Vertical Integration PDP Working Group
Call with Economists Steven Salop and Joshua Wright
TRANSCRIPTION
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Coordinator: Excuse me, this is the operator. I just need to inform all participants that today's conference call is being recorded. If you have any objections, you may disconnect at this time, and you may begin.

Mikey O'Connor: Thanks, (Lori), thanks, Gisella. This is Mikey O'Connor. Welcome to all. This is a conversation with Steven Salop and Joshua Wright, both of Charles River and Associates and both professors.

Steven is a professor at Georgetown University and Joshua is an assistant professor at George Mason University. We're going to spend the next hour in a conversation with these two folks.

The structure of today's call is that they're going to spend the first five to 10, maybe even 15 minutes with a short presentation where they're going to share their thoughts with us and then the remainder of the call will be for question-and-answer.

And so several thoughts. One, if you're not speaking, please mute. Second, let's let Steven and Joshua get through the presentation before we ask questions.

We'll do a roll call after they've finished their presentation because by then everybody who's going to be on the call will have joined and with that, Steven, Joshua, you have the floor and many thanks for joining us today.

Joshua Wright: Thanks, this is Josh. I think I'm going to lead off on the presentation, and what we wanted to do was make it relatively short so we can into the Q&A, but go over some of the economic background that we've talked about previously and then into the specifics of sort of the issues about general approaches and specific proposals that we've made as well.

Of the basic economics, as we discussed when we were in Sydney and in subsequent presentations, they key sort of fundamental economics of vertical integration is that this is a complex economic issue to figure out the competitive effects.

Vertical competition can create competitive benefit. It can do what economists refer to as solving a double marginalization problem, create an incentive for the vertically-integrated entity to charge a lower price.

It's sort of a key well-known competitive benefit of vertical integration. It can facilitate new entry, in this case by registries or create incentives for the provisions of specialized services and so vertical integration can under a number of conditions create competitive benefits for consumers.

Of course it's also true and the core of the debate here that vertical integration can also lead to competitive harms and have the opposite effects. Vertical integration can lead to higher prices, lower quality, slower innovation and there are a variety of mechanisms by which those effects can occur, one being exclusion where a vertically-integrated entity excludes rivals from access to an input so this can happen either at the registry or registrar level.

We've talked some previously about a second way that we get harm which is using vertical integration to evade price caps which is obviously only the case in those TLDs where that's an issue.

And there's a third concern that we've discussed previously to do with the misuse of sensitive competitive information. A vertically-integrated entity might have access and be able to use competitively-sensitive information that a non-integrated firm might not have access to.

And so the complexity in figuring out on net the competitive effects of any particularly vertically-integrated arrangement can be highly complicated because you've got multiple effects, the potential for both effects to be occurring at the same time, and a further complication that much of what can be achieved through cross-ownership or integration - through ownership integration - can also be done by contract, both with respect to the competitive benefits.

For example, one can get some of the inducements to provide such life services and promotional efficiencies we might think about in the context of vertical integration through contracts that give preferential treatment to particular for example registrars, right?

We can do much of what we can do on the pro-competitive side and then the anti-competitive side can be achieved not only through vertical integration but also what we call on this call vertical integration by contract.

And that just leads to something that Steve and I have emphasized before in talking about this issue that it is difficult to craft a one-size-fits-all rule to deal with the complexity of the economic analysis.

Now there are three general sort of high-level ways to approach thinking about dealing with a (unintelligible) situation, right? One is sort of a strict ban. In antitrust terminology, we would call this making vertical integration per se illegal.

Steven Salop: We're moving onto - we're on Slide 3 I guess now.

Joshua Wright: Oh, I'm sorry. We're onto Slide 3. Thanks, Steve and so we could have a straight prohibition of vertical integration. The shortcoming of that approach of course being that in the instances in which vertical integration leads to competitive benefits, we're going to lose the potential to reap those benefits for consumers that derive from vertical integration.

The other downside of the ban is that it's not clear that it'll be effective. A straight prohibition of vertical integration for example is going to be ineffective with respect to prohibiting the same types of harms through contract rather than integration.

The opposite approach on the other side of the spectrum would be to allow vertical integration and cross-ownership sort of in all circumstances. In antitrust parlance in the competition policy world, this would be an approach of per se legality, right?

And of course the downside there is there are of course some competitive risks with vertical integration and integration by contract and a per se legality rule would be accepting the risk of allowing those competitive harms to go unchallenged.

A third potential approach is rather than some bright-line rule that is inevitably going to lead to at least some errors on both sides is in general a case-by-case approach.

Now the difficulty there kind of leading on from the last slide is that figuring out the competitive effects of any given arrangement is a complicated endeavor. And so the shortcoming of the case-by-case approach is that first step is that there's got to be some sort of agreement over what the methodology is going to be to determine - to separate out - instances of vertical integration that might lead to competitive problems from the rest of them, figure out what sort of evidence is required to carry that analysis, and further to figure out who should do the analysis, which institution should conduct it and carry it out.

Of these three approaches given the shortcomings of bright-line rules for what is an inherently complex problem and the potential of losing the competitive benefits of vertical integration with the ban, we recommend the case-by-case approach.

And we also recommend that that approach be carried out through some sort of referral mechanism to a government competition agency which has the expertise and infrastructure and experience carrying out exactly this sort of analysis and similar circumstances across a lot of different types of industries, right. And they've got economists who work on these problems and data and methods to figure out the answers to these sorts of problems.

I'm going to move to Slide 4. So moving from the general bright-line versus a case-by-case approach and the appropriate institution to carry out the analysis to sort of more specifics, what Steve and I had proposed in our short memo was three basic but more specific approaches.

Option 1 being a per se ban -, blanket prohibition - upon a showing that the share of the registry or registrar applying to vertically integrate exceeds some threshold level.

This comes from sort of the fundamental underlying economic insight that to generate the competitive harms from vertical integration, we’re generally only worried about those harms in the instances where one of the firms in the vertical chain has market power.

This approach would be to set some sort of market share threshold above which there’s no case-by-case analysis, there’s just a per se ban once a showing’s been made that either the registry or registrar are above that threshold.

Option 2, what we call notification and potential stay still requires a relevant market share threshold, something to trigger at least the potential for one of the firms having market power. But the result if the share is above the threshold is not to trigger a ban but rather - then ICANN to refer the applications to acquire a significant ownership interest to the appropriate government competition agency.

We’ve discussed in the paper some timing requirements so that the application would be put on hold for 45 days with an additional 120 days if the agency notifies that the acquisition might violate its competition laws. And the Option 3 is a slightly modified version of Option 2 which is above the threshold level, the 120-day period after agency notification, right?

Between those options - I’m moving to Slide 5 there - between those options we did not recommend Option 1 again, sort of similar reasons to rejecting the blanket prohibition more broadly, you know, there’s a much greater risk with losing the competitive benefits of vertical integration.

The fact that a market share of one of the parties in the chain of distributions above the threshold is a necessary but not sufficient condition for competitive harms, and so there is still an Option 1 risk of losing competitive benefits of vertical integration and also Option 1 eschews a fact-intensive expert analysis in favor of sort of a more imperfect and error-prone analysis that's based on market share alone.

Instead we prefer both Option 2 and 3 to Option 1 which would include referral to an expert competition authority to conduct this sort of analysis to avoid the errors that are inevitable with the bright-line rule.

And we talked some in the proposal about what we think are reasonable ranges from the competition policy world and the world of antitrust economics for both the ownership threshold which would trigger the mechanism under either Options 2 or 3 and we mentioned 20 to 25% there.

And then also importantly both of these options would require some market share threshold to be set. In our proposal, we discussed that the lower end is the share that's sort of commonly used in the U.S. and the upper end - in the EU - and the upper end is sort of more commonly used in the U.S. but both sort of well within the range of reasonable estimates.

So that is a short summary of what's in the memo and we wanted to sort of get that out first before we did any of the Q&A but we're happy to talk about what we've done and answer some questions.

Mikey O'Connor: Many thanks, Josh. I think at this point Gisella or Glen, let's do a quick roll call so that we've got an indication of who's on the call and then we'll open up the queue to questions and take it from there.

Gisella Gruber-White: With pleasure, Mikey. It's Gisella. I'll do a roll call. On today's call we have Mike O'Connor, Jeff Eckhaus, Avri Doria, Berry Cobb, Eric Brunner-Williams, (Rob Carter), Baudoin Schombe, Roberto Gaetano, Brian Cute, Jon

Nevett, Kristina Rosette, Ken Stubbs, Michael Palage, Jeff Neuman, Alan Greenberg, Keith Drazek, Richard Tindal, Thomas Barrett, Jean Christophe Vignes, Milton Mueller, Shiva Muthusamy, Cheryl Langdon-Orr, Sébastien Bachollet, Jothan Frakes, Kathy Kleiman.

From staff we have Margie Milam, Amy Stathos, Glen DeSaintgery, Kurt Pritz, Mike Zupke, David Olive, Dan Halloran and myself, Gisella Gruber-White. If I could please remind everyone to state their names when speaking for transcript purposes. Thank you. Back to you, Mikey.

Mikey O'Connor: Thanks, Gisella. I'm going to just go right to the queue so the one thought that I've got is to try and avoid - try and frame your comments in the form that they're questions that people can answer rather than sort of mini-documentaries.

Somebody was speaking? Did somebody want to jump in?

Kathy Kleiman: This is Kathy Kleiman and I'm not on the Adobe so I'd like to join the queue as well.

Mikey O'Connor: Okay, I'll put you in after Palage. Milton, go ahead.

Milton Mueller: Okay, hello, this Milton Mueller at Syracuse University, and the question I had about your policy is that it doesn't seem to distinguish between new TLDs and new entrants and established TLDs. And I'm sure you're familiar with the huge switching costs that are involved in moving from one (unintelligible) and you're probably also familiar with the known disadvantages new TLDs have had in establishing mindshare much less getting (unintelligible) into them.

So I'm asking you, why should there not be a per se presumption of legality as you so nicely put it for cross-ownership in new entrant top-level domains? I mean, just make it an easy clear example.

Suppose there's an entirely new registry proposing an entirely new top-level domain. The operator has therefore zero market share and it proposes to create a new registrar that it owns 100% and also has zero percent market share and it wants to sell its own top-level domain.

What is the consumer harm that can result from such a situation?

Steven Salop: You're saying someone is not an existing registrar or an existing registry?

Milton Mueller: Right, and has - or even if they are an existing registrar - but they have 2% market share and they're a completely new registry and a new TLD?

Steven Salop: Okay, well aside from the whole issue of what the word "per se" means, that would under Option 2 or Option 3 they would not have a problem, if I'm understanding this correctly.

Milton Mueller: Right. What I'm trying to do is basically can we separate the tracks for a new and incumbent (unintelligible) by the entry process for these new entrants?

Steven Salop: Well, but you have to define new. I mean, I just, you're just trying to - it sounds like what you're trying to do is get Option 2 but in some kind of way without saying it's Option 2.

Milton Mueller: All right, so...

((Crosstalk))

Steven Salop: From my point of view, this just seems to be words.

Milton Mueller: Okay, let me explain why it's not words because your Option 2 requires a competition authority and you're probably used to dealing with a national context in which there's a very clear entity descended to with very clear jurisdictional authority. Here we just do...

((Crosstalk))

Steven Salop: I don't - let me - look at Slide 5. I'm sorry, look at Slide 4. It says if the share exceeds the relevant market share threshold, then ICANN will refer applications. In your hypothetical, there is a zero market share.

Milton Mueller: Okay, so you think that ICANN should have kind of a presumption that if they're below a certain market share?

Steven Salop: Is that how you interpret option - that's - I was interpreting Option 2 in the way I just said it. Now I'm not sure what - you and I can both look at the screen and read this - and it seems to me from what you're saying if I'm understanding you correctly that that's Option 2 with a zero market share but if you've something else in mind then maybe I don't agree, I don't know.

Milton Mueller: Okay, I think we are misinterpreting each other here because I'm not so much talking about policy options. I'm asking you about the consumer harms and I simply want you to say given that situation, it's under the market share threshold, can you perceive of any consumer harms that would occur in those situations because this is the debate where they're having in this working group.

We're trying to decide whether there are any conceivable consumer harms that could occur in that situation.

Steven Salop: You know, I conceive of consumer harms for living but as you've described it, it would seem to fit within, you know, there's all the sort of protection things that you guys have talked about but in terms of what we're working on here, no, it seems okay, but maybe I'm missing the point. Josh?

Joshua Wright: From what I hear, I mean, if the question is whether four shares under the threshold there's likely to be harms, no. I mean, the design is to because the design of the threshold is to try to separate out situations where there's more likely to be harms and then less likely to be harms. You know, I'm not going to get put on the hook to say that there's no such thing as consumer harm below a particular threshold.

The idea is that I mean we do know that the market power at one level is required to get consumer harms, and most situations that sort of I've seen discussed in this context. And so that's how I interpret those options as well, right, is to have a presumption that below those harms, below those thresholds there's not likely to be a competitive problem and that's how I read those options as well.

((Crosstalk))

Mikey O'Connor: Okay, folks. Thanks, Milton. Next in the queue is Jeff Neuman from (Newstar). Go ahead.

Jeff Neuman: Yes, thanks. Hey, Josh and Steve. How's it going? I think, you know, have you guys - I have a follow-up - but have you guys undertaken a study as to what is the relevant market?

Steven Salop: What do you mean by that?

Jeff Neuman: Well, I mean, one could - there are some that argue that the market is the market for all GTLDs and that would be the market and that's how you determine the market share.

Some could argue that it's the market of all domain names, gTLD and ccTLD, and other which I think is actually due to the switching costs that Milton talked about. And if they're the study of the elasticity of demand, in reality in some case the market could be within the TLD itself so each TLD could be its own market and so...

Steven Salop: That doesn't make a lot of sense to me but no, we've not undertaken a formal study. We certainly are cognizant of the fact that with all the entry that's occurred in the past years, their assigned share has stayed pretty constant.

Now with respect to ccTLDs versus GTLDs, we've not undertaken a formal study of whether or to the extent they compete with one another. Certainly what we've heard from people tends to suggest that a lot of the gTLDs compete more intensely with one another with (calm) at that in particular than they do with ccTLDs but we've not undertaken a formal study, no, definitely not.

Jeff Neuman: And so I mean you kind of just dismissed the whole argument of each TLD being its own market and I'm just, you know, I think it was given a little short shrift. But I do believe for existing registrants, if that weren't the case then conceivably there'd be no harm to consumers if a registry were to charge a very low price to get people in and then all of a sudden jacked up the price of domain name registrations.

Steven Salop: Yeah, Jeff, I guess I misunderstood you. I thought you were talking about new TLDs and competition for new registrants. Yes, registrants who have build up capital within a particular TLD, they are subject to lock-in and their existing TLD and principal could raise the price to them. Of course it could have been future registrants but they may not care.

((Crosstalk))

Steven Salop: It was just your use of the term market definition rather than market power or power over price or something like that.

Jeff Neuman: Well, I mean, I think it relates in the sense that you could say that while there's no issues with a - and I have to add to Milton's kind of - Milton, you have to - when who is the registry, you've got to talk about affiliations and stuff about with market share. But once you become - if you are a vertically-integrated and competing for new registrants, there may not be a competitive harm.

But once you have them as registrants, now their vertical integration within that TLD presents a number of potential harms.

Steven Salop: Well, I would have used the word lock-in but yeah, sure. I think for example if the price caps were moved from VeriSign, it would seem to have the power to substantially raise the price to existing registrants.

Mikey O'Connor: Jeffrey, this is Mikey. I got to start drawing a line under folks or we're not going to get through the queue. Have you got another question or what that your primary question?

Jeff Neuman: I'll go to the back of the queue.

Mikey O'Connor: Thanks, man. Alan, you're next, and I guess a note to all remaining folks in the queue. I think we're going to have to kind of ease off a little bit on the back-and-forth, maybe only one or two instead of four of five, so go ahead, Alan.

Alan Greenberg: Yeah, I was going in a direction very similar to Jeff's and originally I was going to ask how do you define market share for a TLD and especially a new TLD? If you look at the - and new TLDs are what we're talking about primarily right now, not the existing ones - if you look at what has happened in especially developing countries but even in developed countries with the ccTLDs, five-six years ago dot-com was the standard.

Nowadays the ccTLD is and the ccTLD has become the de facto monopoly within that country because that is the domain that you need if you want to be viewed as a participant in that country. And I think we're going to see with new TLDs especially IDN ones in national languages is the concept of market share across TLDs just does not exist.

Each one may well be considered effectively a unique product, not a commodity and I wonder how one applies your logic and processes where market share is not competitive across all TLDs but is unique one-for-one.

Steven Salop: Well, are these rules going to apply? I mean, are these rules going to apply to ccTLDs?

Alan Greenberg: No, they're not, but ccTLDs are an example of a TLD which exists and de facto people use it in virtually 100% of the cases. And when we're talking about national language ones - ones in Arabic or Chinese - we're going to find very similar effects, that they're going to become the one of choice if you want to reach the billion people in your country.

And ultimately there may be many of them but initially there are going to be very, very few of them.

Steven Salop: Yeah, well sure, if you were strict entry, then a new TLD in a unique niche could have market power. I'm a lot more comfortable talking about this in (herza) market power rather than market definition by the net. That's what we anti-trust for, too.

Alan Greenberg: That's fine.

Steven Salop: So yeah, I mean, it could have market power. Now what's not clear is whether that would imply that you're concerned about vertical integration with a small registrar. I mean, that's a different question so I mean, you know, we were specifically writing about vertical integration and you're talking about a monopoly problem that has nothing to do with whether or not there's vertical integration.

Let me give you an example to help you with what I'm thinking. Suppose there are a hundred of new TLDs that are in unique niches and suppose we assume that they're very special niches and they're not substitutes for one another and suppose each one is integrated with a single registrar.

Well, why would there be any additional market power from the vertical integration if suppose a different registrar has each of these hundred, well then the control over this special registry is not going to give the registrar the ability to knock other registrars out of business.

It'll still be competition among registrars for the other unaffiliated TLDs and it will simply be that the registrar/registry combination, it may not have any more market power than the registry had on its own. I don't, I mean, the issue is whether the vertical integration would create additional market power.

Well economists have a concept called the single monopoly profit where they say in the extreme that a firm with monopoly power can never increase its monopoly power by vertically integrating and that statements as a general statement is not correct.

And I've written about why it's not correct in general. The reason why it's not is because you can foreclosure that leads to harms in the other market but in the example that you're setting out, I think the single monopoly profit theory may apply. I'm not sure that it would lead to any harm in the registrar market or any harm to any other registries. I hope that helps. Josh, do you want to follow-up on that?

Joshua Wright: No, I think - I don't think there's much more to add.

Mikey O'Connor: Okay. Next in the queue is Mike Palage. Palage, you may be on mute. Give you another try.

Steven Salop: Mike Palage is never on mute.

Mikey O'Connor: Michael, you still there? We're still not hearing you if you are.

Joshua Wright: I see I'm typing.

Steven Salop: Oh yeah, you're typing.

Gisella Gruber-White: Michael seems to have disconnect.

Mikey O'Connor: Oh, he's disconnected. All right, Palage, we'll let you get back in - yeah, we'll go ahead to Kathy and after Kathy, if I can get back to it, Shiva had a question in the chat that I may read too, but Kathy, go ahead.

Kathy Kleiman: Great. Thank you so much. This is Kathy Kleiman with (dot-org) and my question for you and I appreciate the presentation today, I was wondering whether you looked at the equal-access provisions among ICANN-accredited registrars?

Over a number of years now, it's been one of the great developments of ICANN to create a system of 945 registrars who reach into different countries, different markets, different communities and we've considered that to be a good thing.

And one of the provisions - the basis of that - is the equal-access provision where a registry has to treat all registrars equally and there are a number of planks on that. I'll just summarize some equal connections, equal access to software and the upgrade, equal access to customer support and equal access information about what's called EPP data.

Lots and lots of information about domain names and the queries, equal access to the deletes. And so I was wondering what the impact of your models are in the vertical integration in this equal-access provision which frankly every proposal that's been dropped on our working group wants to keep the equal access among registrars so let me ask the question. Thank you.

Steven Salop: Well, we see certain benefits to selective distribution and so it would not necessarily apply.

Kathy Kleiman: Benefits of selective distribution but have you evaluated it against the impact on equal access?

Steven Salop: Well, I mean, that is to say selective distribution is not equal access.

Kathy Kleiman: Yes.

Steven Salop: That there could be advantages to registrants of having for example a registry associate with only a limited number of registrars in order to get more promotion of the registry.

Kathy Kleiman: Understood, but I guess the question is have you evaluated the harm of dropping the equal-access provision, what the impact would be on a system that's already in place? We're not creating the system anew.

Steven Salop: Well, we've focused on the impact on registrants and we concerned ourselves in doing our work about whether on balance registrants would be harm or whether they'd be benefited by this sort of situation and that's what led us to the proposal that we've suggested.

We understand that certain registrars may be harmed by a rule that allow registries to have only a limited number of registrars but our focus has been on registrants and antitrust and competition law, the favored group are the consumers and the view is that harms to producers don't have standing unless they also lead to harm to consumers.

In the same way that antitrusters - let me finish - antitrusters would not allow firms to set prices jointly even though it benefits them, because it harms consumers. And if they had been setting prices jointly or if they've erected barriers to entry, competition economists, competition policy people - lawyers - would say relax those barriers to entry and stop the price fixing even though it will reduce the profits of the producers, it'll benefit consumers and the goal of the antitrust of competition was consumer welfare.

Kathy Kleiman: Hopefully that's a goal we all share. Thank you.

Mikey O'Connor: Thanks, Kathy. Palage, you're back on? You wanted to take another try at this?

Michael Palage: Yes. Thank you. Hi, gentlemen. Just a couple of quick questions. The first in your model where ICANN will be doing sort of a preliminary check of market share before potentially referring to the relevant competition authority.

The concern that I had with that was about the potential for a false negative. Obviously ICANN is primarily a technical coordinating body and making determinations about market share could be very complex.

Could you perhaps provide any input on how ICANN would go about making these determinations through a separate panel or experts that they might set-up or what would be done to prevent false negatives from potentially going to a competition authority? Because a false positive would not be a bad thing because if it goes to the competition authority and they say no problem, then there's no harm. It's the false negative so any insight on that?

Steven Salop: Well, I wouldn't say false positives have no harm. I mean, they inflict a cost on the applicant and they inflict a cost on the competition authority but putting that aside, we - I mean, in the work we did - we measures market share.

It seemed to us that the best measure of market share was the share of new registrations on the registry and the registrar side. The issue of - we did not worry about the notion of differentiation leading to narrower markets because since we were worried about vertical - we were focusing on the vertical integration aspect - so we just looked at all the GTLDs and our 40% was based on that notion.

So sure, you have to measure market shares. You always have to measure market shares and if ICANN can't do that, then they have to move over and just refer to the competition authorities all the time I guess.

Michael Palage: Okay, and I do agree with you on the false positives. There's really no harm there. It's just the false negatives and again just the one thing I'd like to point out is one of the TLDs were recently approved was dot-post. So you potentially have in that scenario where theoretically the Chinese government could give 1.5 billion Chinese a dot-post domain name and that could somehow potentially skew some of the rigid calculations that we think ICANN staff may be doing.

So again I appreciate that first point. The second point which is probably of most interest to me is regarding your referral mechanisms. I've co-authored a proposal with Avri and Milton that have talked about trying to involve competition authorities into this review process.

And some of the feedback we've had from the group is regarding the viability of this so I guess what would be constructive particularly for the co-authors as well as the other group members is you have a referral mechanism in there.

How do you see the viability of that? Is that just U.S.-centric DG4? How would you perhaps shed some light on the implementation of that aspect of your proposal?

Joshua Wright: Michael can I - this is Josh - can I ask you to clarify a little bit more what you mean about the viability? I mean, it sounds like you're asking sort of the mechanics about how it'd work but I just want to make sure I understand the question.

Michael Palage: Yes, it's the mechanics so ICANN gets a positive that someone has 40%, right? Now so somebody has 40% market share so therefore under your option of referral, you know, does that then - would you look at this and say well, this is a U.S. Company so we're only going to refer it to the Department of Justice, or this is someone who is located in Europe so we're going to refer it to the DG4?

What happens if it is someone incorporated in a jurisdiction that does not have a competition authority? Those are the implementation aspects with regard to that element of your proposal that I would find very useful in getting your insight and feedback on. Did that answer it better, Josh?

Joshua Wright: Yeah, that did, so with respect to implementation, as far as the notification mechanism goes, we do say here - if I'm understanding the question - we say appropriate governmental competition and force an agency or agencies and you can imagine it being sort of being any number of agencies.

Now that is something that I think there are some degrees of freedom to play with because of precisely that problem whether somebody wants to specify that it's any national competition authority or whether it's the EU or whether it's the U.S.

I mean, frankly I think that is an open question to determine whether you want to choose an agency or a number of agencies that are more likely to either pay attention to the problem or have jurisdiction, right, you know, the U.S. and the EU being the primary two.

And that I think also is going to have some relationship to the market share threshold that you want to pick, right? You know, because those agencies do have some differences in the way they think about these types of competitive issues, right? Those - I don't mean to suggest that the implementation is simple by any means.

I think it also has the complexity of picking the, you know, you might think that there's some relationship between which agency and the market share threshold or you could pick sort of any agency - any appropriate agency - based on where they are.

Now of course if you're talking about - at the end of your question - you talked about sort of folks outside the jurisdiction of either the U.S. or the EU. I mean, jurisdiction for the competition agencies is not going to trigger on where they're incorporated.

Michael Palage: I do not disagree.

Joshua Wright: Right, and so out of the implementation problems, that's the one I worry about the least. Neither of those agencies at the moment is, you know, you don't hear a lot of complaints about things being outside of their jurisdiction.

Mikey O'Connor: I'm going to break in here. This is Mikey with a quick question for especially Steve and Joshua.

Steven Salop: Can I just say one thing to follow-up on?

Mikey O'Connor: Hang on, Steve. We've got a little problem here in terms of time. We either have to get - I either have to get - incredibly aggressive with the queue or if you guys could stay on for maybe another half hour; is that possible?

Steven Salop: I can stay on till 5:15.

Mikey O'Connor: Joshua, how about you?

Joshua Wright: I can do about the same.

Mikey O'Connor: Okay. I'm going to do both, then. If we could go real quickly in terms of both questions and answers, we've got a lot of folks here that we need to hear from. Palage, are you feeling like you've gotten what you got?

Michael Palage: I think I'm - I'll put it this way. What I'll do is - let me just state a question and if perhaps Steve and Josh could just follow-up with an e-mail in the interest of time efficiency. And that question that I have is with regard to your select distribution, is there any - in the (Cray) report - they talked about the inefficiencies of mandating the use of registrars and certain single registrant TLDs.

And if perhaps they could elaborate on such as a member-based organization, if the ACLU wanted to be the registry and allocate names directly, is there anything from a competition standpoint that would raise concerns or threats? That's my question if they could answer that online at a later date, I'd greatly appreciate it. I'm done. Thank you.

Mikey O'Connor: Okay, thanks, Jeff or Michael. Eckhaus, you're next. Go ahead.

Jeff Eckhaus: I'm actually going to defer my question because Kathy had asked that question. I'm hoping we can get a follow-up on it so I'll just on what the benefits of vertical integration, how they're affected by equal access and distribution so I will defer to the next person in the queue.

Mikey O'Connor: Okay, thanks, Jeff. Avri?

Avri Doria: Okay, yeah, mine's pretty quick, thank you, and something I probably just didn't understand. In terms of definitions or market share or market power, are they global or are they global, are they linguistically related? That's something that I've had trouble understanding? Are we always talking about a global market when we're talking about them? Thank you.

Steven Salop: I was trying to use the term market power to get at what the concern was rather than doing it formally in terms of what's the relevant market. A firm with a very small share in a global market could nonetheless have market power and there's often an ability to say what the actual market is really narrower.

But I don't think we need to get into the issue of what the relevant market is, if we know what we have in mind which is the ability to raise price. And I thought that in terms of the question that was being asked, market definition was not the issue because what he was talking about was something where the firm had the ability to raise the price to its locked-in install base which is a different kind of issue.

Avri Doria: Okay, thanks.

Mikey O'Connor: Thanks, Avri. Ken, you're next.

Ken Stubbs: Yeah, Mike, real quick. Beforehand, Steve was trying to make a point when you cut in asking for more time. I'd give him a chance to finish the point he was trying to make, then I have a quick question if that's okay.

Steven Salop: Okay. I was just going to make a quick comment that there's an awful lot of antitrust authorities these days, an awful lot of countries having these trust authorities these days, China, Brazil. It's not just the U.S. and Europe at this point.

Ken Stubbs: Okay. Mike, I have a real quick question for the gentlemen if I could please now.

Mikey O'Connor: Sure, go ahead.

Ken Stubbs: Yeah. Gentlemen, your first sentence in Option Number 2 is somewhat confusing for me because I have trouble just delineating between the term relevant as opposed to material, and I guess what I'm worried about is determining what's relevant.

It can be a moving target and it's almost a beauty is in the eyes of the beholder type of a thing. Are you specifically referring to materiality or have you got some other definition of relevancy in mind there? Thank you.

Steven Salop: Josh?

Joshua Wright: Yeah. I think you're talking about the relevant market share threshold, correct?

Ken Stubbs: That's correct, thank you.

Joshua Wright: What we say in the proposal - I mean so no, I mean, the standard is not for folks to perform a linguistic interpretation exercise on relevant. We think the reasonable range to select from and we think a selection should be made - a precise selection - is between 40 and 60 because these are the thresholds that are used for various competition authorities and in particular of the range between the United States and Europe.

So we do not have in mind a moving target. Rather we have in mind a selection to be made that is we recommend for the selection to be made somewhere in that range.

Mikey O'Connor: Okay. Keith? I think you're next.

Keith Drazek: Okay, thank you, Mikey, and Josh and Steve, thank you for joining us and putting this together. I think it's been very helpful. Just a quick question. One of the things that the group has been discussing over the last couple of weeks is the concept of an orphan TLD or an orphaned registry is unable to get registrars - existing registrars - in the marketplace to offer its TLD.

So in looking to try to put some rules around how, you know, that registry operator would be able to take its product to market by being its own registrar, is there a concern about consumer harm if a new registry - a brand new registry - with zero market share in the global TLD market were to own 100% of its registrar or retail channel?

And I guess the follow-up then is if so, what's the threshold for basically having to say okay, you're big enough and we need to make sure that some competition is introduced?

Steven Salop: Forty to 60%.

Keith Drazek: I'm sorry, say that again?

Steven Salop: It's the 40 to 60 - that's the 40 to 60% in our proposal.

Keith Drazek: So then that's what I wanted to be sure I was clear on is that so a new TLD with zero market share could own 100% of its registrar channel until when?

Joshua Wright: Until it didn't have zero percent market share anymore, until it had 40 to 60% market share.

Mikey O'Connor: Is that it, Keith?

Keith Drazek: Out some unspecified relevant market share - market.

Steven Salop: I'm sorry. I think we're - what we meant by relevant market share - was we meant 40 to 60%. I'm now realizing where the confusion is.

Keith Drazek: So 40 to 60% of what, I guess is what I'm trying to get at? In other words, can a brand new registry own 100% of its sales channel?

Steven Salop: Yes.

Keith Drazek: Under your proposal?

Steven Salop: Yes. Sometimes, yeah, yeah, if it's a small registrar.

Keith Drazek: Okay. Everyone starts out small.

Steven Salop: No, no, there's lot of registrars that are big right now. I mean, you know, I'm not sure anybody has got 60% but GoDaddy potentially could have 40%.

Keith Drazek: Okay, so I guess what I was saying is if a brand new TLD registry submits an application and has no buy-in from the registrar community - from the existing registrar community - and they are permitted to become their own retail sales channel, their own registrar and they are 100% of their own sales channel, is there a risk for consumer harm there?

Steven Salop: Well, we'd permit that. That's what we would permit. That's going to be below our threshold.

Keith Drazek: All right. That answers my question, I think. Thanks.

Mikey O'Connor: Thanks, Keith. Tom Barrett?

Thomas Barrett: Hi, this is Tom Barrett from (Userka). I have a question about any linkage that might exist between the current domain market and the new TLD market. We all know that ICANN has been successful. I think we were seeing competition for dot-com and dot (unintelligible) continuing to do so.

My question is if we - to what degree - do we need to consider potential harm to that existing marketplace when we design these marketplaces? In other words, is it possible that we do something with new TLDs that harms registrars that are currently serving the dot-com consumers and ends-up harming consumers in dot-com?

Steven Salop: We in general we're concerned about the impact on the registrants, not on the impact on the incumbent parties.

Thomas Barrett: Right, so it's about consumers currently served by registrars who were not able to compete in new TLDs?

Steven Salop: We're concerned about the consumers. We're not concerned about the registrars.

Thomas Barrett: So would there be any harm to consumers in that scenario in your viewpoint?

Steven Salop: I'm not sure I understand the situation that you're worried about. Can you spell it out in more detail?

Thomas Barrett: Sure. There's hundreds of registrars. Let's say that in the new TLD marketplace, 20% have access to resell new TLDs so the other registrars are going to basically not grow with the new TLD marketplace and they'll start to wither away.

The consumers will be forced to either with poor customer service or be forced to move to another provider. Now that's a possibility or option to have but nonetheless it seems like it constitutes some consumer harm to be forced to switch providers so there's a switching cost.

Steven Salop: I guess we start with the premise that if the registrar can't make it in the marketplace then it should be permitted to perish and that the switching costs by the consumers likely are not that large.

If they were, the registrar would not perish. I guess that would be my going-in position but it would have to be analyzed, I guess.

Thomas Barrett: But the result would be fewer registrars serving the dot-com (unintelligible) and so that's less competition in that instance, you don't consider it to have...

Steven Salop: It may be fewer participants but just as much competition. I mean, how many registrars are there for dot-com? Is it quite a few registrars.

Thomas Barrett: Eighty percent I think are located in North America, so highly concentrated.

Mikey O'Connor: Tom, can we kind of draw this one to a close and move on to the next? Thanks. Jeff, if I could push you down one notch and let Shiva jump in front of you.

Jeff Neuman: Yeah, sure.

Mikey O'Connor: Shiva's been in the queue for a bit and then we'll go to you. Shiva, do you want to pose the question that you posed in the chat earlier or do you want me to read it? It may be that Shiva is muted.

Shiva Muthusamy: Yeah, I'm online. Would you like me to read the questions?

Mikey O'Connor: Just one is fine but whichever one is the one that you'd really like to pose to the economists. We're very short on time.

Shiva Muthusamy: Okay. I'll start a question that pertains to the case-to-case approach. If that approach is adopted, is it possible for ICANN to say that - make a distinction - between Blacknight and GoDaddy or make a distinction between public Internet registry and VeriSign and apply one set of rules for GoDaddy and another set of goals for Blacknight?

Steven Salop: I don't know who Blacknight is.

Joshua Wright: Blacknight is a smaller Irish registrar.

Steven Salop: Yeah. In our proposal we have different rules according to the market share of the registrar and the registry, you know, different to large versus small ones. That's what the 40 to 60% is all about and...

Shiva Muthusamy: Yeah, but how do you assume that the store with the largest share needs to be controlled while the store with the lower share should be allowed to be free? Where again the discrimination comes?

Steven Salop: Well in general, in antitrust there's discrimination between firms with high and small market shares. We economists recognize that market share is often not a perfect proxy for market power. It's just a starting-off presumption and one that is often weak.

But there is a basic concern that firms that are larger and more powerful in a market share sense have a greater ability to harm consumers and so it's not considered discrimination against them. It's considered a rule designed to help consumers.

Shiva Muthusamy: Well how do you get VeriSign to GoDaddy to accept those sort of rules against them? I think it will be very difficult to get them to subscribe to this idea of discriminatory loss.

Steven Salop: Well, I don't know, you know in the economy, there are different rules for Microsoft than there are for Apple on the desktop and there's different rules for Intel than there are for AMD.

It's very common. That's what antitrust is all about is having different rules according to the situation that the firms are in. Now VeriSign is subject to a price cap and there's a reason why there's subject to a price cap and that some other people aren't.

And VeriSign, there's a lot that's been written because of VeriSign's dominance and the price cap, VeriSign has a greater motive to engage in anticompetitive vertical integration than would lots of other registries.

Mikey O'Connor: Shiva, I'm going to have to draw a line under this one if it's okay.

Shiva Muthusamy: Okay.

Mikey O'Connor: We're just really tight on time, I'm sorry about that. Jeffrey, go ahead.

Jeff Neuman: Yeah, I'll try to make this brief. Going back to the competition authority referral, when I think of this at least in the United States, (theogenic) has to have a statute that gives it authority to hear the particular type of action that you want to bring before it.

So for example the most common one is called HSR which is when there's a merger that's valued essentially at more than $63 million, I think it is now. But the way that operates is that the Department of Justice doesn't have to - it could be filed, it has to be filed - but the Department of Justice could do absolutely nothing with it because of caseload, because it doesn't object, for a whole bunch of reasons.

And therefore there may never be a decision by the Department of Justice or FTC on dot mergers so in this case A, there is no statute at this point that would authorize the U.S. Competition authority to hear this type of action so I'm not sure how we get around that.

And B, even if there was some jurisdiction of the Department of Justice to bring it before it, there's nothing to compel that agency from taking any action so how does that fit within - this is my biggest problem with your proposal but also other ones that have been mentioned that were just arbitrarily refer things to competition authorities? How do we get around that?

Steven Salop: Josh?

Joshua Wright: Let me take this, Steve, so I'm here as an economist but in my day job I'm an antitrust law professor and so let me correct you on the first thing. The statute that gives the DOJ jurisdiction is the Sherman Act.

Jeff Neuman: Correct.

Joshua Wright: The HSR does not give anybody jurisdiction. The HSR is a requirement for merging parties to notify the agencies they are merging. The agencies can challenge so it's a dollar requirement. You can think of it that way, sort of a dollar volume.

There's nothing that says the agencies cannot challenge deals that are below the threshold. It's just a notification requirement, okay? It's not jurisdictional. The DOJ and the FTC can challenge anything that falls under the provisions of the FTC Act and the Sherman Act, Okay?

Jeff Neuman: Correct.

Joshua Wright: You essentially need some commerce traded in the U.S. to trigger that so with respect to the first question, there's no statutory bar from either the FTC or the DOJ - any U.S. Competition authority - reaching these types of agreements. That's just a clarifying point.

Jeff Neuman: I appreciate it. Thank you. You're absolutely right. Thank you.

Joshua Wright: Okay, so there's no jurisdictional bar whatsoever. The second point is a great question which is - or an important one to think about - which is you're absolutely right that referring a matter to DOJ, let's say for an example without loss of generality to sort of other competition authorities, could allow whatever time period you choose to expire and do nothing.

Now that's absolutely correct, right? All you can do is notify them and they can study it and they can make a decision. Now those agencies have the incentives to bring cases where they think there's a violation. That's what they're there for. That's what they do.

But you're absolutely right that there's no guarantee that they bring them. Of course they can also bring them after the time period, right, and all you're doing is setting-up a time period where you say we're not going to allow this transaction to go through until X number of days and referring to the DOJ and trying to give them some time period to make a decision.

To the extent that the second part was a question about whether or not they had to act, of course not.

Mikey O'Connor: I'm going to push us along here a little bit, guys. Jeffrey, you okay with that.

Jeff Neuman: Yeah, I think in maybe afterwards in writing or something, I just want people to understand that even referring it doesn't compel any agency to act and so how we can deal with that situation of notifying them but just nothing happens, we can't really read that there's no violation. Just could be for any number of reasons.

Mikey O'Connor: Great. Eric, you're next. Again, we're coming right down to 15 after the hour so brevity is appreciated. Eric, are you muted? I'll give you another - it could be a combination of local mute and star 6 mute.

Coordinator: Eric, your line is open.

Eric Brunner-Williams: Thank you very much. My line was shut off administratively somewhere upstream.

Mikey O'Connor: There you go.

Eric Brunner-Williams: I sent a question via Margie who's one of the staffers for this working group intended for you each. Did you receive it?

Steven Salop: No.

Eric Brunner-Williams: Okay. The question is to be very simple about this, is there any fact about the existing market - the existing DNS markets - which if changed would cause you to change your recommendations?

Steven Salop: That's a pretty big question.

Eric Brunner-Williams: Well, the purpose of asking is to determine whether or not your recommendations relates to our industry or do not.

Steven Salop: Yeah, if they relate to the industry, we understand it as it stands now.

Eric Brunner-Williams: Right, so would it...

((Crosstalk))

Steven Salop: Well, I mean, we do not think that VeriSign should have the freedom that the smaller registries have and we're concerned that large registrars could use vertical integration in an anti-competitive way.

That's why we tied to market share. We're also worried as we said in the paper about VeriSign and somewhat about the other registries that have price ceilings because...

Eric Brunner-Williams: Thanks. That answers my initial question which is whether or not there was any data from the industry which was relevant to arriving at your current conclusions and I'm glad to hear that there is.

It has been argued in this group that you know less about this than you know about flying airplanes and I didn't think that was a correct statement.

Mikey O'Connor: Eric, if you could just frame the questions for the lads and refrain from...

Eric Brunner-Williams: Thank you, Mikey. You're taking more time than I am. Is it fair to say that - I mean, you've been using illegal per se - and of course we're in a contractual framework here that it's really an in contractual per se of some percent is a way of characterizing some of the proposals that you're aware of that are in our group and contractual per se - another group of proposals which are current in our group?

Steven Salop: I don't understand what your question is. Mike - Josh, do you?

Joshua Wright: I don't understand either.

Eric Brunner-Williams: All right, I'll try again.

Mikey O'Connor: Eric, I think the key here is that I'm not sure that Steven and Josh have read our proposal so if you're referring to the proposal that we're discussing in our other group, I don't believe they've got those in front of them.

Eric Brunner-Williams: All right, Mike. Thank you very much.

Mikey O'Connor: Thanks, Eric. Milton - Eric, could you mute your phone - Milton, you're next.

Milton Mueller: Yes, just a point of clarification as Palage just was saying, we are actually submitting a proposal which tries to draw on your submission to competition authority but there's still a lot of gray areas about how this works.

One of my concerns is in your slide you talk about the agency, but in your discussion here you said virtually any antitrust authority could get involved and you're not concerned about jurisdiction so I just want to clarify that.

For example, could the U.S. Department of Justice decide that a Chinese registry/registrar combination let's say proposed by (CN neck) the country code for China raise competition policy concerns in their mind because of their market power in China or would the U.S. agency have to be concerned exclusively with their global market power?

Steven Salop: Josh?

Joshua Wright: That's a fairly complicated jurisdictional question. To the extent that there's consumer harm felt in the United States because of some transaction, the agencies in the United States could challenge it.

There could be also harm felt in other countries but a necessary condition would be some competitive harm in the United States. That would be sort of the boundary condition. There can be harm everything else but there has to be something here in order for them to have jurisdiction under the Sherman Act. I'm think DOJ right now.

Milton Mueller: So for example the Chinese authority says it's okay but the Lithuanian and the U.S. maybe says it's not because they have Chinese communities that might want to register those names and under this proposal their objection would hold as much weight as the Chinese authority.

Joshua Wright: Hold as much weight with whom, just to be clear?

Milton Mueller: With ICANN, I guess.

Joshua Wright: As a triggering agency? Sure, so you could make a decision with respect to either narrowing or broadening the scope of agencies which you want to be notifying. I think that that is - I mean, what we say in the slide is agency or agencies, you know, that are the relevant agencies, right?

So if it's completely outside the scope of the jurisdiction in the U.S., then you'd be notifying some other agency and it's certainly the case that having ICANN notify somebody does not - this can be complex analysis and it would not be the first time that multiple antitrust agencies all had jurisdiction and disagreed with one another.

Milton Mueller: Okay, that's good. Thanks.

Steven Salop: You know, of course, let me just one thing and that is whether or not you notify an agency, they could still claim jurisdiction.

Joshua Wright: Yeah, I mean that's the flip side, right? I mean, you certainly don't have to notify them for them to have jurisdiction.

Steven Salop: And what often happens in antitrust cases is somebody else complains to them. I mean, the U.S. government looks at a fair number of transactions that are (sub part Scott) and they of course having a whole enforcement program not related to mergers where they're starting investigations based on their own observations in the marketplace or based on complaints by others.

I'm afraid I'm going to need to go. It's after 5:15.

Mikey O'Connor: Hello?

((Crosstalk))

Steven Salop: I'm afraid I have another call. I'm going to have to get off.

Liz Gasster: Thank you so much. Steve, Josh, thank you very much. I appreciate it.

((Crosstalk))

Mikey O'Connor: Thank you, everyone.

END