1st March, 2013

Memo

To: ALAC

From: Salanieta Tamanikaiwaimaro

Submissions to the ALAC on Impact of Closed Generics

Dear All,

These are some reflections on closed generic TLDs.

Background

A "Closed Generic" is a TLD that is a generic term, but domains within that TLD will not be sold to the public.

Today, there are 22 generic TLDs. These include .COM, .BIZ, .INFO and .NET. Domain names within today's generic TLDs are available for purchase by the general public. Generic TLDs that are available for purchase by the general public are NOT closed generic TLDs.

When ICANN held its open application process in June 2012, there were many applicants for Top Level Domains for both branded and generic terms. For example, there were applications filed to create the .BMW Top Level Domain, the .DOT, Top Level Domain, the .SEARCH Top Level Domain, and the .SHOP Top Level Domain. Some of the applicants intend to sell domain names within their proposed new Top Level Domains to the public, while others do not intend to sell domain names within their proposed new TLDs to the public.

The litmus test in my mind is what is the impact on global public interest? The Affirmation of Commitments (AoC) by the United States Department of Commerce (DOC) and ICANN clearly specify the promotion of competition, consumer trust and consumer choice.[1] There are two ways of examining the situation, one is by looking at the closed generic applications and the other is to look at it from the standpoint of ICANN which is beholden under the AoC. For the purposes of the questions that are being asked of the ALAC, I would like to submit a dual approach to viewing the issues.

Issues

The issues that arise are as follows:-

1. Would the endorsement of "Closed Generic" Applications create a situation or a series of situations whether now or in the future that will restrict competition?
2. Would the endorsement of "Closed Generic" Applications create a situation where there is a dominant position within the market?
3. Would the endorsement of the "Closed Generic" Applications create a restraint in trade of a particular market?

[1] Clauses 3 and 9.3 of the Affirmation of Commitment between the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers

4. Would ICANN be immune from anti-trust liability?

Traditionally, the prohibition and control provisions laid out in competition rules basically aims to prevent cartelization and monopolization in markets for goods and services. Such developments in markets inevitably harm consumer welfare which competition rules aim to protect. On the same token, there are instances where some agreement may limit competition to allow for social and economic benefits to pass to the other. In order to ensure that such agreements with a net effect of increasing competition can be made, an exemption regime is regulated in competition law and agreements between undertakings in the same level (horizontal) and different levels (vertical) of the market may be left exempt from the prohibition of the competition rules under an exemption system, provided they are not cartel agreements which are, by nature, out of the scope of exemption.

The *Sherman Antitrust Act* also referred to as the *Sherman Act* prohibits certain business activities that federal government regulators deem to be anticompetitive, and requires the federal government to investigate and pursue trusts, companies, and organizations suspected of being in violation.

On 4 August 2012, the Honorable Philip S. Gutierrez, United States District Judge ruled in *Manwin Licensing International S.A.R.L., et al. v. ICM Registry, LLC, et al.*[2] that "anti-trust" claims could be filed over controversial .xxx. See: *a. ICANN's Involvement in Trade or Commerce By its terms, the Sherman Act applies to monopolies or restraints of "trade or commerce." 15 U.S.C. §§ 1, 2.* ***The identity of a defendant as a nonprofit or charitable organization does not immunize that organization from antitrust liability****. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 101 n.22 (1984) ("There is no doubt that the sweeping language of § 1 [of the Sherman Act] applies to nonprofit entities.").* ***To the contrary, nonprofit organizations that act in trade or commerce may be subject to the Sherman Act****. Big Bear Lodging Ass'n v. Snow Summit, Inc., 182 F.3d 1096, 1103 n.5 (9th Cir. 1999) ("A nonprofit organization that engages in commercial activity . . . is subject to federal antitrust laws."). Rather than focusing on the legal character of an organization, an antitrust inquiry focuses on whether the transactions at issue are commercial in nature. Virginia Vermiculite, Ltd. v. W.R. Grace & Co. – Conn., 156 F.3d 535, 541 (4th Cir. 1998) ("We emphasize that the dispositive inquiry is whether the transaction is commercial, not whether the entity engaging in the transaction is commercial."). "Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances." United States v. Brown Univ. in Providence in State of R.I., 5 F.3d 658, 666 (3rd Cir. 1993).* ***In any circumstance, "[t]he exchange of money for services . . . is a quintessential commercial transaction****." Id. [My own underlining]*

Each of the generic TLDs presents a market and there are generic brands like .blog which if were closed could pose serious threats to freedom of expression for those who wish to register .blog. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) clearly provides for freedom of expression. The threat of limiting or restricting the ability of persons wishing to acquire .blog poses serious harm to the global blogging community and individuals.

For the purposes of assessing whether closed generic TLDs should be permitted, it is essential to engage in identifying the market for the TLD and whether there is likelihood that a monopoly or oligopoly would be created that could distort the market and prejudice public interest.

[2] CV 11-9514 PSG (JCGx), United States District Court, Central District of California, see: http://pdfserver.amlaw.com/tal/icann.pdf

Under the *Sherman Act § 2, 15 U.S.C. § 2*[3] monopolizing trade is a felony. Under the circumstances where this trade involves foreign nations such as generic TLD applications that have been made by countries outside the US, then *Sherman Act § 7 (Foreign Trade Antitrust Improvements Act of 1982), 15 U.S.C. § 6a* will apply in relation to conduct involving trade or commerce with foreign nations.

There is the possibility that something which is declared open can be later declared closed, depending on market dynamics and how competition is controlled. The other issue is who regulates the competition of the gTLD market? Is this supposed to be self regulatory where market forces are left to determine how the pendulum swings or does ICANN or the Applicant of the gTLD given discretionary rights to control its respective gTLD market?

However complex these questions, the litmus test for the ALAC is the impact on global public interest and I would propose that the considerations would be:-

- Is there a visible threat to the global public interest?
- What is the nature of the threat/challenge?
- Is there need to "seal off a market" to preserve competition?
- Are there generic terms where it is in the public interest to be closed?