

World Trademark Review Daily

European Commission calls foul on ICANN auctions
International - Hogan Lovells LLP

gTLDs

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The [Internet Corporation for Assigned Names and Numbers](#) (ICANN) launched the application process for new generic top-level domains (gTLDs) in January 2012. During the application window, over 1,900 new gTLD applications were submitted to ICANN for evaluation. When ICANN published the list of new gTLD applications, it transpired that a number of applicants had applied for the same new gTLD strings - there are 230 strings where there are two or more applicants, and this affects 750 new gTLD applications in total.

According to the ICANN new gTLD Applicant Guidebook, where two or more candidates have applied for the same new gTLD, or applied for confusingly similar new gTLDs, the applications go into a "contention set". Each contention set then needs to be resolved in order for the new gTLD to be awarded to one applicant.

ICANN envisages that most of these contention sets would be resolved by the competing applicants amongst themselves. For those cases where self-resolution of the contention set proves impossible, ICANN suggests conducting an auction as a mechanism of last resort for the resolution of the contention set, with the proceeds from the winning bid being paid to ICANN to firstly offset the cost of the new gTLD programme and to also possibly be used for future projects for the benefit of the internet community.

ICANN recently published for public comment a draft version of the [ICANN Auction Rules](#). The draft rules explain in great detail how and when ICANN would conduct an auction as a mechanism of last resort for resolving a contention set.

However, the draft proposal for ICANN auctions has come in for some serious criticism, not least from the [European Commission](#). The Commission raised its concerns that the ICANN auction process could have a negative impact on the "protection of public policy interests, competition, openness and innovation". In the view of the Commission, the ICANN auction process is weighted in favour of large, cash-rich gTLD portfolio applicants at the expense of "small, innovative and community applicants". As a result of the perceived unfairness in the ICANN auction process, the Commission feels that ICANN is going against its goals of encouraging diversity, innovation and security on the Internet, and is instead sacrificing these aims to commercial interests and letting those entities with the deepest pockets prevail in cases of string contention.

Indeed, in the view of the Commission, there is little or no incentive for financially stronger applicants to seek self-resolution of a contention set. However, based on the Commission's comments, it is not clear why it believes this to be the case.

In any event, the Commission also reminded ICANN of previous advice issued by ICANN's Governmental Advisory Committee (GAC) that, in the resolution of a contention set, preferential treatment be given to any new gTLD application that had "demonstrable community support". The Commission also reiterated the GAC request that a briefing be held on the public policy implications of using auctions as a mechanism of last resort to resolve a contention set.

The Commission also called ICANN out over the potential use of any funds that accrue to ICANN as a result of the ICANN auctions. In the Commission's view, there is a "lack of clarity as regards the destination of the significant funds that ICANN will receive as a result of these auctions" and that ICANN must begin a consultation process with the wider internet community over the potential use of such funds.

Whether the Commission's comments on the ICANN Auction process will cause any significant changes to ICANN's proposed rules remains to be seen. Taking into account the rapid pace of the new gTLD programme in recent months, it does appear as if ICANN is pushing towards the finishing line for this application round and any further modifications to the new gTLD application and evaluation process will be considered for inclusion in a future application window.

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