



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

JUN 16 2011

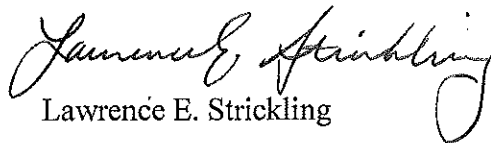
Mr. Peter Dengate-Thrush
Chairman of the Board of Directors
Internet Corporation for Assigned Names and Numbers
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601

Dear Chairman Dengate-Thrush:

Over the last fifteen months, the Board of the Internet Corporation for Assigned Names and Numbers (ICANN) has approved a variety of resolutions that, if implemented, will result in fundamental changes to the domain name system (DNS) marketplace. Given the importance of the Internet as a global medium for economic growth and innovation, the National Telecommunications and Information Administration (NTIA) believes preserving competition in the DNS marketplace is critical, and thus has sought the advice of the U.S. Department of Justice's Antitrust Division on certain issues. We take this opportunity to share the Department's advice on the issue of cross-ownership of registries and registrars for existing and new gTLDs with you, and urge you to take it into account as the ICANN Board considers further action with respect to the new gTLD program. (See attachment).

In addition, in the Affirmation of Commitments, ICANN committed to the global community that it would adequately address a number of items, including competition and consumer protection issues, prior to implementing the new gTLD program. In light of this obligation as well as the concerns raised by the European Commission in its letter to the ICANN Board on June 14, 2011, we recommend the ICANN Board carefully consider the concerns raised by competition authorities before taking action on proposals to make wholesale changes to restrictions on cross-ownership of registries and registrars for existing and new gTLDs.

Sincerely,


Lawrence E. Strickling

cc: Mr. Rod Beckstrom, President and CEO, ICANN



U.S. Department of Justice

Antitrust Division

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Networks and Technology
Enforcement Section
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*Liberty Square Building
450 Fifth Street NW, Suite 7100
Washington, DC 20530*

June 14, 2011

Via Electronic Mail

Lawrence E. Strickling
Assistant Secretary for Communications and Information
National Telecommunications and Information Administration
United States Department of Commerce
Washington, D.C. 20230

Re: Cross-Ownership Issues for Registries and Registrars

Dear Mr. Strickling:

This letter responds to the United States Department of Commerce's ("DOC") request for advice regarding competition issues associated with resolutions by the board of the Internet Corporation for Assigned Names and Numbers ("ICANN") that would allow for cross-ownership of registries and registrars of existing and new generic top level domains ("gTLDs"). The Antitrust Division has reviewed recent resolutions of ICANN's board in addition to reports and studies prepared for ICANN by independent consultants on the question of cross-ownership, or vertical integration, of registries and registrars of gTLDs. Our analysis is also informed by the Antitrust Division's evaluation of ICANN's Draft Application Guidebook and other materials related to the issuance of new gTLDs as well as the Antitrust Division's review of the revised .com registry agreement and assessment of market power possessed by .com and other gTLDs.¹

With respect to new gTLDs, on November 5, 2010, ICANN's board resolved not to "restrict cross-ownership between registries and registrars" and "to permit existing registry operators to transition to the new form of registry agreement."² In allowing the migration of existing registry operators to the new form of registry agreement, ICANN acknowledged that "additional conditions may be necessary and appropriate to address

¹ See Letter from Deborah A. Garza to Merideth A. Baker, dated December 3, 2008, and Letter from Thomas O. Barnett to John M. R. Kneuer, dated October 27, 2006.

² See <http://icann.org/en/minutes/resolutions-05nov10-en.htm>.

particular circumstances of established registries.”³ On April 21, 2011, ICANN’s board further resolved to “[direct] the CEO to develop a process for existing gTLD registry operators to transition to the new form of Registry Agreement or to request amendments to their registry agreements to remove the cross-ownership restrictions.”⁴ In adopting this resolution, the board noted that existing registries “need their current restrictions on cross-ownership to be removed on a timely basis in order to be able to compete with registrars that are planning to operate new gTLDs.”⁵ ICANN’s board cited the resulting “level playing field” as a “positive community impact,” and it identified no “negative community impacts” stemming from the resolution.⁶

The Antitrust Division respectfully submits that the competitive analysis to make the proposed wholesale change for existing gTLDs requires a more thorough examination of the potential consumer harms. This is acknowledged expressly in an independent report commissioned by ICANN:

We find that there can be various, sometimes subtle, economic incentives for a registry to discriminate among registrars in a manner that harms consumers (registrants). Those incentives are especially clear and strong when a registry is operating under a binding price cap. Under those circumstances, vertical separation and equal access requirements are useful tools for limiting the possibility of harmful discrimination.⁷

Though a full analysis of the harms and benefits of cross-ownership is beyond the scope of this letter, cross-ownership raises two competitive concerns that warrant serious scrutiny. First, it is well established that firms subject to price caps or other regulatory restrictions can evade such restrictions by integrating either upstream or downstream. In the present context, for example, a gTLD subject to a price cap could develop or purchase a registrar, grant it an exclusive contract, and exercise its market power by increasing the registrar’s price. Second, cross-ownership may allow a registrar or registry to disadvantage its rivals, foreclosing competition and harming registrants.

Because there are often efficiencies to vertical integration, the Antitrust Division typically requires a showing of market power before it considers whether a vertical arrangement poses serious competitive concerns. In the Division’s view, ICANN should retain its prohibition on vertical integration for existing gTLDs, except in cases where ICANN, in consultation with public and private sector stakeholders and independent analysts, determines the registry does not have, or is unlikely to obtain, market power. In light of the above, the Antitrust Division makes the following recommendations:

³ *Id.*

⁴ See <http://icann.org/en/minutes/resolutions-21apr11-en.htm>.

⁵ *Id.*

⁶ *Id.*

⁷ See “Revisiting Vertical Separation of Registries and Registrars,” by Joe Farrell, John Hayes, Ann McDermott, and Jenny Grunditz, dated October 23, 2008, at 3.

First, ICANN should retain cross ownership restrictions for existing gTLDs that are subject to price caps, unless ICANN determines that the price caps no longer constrain the exercise of market power. Based on past analysis by the Antitrust Division as well as independent reports commissioned by ICANN, we would expect that removing cross-ownership restrictions would lead to substantial price increases for .com,⁸ .net, and .org, and would likely lead to price increases for .info and .biz.⁹ Although .name and .pro are also subject to price caps, the Antitrust Division has never considered whether price caps are useful in constraining the exercise of market power by those two gTLDs. If these two gTLDs are found not to possess market power, it may be appropriate to remove the price caps and restrictions on vertical integration.

Second, for existing sponsored and unsponsored gTLDs that are not subject to price caps, such as .aero, .museum, .mobi and .tel, cross-ownership should presumptively be allowed, unless consultations with public and private sector stakeholders along with independent analysts, lead ICANN to determine that the TLD has market power.

Third, new gTLDs should be permitted to adopt registry agreements that allow for cross ownership subject to a determination by ICANN that the gTLD is unlikely to possess market power. The Antitrust Division anticipates that most new gTLDs are unlikely to possess significant market power, especially new community-based gTLDs that are focused on a limited and defined base of potential registrants. ICANN, however, should require all new gTLDs to take steps to minimize external costs that defensive registrations will impose on owners of domains that reflect brands or trademarks.

Finally, ICANN has made a commitment to "promote competition, consumer trust and consumer choice."¹⁰ In order to honor its commitment to promote competition, ICANN, in consultation with public and private sector stakeholders and independent analysts, should make a market power determination before removing cross-ownership restrictions. We disagree with ICANN's apparent belief that it would be effective and easy to address market power issues through contract restrictions. As we discuss above, and as ICANN's studies have acknowledged, allowing vertical integration will facilitate the evasion of such restrictions. In our view, the current structural rule that prohibits vertical integration provides a more effective and easier way to prevent competitive abuse. Moreover, ICANN's apparent belief that competition agencies can effectively address any competitive harm created by ICANN's decision to allow vertical integration is misguided. The Antitrust Division questions the effectiveness of this approach as it is not clear that a registry or registrar that operates within the scope of its delegated authority, even if it is able to exercise market power, would pose an enforcement issue

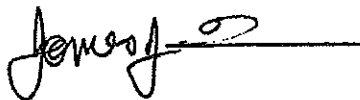
⁸ Pursuant to Amendment 30 of the Cooperative Agreement between the Department of Commerce and VeriSign, VeriSign cannot agree to remove the cross-ownership restriction in the .com agreement without the Department of Commerce's approval.

⁹ See "An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names," by Michael L. Katz, Gregory L. Rosston, and Theresa Sullivan, dated June 2010, and "Economic Considerations in the Expansion of Generic top-Level Domain Names, Phase II Report: Case Studies," Michael L. Katz, Gregory L. Rosston and Theresa Sullivan, dated December 2010.

¹⁰ See "Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers," dated September 30, 2009.

under applicable competition laws, at least in the United States. ICANN, therefore, should address competition issues before removing cross-ownership restrictions.

Sincerely,

A handwritten signature in black ink, appearing to read "James J. Tierney", followed by a long horizontal line extending to the right.

James J. Tierney
Chief
Networks & Technology Enforcement
Section