

Analysis of Public Comment Regarding the Proposed .COM Agreement

Introduction

The analysis below is intended to bring into focus the key issues associated with the proposed settlement of the long-standing dispute between ICANN and VeriSign. This document is intended as a complement to Summary of Comments on the Proposed VeriSign Settlement (published coincidentally with this document). The description below conveys where there is essentially community consensus on a particular issue. The analysis offers contrasting viewpoints indicated in the various constituency positions and seeks to indicate the opinion of particular constituencies.

This document is not intended to determine the correctness or accuracy of comments supporting or criticising the proposed agreement. It does indicate areas for ICANN to undertake additional inquiry in certain circumstances.

Effects of the Settlement on ICANN's Security and Stability Mission

Community consultations identified three broad areas where the outcome of the proposed settlement is related to ICANN's mission of ensuring the ongoing security and stability of the Domain Name System (DNS).

Ending the Litigation

First, there appears to be broad recognition that an end to litigation will provide increased stability to the ICANN environment and enhance ICANN's ability to provide services to its stakeholders. The distraction in management attention and the drain on resources resulting from the litigation will be lifted. A theme emerged that the resources now available to ICANN could be utilized to improve contractual compliance efforts and other important purposes as determined by the community. There was also general agreement that the requirement for arbitration would serve to avoid future litigation and its associated costs.

There were opposing comments to the effect that the settlement had no effect on security and stability aspects. It was also suggested that a cost-benefit analysis be performed to determine if funding continued litigation would be more effective than the terms of this settlement.

The Root-Server Transition Agreement

The root server management transition (i.e., the transition of root-server editing from VeriSign to ICANN) was seen as a positive step. Given the change in responsibility outlined in that part of the agreement, one observer called for independent oversight of the process. It was also noted that the transition agreement does not reference the fact that ICANN administers the .ARPA TLD in cooperation with the IAB. ICANN indicated in a public forum that it does not intend to alter the IAB role. Clarification of the text of the agreement to reference the continuing role of the IAB may be warranted.

Consideration of New Registry Services

There was acknowledgement of the benefits of "the "funnel" (the manner in which new registry services are considered) under the proposed agreement. These benefits include meeting the need for predictability, transparency and timeliness and the incorporation of international arbitration. After this acknowledgement, two areas of concern were raised. The first has to do with ICANN's role as the party that weighs the interests of all parties in the community prior to "approving" a new registry service. The "funnel" provides that ICANN will no longer "arbitrate" competition issues but instead passes consideration of those new services on that may affect competition on to an appropriate competition agency, e.g., a U.S. Governmental agency or the European Commission. There was support for and against this idea with some comments that the model specified in older registry agreements was more in line with ICANN's charter.

The second concern has to do with the "funnel's" effect upon the bottom-up policy development process because:

There are differences between the "funnel" as specified in the .COM proposed agreement (the product of a bi-lateral negotiation) and the process for consideration of registry services developed through ICANN's bottom-up, policy development process (PDP). In order to quantify that debate, ICANN has developed an analysis of the differences between the two versions of the process. That analysis is found below in the Appendix to this document.

The .COM proposed agreement "freezes" the proposed process from effects of future PDPs for a period of three years, temporarily removing what should be a policy consideration from the oversight of ICANN's policy-making body and affecting the integrity of the process going forward.

Registry Price

There was considerable discussion to the proposed settlement's provisions on increases in the price of .COM domain names. Several different points were made regarding the amount of increase allowed by the agreement, the net effect of those increases, and how allowable increases specified in the contract should be determined. In several Vancouver constituency discussions and the public forum, the process of arriving at the 7% annual price ceiling increase was described.

Comments regarding the amount of the price increase ranged among: the price per name should be going down based upon the .NET bidding and price reductions by other registries; the price should remain the same; and some price increase may be allowed if justified. The final comments stated that the terms of the proposed contract combine to provide a 7% increase, essentially in perpetuity and that price terms should be renegotiated at the end of the term. Otherwise, the registry would be granted the ability of unlimited price increases in the long-term without suffering from the effects competition would bring.

According to commentary, there are essentially two groups that may be affected by the price change: registrants and upstream providers (i.e., ICANN accredited registrars, their resellers, and ISPs). Regarding registrants, there was some expression that there might be some negative effects due to the potential price increases, but, the majority across constituencies expressed that the increase in cost was negligible when compared to the value of a domain name registration.

Registrars, in particular, described negative aspects associated with price increases to the sellers of domain name names. Some registrars stated that the increased cost could be passed through to registrants. However, the consensus statement of registrars described negative effects of price increases, and that the potential price increases would come out of the registrar and resellers margins that already are tight due to competition. This effect is heightened in the cases of registrars that sell wholesale to ISPs, hosting companies or resellers. This price issue is the most important aspect of the settlement for many registrars and it has been adopted by the registrar constituency as such.

Finally with regard to price and how increases could be justified, there two sets of comments. The first recommends that price increase should be cost justified. It was suggested this can be accomplished either by VeriSign revealing cost information or, alternatively, describe areas of cost increase.

The second recommendation calls for the designation of many new TLDs that would bring the necessary aspects of competition to the domain space that would work to render irrelevant the ability of registries to increase prices.

ICANN Funding

There was acknowledgement of ICANN's need for stable, adequate funding. Several constituencies voiced support for a strong ICANN. In conjunction with the increased funding, ICANN responded positively to requests for greater transparency and accountability in the planning and budgeted process.

Since the fees specified in the proposed agreement are “ICANN fees,” the agreement also provides that the fees will be passed down along with the per domain name price charged to registrars by VeriSign. Depending upon views as to whether these fees can be passed on to registrants, there were two views on the effects of introducing a registry-level transaction fee in .COM.

As with the per name price issue, there was discussion of the effect of the fees on registrants. Again, the majority seemed to agree that, if the ICANN fee were passed onto the registrant, the increase in cost was negligible when compared to the value of a domain name registration. However, there is the additional point that while the impact on each registration was minimal, the amount of cash taken out of the registration market pool over the life of the contract is considerable.

Also as with the per name price issue, gTLD registrars in particular, described negative aspects associated with price increases to the sellers of domain name names. Some registrars stated that the ICANN fees could be passed through to registrants. However, the consensus statement of registrars described negative effects as the same with price increases, and that the effective price increases would come out of the registrar and resellers margins that already are tight due to competition. This effect is heightened in the cases of registrars that sell wholesale to ISPs, hosting companies or resellers. This issue is also an important aspect of the settlement for many registrars.

A comparison was made to the .NET agreement as a model for ICANN funding because, even though ICANN increased its fees in that agreement and the fees are "passed through", the price to registrars went down and the entire community (including registrants) benefited. (Others noted that registrants did not benefit from the price reduction in .NET.)

Concern was expressed that the proposed settlement would replace the present gTLD registrar fee approval mechanism. It was proposed by some registrars that arising out of the proposed settlement that there should be continued discussions regarding alternate funding sources for ICANN and the method by which registrars indicate their approval of gTLD registrar fees.

Registry Agreement Renewal Terms

Comments focused on the proposed settlement's presumptive renewal terms, and the conditions precedent to termination of the agreement. It was stated in public fora that the presumptive renewal terms in the proposed agreement had reduced ICANN's ability to designate a different registry operator if conditions warranted.

Despite the callout in the existing agreement for the continuation of presumptive renewal there were comments that the presumptive renewal: be stricken entirely; be compliance-based and procedural in nature; include guarantees of price reductions based on an industry index or community review; be accompanied by guaranteed investment levels, improvements and/or other assurances that continued control of the .COM space by VeriSign is in the continued best interest of the Internet community; termination provisions should be strengthened.

There were opposing views of the effects of presumptive renewal provision. The presumptive renewal provisions were sighted as anti-competitive, damaging to innovation and accountability, and counter to ICANN's core principles. On the other hand, presumptive renewal encourages a long-term strategic planning horizon and investment by the registry operator, thereby enhancing network stability and security. The consensus registry constituency position (and of some other constituencies) holds that the offer of presumptive renewal should be extended "to similarly situated registry operators on an equitable and non-discriminatory basis," for those reasons.

An opinion was expressed that the current agreement requires that the proposed agreement requires a six-month review period of a "renewal proposal" made by VeriSign and the terms of the renewal must be in "substantial conformity with the terms of registry agreements between ICANN and operators of other open TLDs."

Registry Responsibilities

Questions were raised to the proposed settlement's provisions regarding the use of traffic data. Most who raised this issue expressed concern about allowing commercial use of domain name traffic data ("a commercial asset") for almost any purpose. This "entitlement" could raise concerns about competition and who should have access to the data. Noting the proposed settlement might permit data mining that may be illegal in countries with data privacy laws, many called on ICANN to provide appropriate protections for the community's data.

Suggestions include deletion or the restriction of traffic data use. ICANN also received recommendations to extend the proposed settlement's traffic data terms to other registry competitors to ensure equitable treatment among registries. It also was suggested that the issue of ownership rights relating to traffic data should be a policy related consideration.

The deletion of VeriSign's obligation to invest at least \$200 million in research, development and infrastructure improvements (a "substantial proportion" of this prior to November 2007) resulted in comments that called for a description of spending to date or make a similar commitment in the proposed settlement to invest in improvements of the .COM registry.

Also, the deletion of the WhoIs requirement as described in Appendix W of the existing agreement led to speculation as to whether and VeriSign's commitment to the design and development of "a Universal WHOIS Service that will allow public access and effective use of WHOIS across all Registries and all TLDs," still existed.

Finally, ICANN also was asked to include typical "SLA" requirements on, for example, query response times. This sort of performance measurement is lacking in the proposed settlement.

APPENDIX

CONSIDERATION OF PROPOSED REGISTRY SERVICES

This comparison was made by highlighting differences in language between the "funnel" in the proposed .COM agreement and the ICANN Board approved policy for Consideration of New Registry Services developed by the GNSO. The analysis identifies six differences between the provisions for considering proposed new registry services in the .COM agreement and the GNSO Policy Development Process (PDP) product.

1. Confidentiality

Step 4 of section 5.1 of the PDP permits the designation of any information as confidential and allows ICANN to disclose such information to experts only if it "provide[s] notice to Registry Operator (or sponsoring organization) of the identity of the expert(s) and the information it intends to convey." Section 3.2(d)(iv) of the .COM agreement dictates that "[f]ollowing written notification by Registry Operator to ICANN that Registry Operator may make a change in a Registry Service . . . Registry Operator will not designate 'CONFIDENTIAL' information necessary to describe the purpose of the proposed Registry Service and the effect on users of the DNS."

On its face, the .COM agreement provides for more openness. The .COM agreement environment addresses the need for confidentiality by allowing the registry to confidentially share aspects of the proposed service with ICANN prior to the formal submission of the proposed service.

2. Reconsideration

Section 5.2 of the PDP explains that reconsideration of an ICANN decision is available pursuant to Article IV, Section 2 of the ICANN bylaws. The PDP does not say to what end the process could be used or if services could be undone.

The .COM agreement is silent on reconsideration.

3. Requirement of Process

In Step 2 of the PDP's approval process, the registry operator determines whether a change to the registry should be put through the ICANN consideration process.

Section 3.1(d) of the .COM agreement provides a definition of "registry services" and requires that all new registry services go through the ICANN consideration process.

4. Security and Stability Review During the Preliminary Determination Process

Both the .COM agreement and the PDP create a fifteen calendar day "preliminary determination period" during which ICANN may seek expert advice from entities or persons (subject to confidentiality agreements) on the security or stability implications of the registry service in order to make a preliminary determination as to the proposed registry services. Step 4 of the PDP also permits ICANN to "draw an expert from the Standing Panel of Experts described in Step 6 [of the PDP]" in reviewing security and stability implications of the proposed registry service.

Section 3.1(d)(iv)(C) of the .COM agreement permits ICANN to seek expert advice during the preliminary determination period, but it does not incorporate a panel of experts.

5. Competition Review During the Preliminary Determination Process

Step 5 of the PDP directs ICANN to "consider whether the [registry services] change would lesson [sic] competition amongst registrars providing services to registrants, or lesson [sic] the fair competition amongst registrants for specific domain names" when determining whether a change should prompt referral to a governmental competition authority or authorities with jurisdiction over the matter.

Section 3.1(d)(iv)(E) of the .COM agreement requires ICANN to refer a matter to the appropriate governmental competition authority or authorities with jurisdiction over the matter if the service "might raise significant competition issues."

6. Scope

Step 2 of the PDP explains that the consideration process would apply to changes to services. Section 3.1(d)(iv) makes clear that its consideration process applies to "Proposed Registry Services."

Conclusion

It should be noted that the PDP version is an approved, but not yet implemented policy. After a policy is approved by the ICANN Board, the ICANN staff is charged with implementing that policy. In the implementation version, some change may be expected in the wording of the policy where vagueness or contradiction may exist. Therefore, as the policy is implemented, some or all of the differences indicated above may be resolved.