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Comments of David A. Balto

I write to offer my opinion on the decision to remove price caps on legacy gTLDs. I believe that this is largely a competition question, as competition disciplines markets and protects consumers from monopoly prices. Market regulations, especially price regulations, are best used in markets in which there is "market failure" that market forces can not lead to a competitive result or in markets that tend towards natural monopolies. I do not believe this to be the case in the gTLD market.

ICANN has taken great effort to increase competition, and the effects of those efforts are beginning to bear fruit. Indeed, ICANN's bylaws require it to "enable competition and open entry in Internet-related markets."[1] The current landscape is such that .org competes heavily against both legacy and new gTLDs, and this competition should be sufficient to discipline price. Additionally, the ICANN contract requires advance warning of price increases as well as the ability of users to lock in a price for up to 10 years. These provisions provide additional protections to users from any potential attempts to impose unreasonable prices.

My comments are based on my 30 plus years of experience as a private sector antitrust attorney and an antitrust enforcer for both the Department of Justice and the Federal Trade Commission ("FTC"). From 1995 to 2001, I served as the Policy Director for the FTC's Bureau of Competition and the attorney advisor to Chairman Robert Pitofsky. In that work we advised numerous state and federal regulators on the need for regulation and how to appropriately craft regulations to protect competition and consumers. Currently, I work as a public interest antitrust attorney in Washington, DC. I have represented consumer groups, corporations, health plans, unions, employers, on regulatory and competitive issues.

In these comments I make the following points:

- The gTLD landscape is in transition from an environment that was dominated by .com to one that is competitive and has more consumer options. The .org gTLD faces competition from .com, other legacy gTLDs and new gTLDs.

[1] https://www.icann.org/resources/pages/governance/bylaws-en

- An analysis of the .org gTLD under competition would likely find that it has little market power, and thus would be unable to unreasonably raise prices. Any attempt to do so should result in users defecting to alternative gTLDs.
- Users have ample protections in the form of marketplace competition and contract provisions that allow users to be notified of price increases and lock in rates for up to ten years.

I. The .com divide and the new competitive environment

While the state of gTLD competition is improving, it has historically not been the healthiest. In 2012, the website Mashable remarked on 27 years of dot-com dominance.[2] In 2014, the news publication The Telegraph remarked that we could see an end to dot-com dominance by 2020.[3] With only a year to go, that seems optimistic. In 2015, it was thought that Google's choice of .xyz as the gTLD for its newly formed Alphabet holding company would mark the end of .com dominance.[4] That obviously has not come to pass.

Internet users have become so used to .com being the standard gTLD that conversion to other gTLDs has been slow.[5] Users are often unaware of the availability of alternatives and wary that people will not take them seriously without a .com address. This attitude has given Verisign, the owners of .com, a certain amount of market power. Indeed, the industry has coined the term not-com to represent alternative gTLDs and have invested substantially in education and advertising campaigns to win users.[6] Not-coms compete hard to convince users to use an alternative to .com, and not-coms compete heavily with each other to win the users willing to register a not-com. The key differentiator appears to be whether a particular user is willing to accept a not-com as a viable alternative, once this conversion is made the competitive landscape is wide open.

ICANN introduced the New gTLD Program in 2008[7] in response to a need for greater competition, choice, and to combat the problem of running out of easy to remember domain names. ICANN's stated goals for this program are to create greater innovation, competition, and choice in the gTLD market.[8] This program represented the biggest expansion of gTLDs in ICANN's history, with over a thousand new gTLDs expected. This expansion has opened up many alternatives to the .com space and offered many new possibilities for users to find easy to remember domain names that fit their brand.

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[2] https://mashable.com/2012/03/15/dot-com-domains-infographic/
[3] https://www.telegraph.co.uk/technology/internet/10914379/Dot-com-to-lose-dominance-by-2020.html
[4] https://www.wired.com/2015/08/alphabet-rewrites-the-domain-name-game/
[5] https://www.icann.org/en/system/files/files/cct-final-08sep18-en.pdf
[6] *See*, *e.g.*, https://www.orbitmedia.com/blog/not-com-domain-names/
[7] https://newgtlds.icann.org/en/about/program
[8] https://newgtlds.icann.org/en/about/program

The program is also intended to drive competition in the domain name industry, which will have a substantial positive impact on prices. Owners of gTLDs will have far less power to charge high prices for premium domain names if alternatives that are just as good, if not better, are available on other gTLDs.

ICANN's 2018 report "Competition, Consumer Trust, and Consumer Choice Review"[9] provides an early analysis on the progress the New gTLD Program has had in increasing competition. The report states that "preliminary findings suggest that the potential for healthy competition exists and some important indicators are consistent with increased competition." The report also states that "the availability of independent back-end service providers and retailers (registrars) decreases barriers to entry because new registries do not need to invest in supplying their own in-house back-end infrastructure or developing their own sales channels. Consequently, smaller niche registries have a higher likelihood of achieving minimum viable scale." These are positive signs that ICANN is fulfilling the New gTLD Program's goals in increasing competition and choice for consumers.

More work remains in converting all users to the idea of options in the gTLD market, and to reduce consumer confusion in the gTLD system. These efforts are sure to lead to additional competition in the gTLD space among both new and legacy gTLDs and, hopefully, make it easier for users to move gTLDs in response to better options. However, as the 2018 ICANN report notes, progress has been made. Competition appears to be continuing to increase over time in the gTLD space, regardless of stickiness of .com power, and there is likely to be far more competition in the not-com space where users already accept the use of alternative gTLDs. The more users understand the registry system and the options available, the more competitive the environment is likely to be and owners of short domains on the .com gTLD will have less power over price.

In recognition of this improvement in competition, the new gTLD contracts do not have the price caps that were in the older contracts to provide for maximum flexibility to respond to markets. This is consistent with the benefits of competition, which require less in the way of strict regulatory protections like price control. While .org is a legacy gTLD with a respectable number of registrants, it still only has around one thirteenth of the registrants of .com and it faces competition with other newer gTLDs. The .org gTLD faces a much different competitive environment than .com and is likely to be disciplined if it attempted to unreasonably raise prices.

[9] https://www.icann.org/en/system/files/files/cct-final-08sep18-en.pdf

II. What we can learn from competition law and policy

It is generally accepted in competition policy that competition and regulation stand at opposite ends of a policy regime. The more competition, the less a need for regulation. Indeed, regulation is often shown to entrench current market participants and act as a barrier to competition. However, when a market experiences market failure – the inability of market forces to protect competitive outcomes – then there is a greater need for regulation to protect competition. Market failure is uncommon and therefore regulation must be used in a sparing fashion. This is consistent with ICANN's own bylaws. Markets that trend towards natural monopolies require regulation to provide the protections that competition would have normally provided.

Antitrust Division head Makan Delrahim has said that antitrust law enforcement "supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention."[10] Former Supreme Court justice Robert Jackson observed ""The antitrust laws represent an effort to avoid detailed government regulation of business by keeping competition in control of prices." Delrahim went further, stating "[w]hen regulation replaces antitrust enforcement, the regulations – and regulators -- become stealthy and disruptive forces that can interfere with the competitive marketplace. And, like a boa constrictor, they can slowly, and painfully, squeeze competition from the free market."[11] The discipline of the market leads to the most optimal competitive results and it is very difficult for regulation to reach a similar outcome.

Any analysis of the market would suggest that other than .com, no one possesses market power. The law suggests that market power may exist if a firm has a 30% market share. Today, .com has a 75% market share of the gTLD domain name market with almost 140 million registered addresses.[12] In contrast, the .org TLD has only 5.5% of the market with just over 10 million registered addresses. Even using one of the more aggressive cases in merger law history, .org falls far short of being a concern.

Market power analysis in all competition law cases is also concerned with the number of competitors in a market and the difficulty of new competitors entering. Here again the gTLD market exhibits competition. The New gTLD Program introduced twelve hundred gTLDs, including scores of ".BRAND" top-level domains. The New gTLD Program increased competition and choice.

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[10] https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar

[11] https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-division-s-first

[12] https://www.domainstate.com/registry-stats.html

Additionally, competition law has had significant experience with the “lock-in” concern that some have expressed. Namely, the argument that an existing user cannot take advantage of competition in the market because they are “locked-in” to their current choice. But the instances in which competition law has been concerned with lock-in are far different than that experienced in the TLD market. The key Supreme Court case on lock-in, *Image Technical Services*,[13] found that lock-in was a concern when switching costs are high. In the case, the switching costs at issue was the substantial capital investment in expensive copier machines that would have to be made again for little-to-no benefit if the user were to switch. But there is no real capital investment lost in moving TLDs, the loss is almost exclusively in the registrant’s costs of notifying their users of the change (and perhaps some rebranding, although organizations sometimes find brand refreshes to be overall beneficial).

Price regulation, like price caps, are a form of regulation best suited for markets that see little in the way of competition. That does not seem to be the case in the market for not-com gTLDs. Indeed, heavy regulation often has unintended consequences that can entrench market power and make competition difficult. For example, ideally moving TLDs should be similar to moving a business address for a user. Moving a business address has costs, but it is not a bar to seeking out real estate better suited to the entity. Indeed, the fact that it is commonly accepted that sometimes businesses move makes it easier when one does, as those that interact with the business know how to respond. Regulations that treat gTLDs like an address that can never be changed will discourage existing users from ever considering competing alternatives and will substantially restrict the viability of competition in the gTLD market.

Indeed, the more websites that move the easier moving will become as the public becomes educated on TLDs and movement between TLDs is more accepted. While not recommended, a price shock might actually increase long-term overall competition in the gTLD market. A price increase that existing users find unreasonable would motivate those users to begin educating themselves on choices in the TLD market and the logistics of moving TLDs. There would likely be articles written on why websites were moving, as well as pieces informing domain owners of how to plan a move themselves. The public would become better educated on the gTLD system and the options that exist, and TLDs would be perceived less as a part of a brand and more like a business address that can be moved. Users would also treat TLDs more like business addresses and will avoid actions that unnecessarily bind them to their TLDs.

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[13] Eastman Kodak Co. v. Image Technical Services, Inc., 504 US 451 (1992)

III. Conclusion

Competition law would not consider .org to have near the market power necessary to warrant regulation, especially utility-style price regulation. Additionally, the competitive landscape is only expected to increase in the future. The Public Interest Registry is unlikely to have any power to enact monopoly prices absent a price cap and any attempt to do so would likely be punished with a consumer exodus to competing gTLDs. As such, I believe that users are protected through competition among gTLDs from any ill-effects of the proposed changes to the .org contract. One of the major goals of the new gTLD program was to offer users choice and create competition for website registration. A user who believes .org to be pricing unfairly can move their business to an alternative gTLD, including some that may suit their needs and brand identity better. Indeed, this sort of competition is one of the primary goals and anticipated benefits of the New gTLD Program.

Additionally, users also have some protection from price increases under the proposed contract's terms. Public Interest Registry must give advance notice of any price increases: at least 30 days for new registrants and at least 180 days for existing registrants. Users may lock-in the current rate before the increase takes effect for up to ten years. This benefit provides users a great deal of stability in their domain pricing. This stability should also help increase competition, as existing users can even lock-in existing prices for the time necessary to move TLDs in a manner that minimizes any negative impact. This provides a large degree of stability and ability for users to explore their options.

Based on the reasons stated above, I do not believe this change in the .org contract provisions will harm new or existing domain name customers.