

## Replacing Digital Archery with Fairness

1. **Proposal:** separate evaluation tracks for Exclusive-Use and Third-Party-Use TLDs; take into account public interest and fairness (including fair competition); use continuous roll-over instead of stop-and-go batches; acknowledge the simplified nature of many evaluation parts for Exclusive-Use TLDs.

Here is a coherent solution for handling some 2000 new gTLD applications:

- 1) **Amend the Board resolution** on digital archery/secondary time stamp, in the way indicated below.
- 2) Add **a third supplemental question** to the TAS: “Do you declare this TLD to be for exclusive use by the applicant as per Specification 9 of the Registry Agreement?” , and allow ten business days to all applicants to check that box, if needed.
- 3) Announce that ICANN will run **two concurrent tracks** for initial evaluation: the Exclusive-Use TLD track and the Third-Party-Use TLD track.
- 4) Announce that applicants will be allowed to use the authenticated TAS channel to submit publicly attributed public comments on other gTLD applications, so they can identify the other applications they perceive as direct competitors and that should be placed in the same group for evaluation (allowing ten business days after publication of all application for doing so).

### B) Explanation

There is probably no need for any decision on batching at this stage. Once all applications are published, relevant and objective information can be used to set priorities if need be (see below under Roll-over Criteria). In any case, ICANN must make sure that the system does not work against the public interest, nor creates involuntary but serious and unneeded discriminations among closely competing or related applications.

There is little doubt that at least half (and probably more than that) gTLDs applied for are for the exclusive use of the Registry. ICANN has published a clear definition of Exclusive Use in the Knowledge Base. This does not include all so-called Brand TLDs, as many (think about a social network, a mail service, a gaming portal or a picture/video sharing portals) will allow its users to control the content related to the domain names, to manage their own profiles, use all or part of its websites and post content there, etc. We are referring here to the strict definition contained in Specification 9 to the Base Agreement and clarified in the Knowledge Base article of January 18th.

What is so special about Exclusive-Use TLDs? In the case of an Exclusive-Use TLD, ICANN does not have the role of protecting the registrant (nor the registrars) from the registry, because the registrant (and sole user) is the registry. As a result, almost no evaluation is needed in this areas, making batching unnecessary. Initial evaluation for the Exclusive-Use TLD track and Third-Party-Use TLD track can be completed concurrently, within 5 months, or perhaps slightly more. Bear also in mind that the Technical Plans for such TLDs with no registration activity whatsoever will be easier to evaluate, and in fact consist of a very limited number of proposals from a very limited number of providers, copied-and-pasted over and over again through dozens and dozens of cloned applications. Not to speak about simplified Financial Plans (registration

volumes?). All in all, it is evident that ICANN can evaluate (uncontested) Exclusive-Use TLDs much faster (and probably with different teams) than Third-Party-Use TLDs. More than five months will probably be required, but there is a big difference between an extended roll-out over more than five months, or double that, and many arbitrary, start-and-stop-and-start-again “closed” batches.

How to identify those Exclusive-Use TLDs? Posting a third supplemental question is in line with the established practice of TAS and reflects existing content of the AGB. (The two previous supplemental questions were on the 2000 round rebate and financial support.)

### **How to batch if there is real need to do so? The differentiated tracks.**

First of all, the first batch should be made up of **uncontested** applications (ie, not subject to string contention or other objection procedures). Indeed, most of these objections will only appear once the Initial Evaluation is in progress or completed, but names that are deemed in contention sets during the String Similarity Evaluation should not be in the first batch, if more than one is necessary. Secondly, the first batch should be comprised by a **majority** of Third-Party-Use TLDs. Exclusive-use TLDs benefit mostly the applicants, and only sometimes, and to a lesser extent, the public in general. Certainly not all open to Third-Party-Use TLDs will serve the broader interest of all Internet users, but it is undeniable that they are at least likely to benefit a broader circle of users. This is in itself an objective measurement.

Exclusive-Use TLDs, in many instances, are under a lesser time pressure. Unless competitors in the same industry sector (or, sometimes, geographical market) also applied for their own brand TLDs. If there is a need for roll-over by stages, competing companies (brands in the same industry sector) must be kept together. To make this more explicit, what we are getting from everybody involved is that indeed nobody wants to be last; that everybody prefers being first, but that, for example, Bank A prefers being evaluated in early 2014 if Banks B and C are not approved before, than being evaluated and approved in Summer 2013 but Banks B and C being approved in January 2013. The absolute timing is important. But not **losing against direct competitors** is by far much more important. Digital Archery, as currently proposed, is bound to create unfair competitive landscapes everywhere

The TAS comment feature can be used by Exclusive-Use applicants to publicly state whom they regard as competitors (immediately after June 13th). This provides ICANN with **objective information** as to which Exclusive-Use TLDs have to be delegated at the same time. No need to make guesses or arbitrary decisions on ICANN's side. Just treat your stakeholders as responsible, grown-up participants. Ten business days after June 13th should also be enough.

The above is in the interest of all applicants as well as the public at large. If instead digital archery is used, pointless antagonism ensues between parties who have no natural reason for contention (think also about cities in the same country being set in batches years apart...). This is not to speak of unfairness, gaming and disregard for the public interest.

Many brand TLD applicants will be forced to play the digital archery game against their will. Getting evaluated late would give an unfair marketing advantage to a competitor in the same industry sector who achieved early evaluation. And the system as proposed is completely blind as to the main point: who are each other's competitors.

D) Establishing of batches: **additional roll-over criteria**

1. If there must be batches, make sure the first one is composed of 60% third-party registration TLDs, and 40% exclusive-use TLDs.
2. For the Third-Party-Use TLDs, give priority to IDNs. Not much need to be added as to the public interest side of this long-overdue area of gTLDs.
3. Immediately after, add all Applications submitted by a Public Authority or International Governmental Organization. As ICANN has acknowledged, the interpretation of the public interest is basically a question of the relevant Governments. If they have applied and believe the application serves that public interest, so be it.
4. Same can be said of the applications submitted with the explicit support of a Public Authority (these two categories will include all geographic names, but not only).
5. Other community-based applications. Again, not only the representativeness and accountability requirements often will yield some sense of serving the public interest, but also the eligibility, name selection, content and use requirements and other restrictions make this kind of gTLDs less likely to cause worries to the public in general and the trademark interests in particular. An issue that, despite all our collective efforts, is not yet completely behind us, as the announcement of new meetings on the topic made by ICANN proves.

All in all, the applications corresponding to 2-5 will never exceed 300, very likely much less than that. So there is still room for processing a fair number of Exclusive-Use TLDs by sectors of activity along those fulfilling the above criteria. And probably many more third-party registration TLDs, as well. How to keep on the roll-over? Well, one category that has been not covered at all, and that we all know is very present (in absolute numbers) in this round is the “portfolio” standard TLD applicants: those applying for, say, more than 25 completely standard gTLDs (and often many more). So next criteria should be, in the name of fairness:

6. 10% of the “portfolio” gTLDs for each such applicant, as chosen by themselves among their uncontested (at the time of the roll-out decision) applications
7. Then, all string contention sets (as they will take longer time to resolve past Initial Evaluation). More than 10% can be included if feasible, we set this as a minimum.
8. For any other remaining application, give priority to those based first in non-OECD countries, then, outside USA, EU and Switzerland (the only three places with more than one existing gTLD, and then the rest of those remaining.
9. If there is a need of batches as announced, invert the proportions proposed in point 1. for the second batch, and take 60% approx. of Exclusive-Use TLDs and 40% of Third-Party-Use TLDs. Digital Archery results could be used to order Sectors within Exclusive-Use, or those for which no public-interest criterion could be made.

Probably, more than “batches” ICANN needs a roll-out over some time, but not stop-and-go long periods where nothing happens. String Similarity review; Applicant review; technical Plan review; Financial Plan review; etc, are (hopefully) performed by different teams that can evaluate different number of evaluations in the same period.

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