

BC position on competition, consumer trust and consumer choice v2

Background

ICANN and the US National Telecommunications and Information Administration (NTIA) signed an Affirmation of Commitments (AOC) on 30 September 2009.

<http://www.icann.org/en/documents/affirmation-of-commitments-30sep09-en.pdf>

Article 3.c of the AOC was a commitment to “promote competition, consumer trust, and consumer choice in the DNS marketplace”. Article 9.3 expanded on this and committed ICANN:

- to “adequately address” “competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection” “prior to implementation”; and
- after the first year to “examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice”.

However, the AOC did not define the terms or measures of “competition, consumer trust and consumer choice”. Consequently the ICANN Board resolved in December 2010 to “request advice from the ALAC, GAC, GNSO and ccNSO on establishing the definition, measures, and three year targets for those measures, for competition, consumer trust and consumer choice in the context of the domain name system.”

This is the BC’s advice on that request.

1. Definitions

In the context of the domain name system the BC proposes the following.

Competition.

Competition law (known as anti-trust in the US) is most usefully defined by its objective rather than its inherent meaning. In the context of domain names the first two of three general principles of competition law are the most useful.

- “prohibiting agreements or practices that restrict free trade and competition,
- banning abusive behaviour by a firm dominating a market, or anti-competitive practices that tend to lead to such a dominant position”.

The issue of “dominating a market” leads to a need to define “relevant market”. The European Union provides useful guidance¹:

“The relevant market combines the product market and the geographic market, defined as follows:

- a relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products’ characteristics, their prices and their intended use;
- a relevant geographic market comprises the area in which the firms concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous”.

In the context of TLDs the geographic market may be the world, or a subset of the world. The subset may be determined by the positioning of the TLD as to geography or culture.

¹ http://europa.eu/legislation_summaries/competition/firms/l26073_en.htm

Proposed definition for Competition in the context of the DNS and new gTLDs:
Competition is the availability of multiple suitable TLDs and multiple Registrars where registrants may seek their desired domain name at reasonable prices and terms.

Consumer

Before defining consumer trust and consumer choice it is useful to define consumer. In the context of the domain name system the BC proposes a broad definition of "consumer" as an Internet user.

(This definition is consistent with the AOC concepts of "public interest" and differs from a narrower definition such as a registrant).

Consumer trust

Creating trust is an important determinant of consumer awareness and behaviour. Consumer trust in the context of the domain name system can be defined as those measures that are crucial to consumers in determining whether to trust or distrust the domain name system.

Proposed definition for Consumer Trust in the context of the DNS and new gTLDs:
Consumer Trust is the perceived integrity of domain name registrations such that Internet users have confidence that a domain name is held to the advertised purpose and standards of the TLD operator, ICANN and relevant law.

Consumer choice

Consumer choice, in the context of competition law, is not an objective or policy: it is merely a positive consequence of rivalry between competitors. (A UK study is note worthy²).

The two fundamental determinants of consumer choice are:

- the availability of competing differentiated offers, and
- the freedom to exercise a choice.

Key to exercise of choice is the concept of value defined as the balance between quality and price. Choice can only function when information on both quality and price are available to the consumer.

Proposed definition for Consumer Choice in the context of the DNS and new gTLDs:

Consumer Choice is the availability of TLDs that offer competing propositions as the purpose and integrity of their domain name registrants.

2. Measures

2.1 Measures of competition

a	Value added	A TLD must create value-added competition. Does the new TLD add value to the domain name system? Does the TLD add differentiation and make the domain name system more useful and more accessible to broader communities of interest and to more end users?
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² <http://www.esds.ac.uk/qualidata/support/q5049.asp>

b	Barriers	<p>Barriers to enter the TLD market should be eliminated</p> <p>Are there regulatory barriers to entry to the market for registry services? Is there a level-playing field for market access leading to a plural supply base?</p>
c	Dominance	<p>There should be no exercise of dominance by registries</p> <p>Is market power being used to exert tactics that preserve or extend monopoly positions? Is there any market-distorting supplier dominance which prevents registrants having a fair share of any benefit? What has the expansion of TLDs done for the pricing of registrations?</p>

2.2 Measures of consumer trust

d	Certainty	<p>A TLD must give the user confidence that it stands for what it purports to stand for</p> <p>Does the new TLD assist the Internet end-user to determine the relationship between the name and its stated purpose?</p>
e	Good faith relating to users	<p>A TLD must avoid increasing opportunities for bad faith actions to deceive or defraud users.</p> <p>Does the new TLD confuse net users by being typographically similar to, variants of, or derived words from, existing TLDs? Is there any confusion with popular marketing terminology or brand names ? What protections were made available to registrants? What type of dispute resolution mechanisms are provided for the protection of registrants in the event of a dispute between the registrant and the registry or the registrant and the registrar? Are consumers protected from malicious registries and/or from malicious domain names or domain name use? Does the registry provide sufficient protections against domain name hijacking? Does the registry respond in a timely manner to TLD requests from government agencies conducting investigations?</p>
	Good faith relating to registrants	<p>A TLD must not exert pressure for defensive registrations on registrants holding domain names in other TLDs</p>
f	Fraud relating to third parties	<p>A TLD must not increase opportunities for fraud such as cyber-squatting, ID theft and other deceptive practices</p>

		<p>Does the new TLD make fraud less or more likely? Has the registry a robust anti-fraud system in place to prevent fraudsters registering? Does the registry exercise rapid take down of fraudulent web sites? Does the registry maintain an accurate and accessible WHOIS service? Is the vetting procedure stringent for all new gTLD applicants to ensure that registries are not operated by criminal entities working efficiently? What were the average costs of engaging in challenge procedures? How many disputes occurred during Sunrise periods? What was the average time for the resolution of a dispute? What were the total costs? Did the brand owner have to resort to litigation?</p>
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2.3 Measures of consumer choice

g	Differentiation	<p>A TLD must be clearly differentiated from other TLDs</p> <p>Is the new TLD differentiated in a meaningful way from existing TLDs? Are the majority of new registrations creating new opportunities for the registrant? What is the scale of defensive registrations?</p>
h	Freedom	<p>New TLDs should offer the consumer a genuine choice between value propositions</p> <p>Is the consumer free to choose between all new TLDs or are there constraints? Is there evidence that the registry is keeping certain names for itself (warehousing) ?</p>
i	Information	<p>Choice is only meaningful when information is communicated effectively</p> <p>Do new TLDs make sufficient efforts to inform consumers so that they can exercise choice?</p>