

Vertical Integration PDP Working Group Antitrust And Competition Memorandum

As the Vertical Integration Policy Development Process Working Group (“WG”) evaluates and proposes policy recommendations on the topic of vertical integration between registries and registrars in the New gTLD Program, it is important to remain cognizant of the antitrust and competition laws. Please note that ICANN counsel is not counsel for this WG and this should not be considered as legal advice. For specific legal advice regarding antitrust and competition laws, please consult with your own counsel.

Antitrust and competition laws are designed to protect free and fair competition. In a free marketplace, the most innovative and efficient firms thrive, and consumers receive the best products and services at the lowest prices. For this reason, the interests of ICANN, consumers, members of the WG, and all Internet stakeholders are best served through fair competition as well as strict compliance with the antitrust and competition laws that are in effect throughout the world, including the United States. Violation of such laws could lead to civil or criminal liability.

One of the most fundamental antitrust principles, certainly in the U.S., is that firms must act independent of their competitors and other market participants so that free market forces – such as supply, demand and consumer preferences – shape the competitive playing field. As such, the antitrust laws prohibit companies and individuals from improperly interfering with these free market forces through agreements or understandings with each other that unreasonably restrain competition.

An agreement or understanding among market participants can be inferred from conduct and other circumstances. In particular, an agreement may be inferred based on discussions or exchanges of information between market participants, followed by a common course of conduct. For these reasons, discussions between competitors or potential competitors, which on many occasions can be pro-competitive, should be guided by a few basic rules.

First, as with all communications among competitors or potential competitors, certain competitively sensitive topics should not be discussed by WG members. These topics include, but are not limited to, current or future prices, profits, costs, discounts, products, customers or specific markets in which competitors have or will compete. Second, the WG participants should avoid engaging in discussions that could be construed as an effort to exclude, disadvantage or boycott any particular competitors, suppliers or customers. Third, promotional, competitive and marketing strategies should not be shared between members of the WG. Finally, it is just as inappropriate for these topics to be discussed during informal WG activities as it is during formal WG activities.

If you have questions about what is appropriate or inappropriate under the antitrust and competition laws, ICANN urges you to consult your company counsel or supervisors. ICANN counsel will be available during the call scheduled for 12 April 2010 to discuss this paper if requested. It is, however, the responsibility of the WG participants to ensure that neither the WG nor any of its participants violates any antitrust or competition laws during any formal or informal meetings of WG participants.