analyze that financial impact on ICANN once the number new gTLD Registry Operators are know.

The Board thinks that there will be a positive fiscal impact on the community and the public. Registries and Registrars will be able to reduce costs and, the savings of which hopefully will be passed on to the consumers. Moreover, competition tends to reduce prices to the consumer.

VI. Security, Stability and Resiliency.

The Board sees no security, stability and resiliency issues relating to the DNS arising from its decision on cross-ownership.

REFERENCE DOCUMENTS: REGISTRY-REGISTRAR SEPARATION

— **SUMMARY OF ACTIONS TAKEN RESPONDING TO GAC AND PUBLIC COMMENTS**

— **CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPICS**

SUMMARY OF ACTIONS TAKEN RESPONDING TO GAC AND PUBLIC COMMENTS

Registry-Registrar Separation

- ICANN commissioned an independent study on cross-ownership restrictions. The study recommended a limited lifting of cross-ownership restrictions for the New gTLD Program.
- ICANN commissioned an independent study on pricing. This study concluded that price caps in new gTLDs would not be necessary to realize the competitive benefits of the program, nor to protect against opportunistic behaviour. ICANN also wrote protections (in the form of notice requirements) against renewal price increases into the registry agreement.
- An additional pair of economists were engaged (selected for diversity of views) to perform additional analysis on cross-ownership. This analysis yielded a range of potential models.
- Ultimately, most restrictions on cross-ownership were removed from the Guidebook. This allows for flexibility to accommodate a variety of TLD models, allowing for greater benefits of innovation.
- The Board has posted draft rationale for the decision to lift those restrictions.

THIS TABLE PROVIES A CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPIC

Registry-Registrar Separation

GAC Advice and Comments	ICANN responses and key documents
27 March 2007: GAC Principles regarding New gTLDs 2.6 It is important that the selection process for new gTLDs ensures the security, reliability, global interoperability and stability of the Domain Name System (DNS) and promotes competition, consumer choice, geographical and service-provider diversity.	**ICANN mapping of GNSO Policy Recommendations** **2.6)** is addressed by multiple GNSO Principles and Recommendations, as follows: GNSO Principle A: "New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way." GNSO Principle C: "The reasons for introducing new top-level domains include that there is demand from potential applicants for new top-level domains in both ASCII and IDN formats. In addition the introduction of new top-level domain application process has the potential to promote competition in the provision of registry services, to add to consumer choice, market differentiation and geographical and service-provider diversity." GNSO Principle D: "A set of technical criteria must be used for assessing a new gTLD registry applicant to minimise the risk of harming the operational stability, security and global interoperability of the Internet." GNSO Recommendation 4: " Strings must not cause any technical instability." GNSO Recommendation 7: "Applicants must be able to demonstrate their technical instability. GNSO Recommendation 7: "Applicants must be able to demonstrate their technical capability to run a registry operation for the purpose that the applicant sets out." In the current implementation planning phase, proposed sets of technical and operational capability criteria are being developed, to be explained fully to the applicants in the Request For Proposal (RFP).
10 March 2009: Comments on V1 of Applicant Guidebook	**24 October 2008: Applicant Guidebook Version 1** http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf **18 February 2009, version 1 Public Comments Analysis Report** http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf
	18 February 2009: Applicant Guidebook Version 2 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf

	18 February 2009: Explanatory memo—Registry Registrar Separation http://www.icann.org/en/topics/new-gtlds/regy-regr-separation-18feb09-en.pdf **31 May 2009, Summary and analysis of public comments on version 2** http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf
18 August 2009: Comments on V2 of Applicant Guidebook The GAC has considered whether there is a risk that the gTLD process could create a multitude of monopolies rather than increasing competition. This rests in part on important, but unanswered questions relating to: (1) whether registrants view gTLDs as reasonable substitutes for one another; and (2) why some registrants purchase the same domain name in multiple TLDs. Further concerns have arisen regarding the apparent desire to alter existing policy that requires a structural separation between registrars and registries. Change to this policy should be guided primarily by whether and how such a change would benefit consumers and registrants. Studies to date have not fully addressed this aspect of the marketplace, nor have they included an analysis of the potential harm to domain name registrants of permitting registrars to operate as new gTLD registries.	**22 September 2009: Reply from ICANN Chairman** http://www.icann.org/en/correspondence/dengate-thrush-to-karklins-22sep09-en.pdf **Registry-Registrar Separation** I. Status quo ICANN has not had a policy prohibiting gTLD registrars from applying for or operating registries. Historically, ICANN has permitted registry-registrar cross-ownership with structural separation requirements. Recent agreements entered with registry operators since 2005 have included prohibitions on acquiring more than a 15% interest in registrars. Currently, there is not a prohibition on registries acting as resellers or using registrars as back-end registry service providers. Registrars currently provide back-end services for TLD registries. Current practices have worked well in the context of a relatively static set of competitors on the registry and registrar side. It is expected that the numbers of registries using back-end registry service providers may grow substantially in the new gTLD environment. This isn't anticipated in current practices, and requires a reevaluation of structural separation in the new gTLD environment. II. New gTLD implementation planning Based on the requirement to reevaluate current structures, and at community request, ICANN commissioned an independent study that recommended a limited lifting of co-ownership restrictions. That and a set of face-to-face community meetings resulted in a model published in the initial Guidebook. The registry constituency issued a report that opposed integration and sought to prohibit registrars from competing for back-end services. Two registrars published responses. As a result of the registry report, ICANN engaged another set of

	economists who recommend that, with caveats, all restrictions be removed. The two economists were selected for their diversity of views – they are on opposite ends of the spectrum in antitrust thinking. It was thought that they would either: develop separate views for discussion; or, arrive at the same view, indicating a conclusion that would have broad "economist" support. The anticipated changes in the market and the fact that no party is recommending an un-changed status quo requires ICANN to consider new options. There are four options to be considered: 1) No cross-ownership restrictions except where there is market power and/or registry price caps (regulation needs, if any, left to regulating authorities) 2) No cross-ownership restrictions for new registries, existing restrictions for existing registries (probably most disagreeable outcome to registries) 3) Limited lifting with enhanced structural separation: a. The registrar cannot sell names in the co-owned registry, or b. The registrar can sell a very limited number of names in the co-owned registry While this approach may represent a reasonable transition strategy, economists indicate this removes the possible consumer advantages in efficiencies due to structural integration. 4) Complete restrictions: a. Registries cannot have ownership percentage in registrars, and vice versa b. Registrars prohibited from providing back-end services (this might be accompanied by reciprocal restrictions, i.e., that registries cannot provide back-end services for other registries and registries cannot own resellers). The final position will take into consideration: 1. Registrar accreditation still required. 2. If an entity is abusing its market position to hinder competition, a relevant government competition authority should make that determination. ICANN has contractual authority, and governmental authority on competition issues is most appropriate.

	3. Rules made should be enforceable, not easily circumvented. Rules to prevent "selling shelf space" or against owning resellers can be overcome through other forms of agreement or organization. Imposing co-ownership restrictions on registries with price caps would not necessarily prevent them from inserting themselves higher in the value chain and circumventing the effects of price caps. 4. While some risks are avoided through limited lifting of restrictions, the limitation also obviates most of the benefits. 5. ICANN might consider removing price controls on registries without market power in order to facilitate their entry to moving into the less regulated space. With the current input: o The incumbent registries generally advocate imposing new and tighter restrictions on the ability of registry operators to own registrars. Additionally, existing registries want to define back-end registry operation to be the same as a commercial registry operator. This restriction and interpretation would effectively limit registrars' ability to compete against registries' TLD and back-end services offerings. Registries argue that since they have been prevented from owning registrars they would be at a disadvantage if the restrictions are not tightened since they have not established retail relationships with registrants. One of the risks identified is that registrars can leverage "shelf space" to gain back-end service market share. o Registries argue that abuses can occur if a single entity holds the registry and customer (registrar) data. o Economists are still at work, but so far have indicated (in the CRA report and at the Sydney workshop) that there are potential benefits to consumers from allowing cross-ownership, including lower prices and more innovation. o Economists also indicate that separation does not fully meet registry concerns. Registrars can and will allocate shelf space through means other than agreement to provide back-end services: for cash payments or other forms of consideration. They also indicate that data abuses can be prevented through agreement. Sources:

	http://www.icann.org/en/registries/agreements.htm http://www.icann.org/en/registrars/accredited-list.html http://www.icann.org/en/tlds/app-index.htm
28 October 2009: Communiqué Seoul Following discussions in Seoul however, both between GAC members and with other stakeholders, the GAC feels that many of its concerns remain outstanding, related in particular to: - the ongoing discussions within the community regarding structural separation between registries and registrars, price caps and the potential impacts on competition in the DNS market;	
	4 October 2009: Applicant Guidebook Version 3 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-04oct09-en.pdf **15 February 2010, Summary and analysis comments version 3** http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf
	28 May 2010: Applicant Guidebook Version 4 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf **28 May 2010: Explanatory Memo—"Quick Look" Procedure for Morality and Public Order Objections** http://www.icann.org/en/topics/new-gtlds/morality-public-order-quick-look-28may10-en.pdf **12 November 2010: Summary and analysis of comments version 4** http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf
23 September 2010: Comments on V4 of Applicant Guidebook The GAC notes the significant work being done within the ICANN community to resolve the difficult issue of registry-registrar separation. The GAC looks forward to further discussion of this important issue.	**23 November 2010: Reply from ICANN Chairman** http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf The Board agrees with the GAC that the registry-registrar separation issue must

The GAC notes that CANN has incorporated strict rules in version 4 of the DAG under which registrars are not able to provide registry services or to operate a new gTLD. Governments generally support restrictions on vertical integration and cross-ownership as important devices for promoting competition, preventing market dominance and averting market distortions. The GAC notes in this regard the Salop and Wright report and recognizes that vertical separation may be warranted where a market participant wields, or may in the future wield, market power. However, the GAC also recognises that if market power is not an issue, the ability of registrars with valuable technical, commercial and relevant local expertise and experience to enter the domain names market could likely lead to benefits in terms of enhancing competition and promoting innovation. An important additional benefit which the GAC expects would flow from such an exemption would be that community-based TLD applicants would be able to cast their net more widely in securing partners with the necessary expertise and experience in the local market to undertake what would be relatively small scale registry functions. The GAC therefore urges ICANN to resolve the current debate about registry-registrar separation with a solution that fosters competition and innovation in the DNS market by allowing exemptions, subject to some form of regulatory probity that ensures a level playing field, for certain registrars as potentially valuable newcomers to the registry market. ICANN may find it useful to consider the experience of competition regulators around the world in addressing this issue.	result in a solution that fosters competition and innovation in the DNS market. The Board notes that registries and registrars will continue to be subject to all applicable national and local laws intended to protect consumers and competition. The GNSO recently confirmed that its Vertical Integration Working Group has been unable to achieve consensus <http://icann.org/en/correspondence/gomes-to-dengate-thrush-07oct10-en.pdf> on recommending a model for addressing vertical integration of registries and registrars. As indicated at the time of the publication of version 4 of the draft Applicant Guidebook, the Board again reviewed this issue on 9 November 2010, and voted to allow new gTLD registries to own registrars, opting not to create new rules prohibiting registrars from applying for or operating new gTLD registries. Under the Board resolution additional enforcement mechanisms have been added. New gTLD registry agreements are to include: (1) a Code of Conduct prohibiting any misuse of data or other abusive conduct arising out of registry-registrar cross-ownership; (2) robust auditing requirements; (3) graduated sanctions up to and including contractual termination and punitive damages; and (4) ICANN's right to refer competition issues to appropriate government competition authorities. The full resolution is available at: http://www.icann.org/en/minutes/resolutions-05nov10-en.htm
	25 September 2010: Board meeting in Trondheim http://www.icann.org/en/minutes/resolutions-25sep10-en.htm Board Briefing Materials: One [PDF, 3.23 MB] Two [PDF, 2.03 MB] Three [PDF, 816 KB] Four [PDF, 240 KB] Five [PDF, 546 KB] "…Whereas, on 23 September 2010, the Governmental Advisory Committee (GAC) provided comments on version 4 of the draft Applicant Guidebook.

	Resolved (2010.09.25.__), staff is directed to determine if the directions indicated by the Board below are consistent with GAC comments, and recommend any appropriate further action in light of the GAC's comments." ***Vertical Integration*** The Board will send a letter to the GNSO requesting that the GNSO send to the Board, by no later than 8 October 2010, a letter (a) indicating that no consensus on vertical integration issues has been reached to date, or (b) indicating its documented consensus position. If no response is received by 8 October 2010, then the Board will deem lack of consensus and make determinations around these issues as necessary. At the time a policy conclusion is reached by the GNSO, it can be included in the applicant guidebook for future application rounds.
	5 November 2010: Board resolution on New gTLDs – Cross-Ownership Issues for Registries and Registrars **http://www.icann.org/en/minutes/resolutions-05nov10-en.htm** **New gTLDs - Cross-Ownership Issues for Registries and Registrars** Whereas, at the ICANN meeting in Nairobi in March 2010, the Board passed a resolution indicating that as a default position that no co-ownership would be allowed in new gTLDs, but that if the GNSO were to develop a policy on the subject prior to the launch of new TLDs that the Board would consider using the new policy for the new gTLD program <http://www.icann.org/en/minutes/resolutions-12mar10-en.htm#5>. Whereas, in May 2010, ICANN published version 4 of the Draft Applicant Guidebook, which included a note that the Board encouraged the GNSO to recommend policy on this issue, and that the Board would review this issue again if the GNSO did not make recommendations in time for launch of the new gTLD program <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm>. Whereas, the GNSO's Vertical Integration Working Group is divided on whether registrars should be allowed to operate registries (and consequentially whether registries should be allowed to operate registrars). The VI-WG's "Revised Initial Report on Vertical Integration Between Registrars and Registries" is posted at <http://gnso.icann.org/issues/vertical-integration/revised-vi-initial-report-18aug10-en.pdf> [PDF, 2.42 MB]. Whereas, the GNSO VI working group's report includes a number of proposals to

	address vertical integration for the new gTLD program, but the VI-WG has not reached consensus as to which one to recommend <http://gnso.icann.org/mailing-lists/archives/council/msg09754.html>. Whereas, on 23 September 2010, ICANN's Governmental Advisory Committee submitted its comments on v4 of the Applicant Guidebook, including comments on the issue of registry-registrar separation <http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf> [PDF, 44 KB]. Whereas, the Board has had over six months since Nairobi to consider the issue, including consideration of the GNSO VI working group's deliberations, and community comment including at the ICANN meeting in Brussels in June 2010. Whereas, the current set of agreements are not balanced in that while recent contracts prohibit registries from acquiring registrars, ICANN has never had a rule prohibiting registrars from applying for or operating TLDs. Whereas, while ICANN has individually negotiated contracts that recently have included restrictions on registry ownership of registrars, cross-ownership provisions have varied over time and no formal "policy" on this topic has ever been recommended by the GNSO or adopted by ICANN. Whereas, historical contract prohibitions on registries acquiring registrars do not provide a compelling basis for principled decision-making. Whereas, the Board is committed to making fact-based decisions, and has carefully considered available economic analysis, legal advice and advice from the community. Resolved, (2010.11.05.02), the Board directs the CEO to include the following principles relating to registry-registrar cross-ownership in the forthcoming version of the Applicant Guidebook. 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. 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; These provisions may be enhanced by additional enforcement mechanisms such as the use of self-auditing requirements, and the use of graduated sanctions up to and including contractual termination and punitive damages. 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. ICANN will have the ability to refer issues to relevant competition authorities. ICANN will have the ability to address possible abuses that may arise out of registry-registrar cross-ownership through the consensus policy process.
	12 November 2010: Proposed Final Applicant Guidebook http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf
9 December 2010: Communiqué Cartagena That the GAC will provide the Board at the earliest opportunity with a list or "scorecard" of the issues which the GAC feels are still outstanding and require additional discussion between the Board and the GAC. These include: • Registry – Registrar Separation;	**10 December 2010, Board meeting** New gTLD Remaining Issues http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2 Resolved (2010.12.10.21), the Board: 1. Appreciates the GAC's acceptance of the Board's invitation for an inter-sessional meeting to address the GAC's outstanding concerns with the new gTLD process. The Board anticipates this meeting occurring in February 2011, and looks forward to planning for this meeting in consultation and cooperation with the GAC, and to hearing the GAC's specific views on each remaining issue. 2. Directs staff to make revisions to the guidebook as appropriate based on the comments received during the public comment period on the Proposed Final Applicant Guidebook and comments on the New gTLD Economic Study Phase II Report. 3. Invites the Recommendation 6 Community Working Group to provide final written proposals on the issues identified above by 7 January 2011, and directs staff to provide briefing materials to enable the Board to

	make a decision in relation to the working group's recommendations. 4. Notes the continuing work being done by the Joint Applicant Support Working Group, and reiterates the Board's 28 October 2010 resolutions of thanks and encouragement. 5. Directs staff to synthesize the results of these consultations and comments, and to prepare revisions to the guidebook to enable the Board to make a decision on the launch of the new gTLD program as soon as possible. 6. Commits to provide a thorough and reasoned explanation of ICANN decisions, the rationale thereof and the sources of data and information on which ICANN relied, including providing a rationale regarding the Board's decisions in relation to economic analysis. 7. Thanks the ICANN community for the tremendous patience, dedication, and commitment to resolving these difficult and complex issues.