



European Communities Trade Mark Association

6 July 2018

## ECTA POSITION PAPER ON THE REVISION OF .EU REGULATION

### I. INTRODUCTION

ECTA is pleased to have the opportunity to provide comments regarding the Proposal for a Regulation of the European Parliament and of the Council on the implementation and functioning of the .eu Top Level Domain name and repealing Regulation (EC) No 733/2002 and Commission Regulation (EC) No. 874/2004 (hereinafter the 'Proposed Regulation') in the framework of the consultation on Modernisation of the regulations establishing a .eu top level domain name (REFIT).

### II. COMMENTS

The Commission is proposing a Regulation to ensure consistency and legal certainty for users and businesses alike. A Regulation provides a solid legal basis for ensuring that the Union is responsible for the .eu TLD and for the designation of its operator.

#### a) *Two New Important Elements*

The proposal includes two important elements:

- 1) The Extension on the Eligibility Criteria;
- 2) Vertical Integration or, in other words, the removal of the prohibition to offer registrations directly to the end users.

In particular, Article 3 'Eligibility criteria' expressly states the new requirements:

*"Registration of one or more domain names under the .eu TLD can be requested by any of the following: (i) a **Union citizen, independently of their place of residence**; or (ii) a natural person who is not a Union citizen and who is resident of a Member State; or (iii) an undertaking established within the Union; or (iv) an organisation established within the Union without prejudice to the application of national law."*

ECTA notes that the Commission is proposing the new requirement based on citizenship with the view to open the physical borders in relation to the European Identity. ECTA reflects the opinions of many members. As mentioned in the ECTA Position Paper of 13 June 2017 on the revision of .eu Regulations, ECTA has chosen not to take a position on this issue.

While Article 4 'Registration and revocation of domain names' recognizes the possibility of Vertical integration implicitly:

*1. A domain name shall be allocated to the eligible party whose request has been received first by the Registry in the technically correct manner as laid down by the procedures for registration requests on the basis of point (b) of Article 11.*

It is self-evident that the prohibition on the .eu Registry acting as a Registrar has been removed from the Regulation.

Besides the two above mentioned important novelties there are asymmetric provisions that seem to be more important to the Management of the Registry rather than to public policy principles.

The Proposed Regulation seems to have as its principal target the Registry's requirements rather than assessing the public policy and the necessary requirements of the new .eu domain name system.

In fact just at the beginning in Article 1 "Subject-matter and objectives" the following is established:

*"This Regulation implements the .eu country code Top Level Domain ('ccTLD') and lays down the conditions for its implementation, including the **designation and characteristics of the Registry**. This Regulation also establishes the **legal and general policy framework within which the designated Registry will function.**"*

It seems evident that the accent is put on the Registry and its characteristics as a tool to obtain the Public target that the European Institutions would like to obtain.

## **b) Management Options**

Discussions were developed quite extensively on the Management options of the new .eu system which finally were well summarized by the Executive Summary of the Impact Assessment of the Commission Staff Working Group as follows:

*This impact assessment (IA) explores a series of policy options which are mainly, but not exclusively, extrapolated from problem drivers relating to the "outdated and rigid legislation" and "governance mechanisms". Two separate cross-cutting issues, which aim to address the issues emerging from the rapid changes to the market", are taken into account horizontally.*

*OPTION 0: BASELINE SCENARIO: Maintenance of the current regulatory framework for the .eu.*

*OPTION 1: COMMERCIALISATION: Simplifying the regulatory framework while outsourcing the operation and management of the Registry to an external for-profit service provider.*

*OPTION 2: MODERNISING THE LEGAL FRAMEWORK: Replacing the current legal framework with one principle based legal instrument. An external management system for the .eu TLD, based on a contract, would be maintained.*

**OPTION 3: SEPARATE GOVERNANCE: Combines option 2 with the creation of a multistakeholder body which would have an advisory role. This body would be independent from the .eu Registry.**

*OPTION 4: INSTITUTIONALISATION: Management and operation of the Registry within a department of the European Commission (a) or an EU Agency (b1: EUIPO, b2: ENISA) Options 1, Option 4(.a) and Option 4(b2) were discarded at an early stage as they do not meet the policy objectives. In relation to the two cross-cutting issues dealt with separately, the IA analyses both the possibility of the .eu Registry to offer*

*direct registration to registrants given changes in market conditions, and possible changes to the eligibility criteria for obtaining a .eu TLD.*

### **c) Multistakeholder Option**

Preferred option was the OPTION 3, therefore the solution was found in an Independent Governance (likewise it is now) but seriously improved by the Multistakeholder Group that could advise the Commission and the Registry. As it is expressly stated in the Recitals:

“Whereas:

*(20) The Council Conclusions on Internet Governance of 27 November 2014 reaffirmed the European Union's commitment to promote multistakeholder governance structures that are based on a coherent set of global Internet governance principles. An inclusive Internet governance refers to the development and applications by governments, the private sector, civil society, international organisations and the technical community, in their respective roles, of shared principles, norms, rules, decision-making procedures and programmes that shape the evolution and use of Internet.*

*(21) A .eu Multistakeholder Council should be set up with an advisory role to the Commission in order to strengthen and widen input into the good governance of the Registry and the matters covered by the principles and procedures on the functioning of the .eu TLD and increase the transparency of the Registry's commercial and operational practices. The members of the group should reflect Internet Governance multistakeholder model and be appointed by the Commission on the basis of an open and transparent procedure.”*

And it is established by Article 14 of the Proposed Regulation:

*“Article 14 .eu Multistakeholder Council*

*1. A .eu Multistakeholder Council shall be established to advise the Commission on the implementation of the present Regulation.*

*2. The .eu Multistakeholder Council shall be composed of representatives drawn from the private sector, the technical community, Member States and international organisations, civil society and academia and appointed by the Commission on the basis of an open and transparent procedure.*

*3. The .eu Multistakeholder Council shall have the following tasks: (a) assist and advise the Commission in the implementation of the present Regulation; (b) issue opinions on matters of management, organisation and administration of the .eu TLD; (c) advise the Commission on matters of monitoring and supervision of the Registry.”*

In this way, the Proposed Regulation creates a body which will be independent from the Commission and from the Registry and that will only advise the Commission and give opinion to the Commission on management and will monitor and supervise the Registry. This body will not have any decision power and its opinions and advices will not be binding on the Commission or on the Registry.

This new body cannot replace the internal bodies of the Registry either in case the Registry will be a non-profit organization (as it is now) or in case it will be chosen amongst for-profit organizations. Therefore, we will have the risk of a conflicting function and purposes with a possible internal body of the Registry (for example, at the moment with the Strategic Committee of EURid).

The Multistakeholder Council, however, could have its important task in order to help the Commission to elaborate General Plans and Strategy in the rapidly changing environment as it is the international domain name system.

This could be positive only if it will not slow down the decision process and if the personalities chosen to be part of it will be outstanding professional experts in the domain name business.

One good idea would be to have Members of the Registry's Directive Body to be part of this Multistakeholder Body and vice versa people of this Multistakeholder Council Group to be Member of the Registry's Directive Body. This will enhance the communication routes at any level: from the Registry to the Commission and vice versa.

The strategic Policy of the Commission will be more easily and immediately implemented by the Registry and on the other side strategic visions that come up from the Registry's expertise on the field would be immediately reached the Commission through and thanks to the approval of the Multistakeholder Group.

#### **d) Access to Registry Data and Take Down provisions**

A more transparent and clear provision on this subject would be welcome. It is necessary for the Registry to know exactly how to stand in relation to Public Authorities asking data or requesting interlocutory measures such as seizure or other urgent measures in relation to the domain names registered before the Registry. It would be necessary to establish clear lines within which the Registry is obliged to discover data or to seize or suspend domain names. If a Public Prosecutor's order in criminal case or a Judge interlocutory order in civil case are "Orders" that the Registry has to meet and follow, this should be clearly stated in the Regulation avoiding any possible contrary national interpretation.

#### **e) WHOIS database**

Article 12 (2) of the Proposed Regulation makes reference to the disclosing of data about holders of .eu domain names who are natural persons, namely: "*The WHOIS database shall contain relevant information, which is not excessive in relation to the purpose of the database, about the points of contact administering the domain names under the .eu TLD and the holders of the domain names. **Where the domain name holder is a natural person, the information that is to be made publicly available shall be subject to the domain name holder's consent within the meaning of Regulation 2016/679.***"

The data of the holders of .eu domain names should be disclosed based on the legal basis of public interest as provided by Article 6 (1) (e) of the EU Regulation 2016/679 ("GDPR") – "*processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*" and also as provided by Article 111 (9) of the EU Regulation 2017/1001 on the EU Trade Mark, for the EU trade mark registry, namely: "*All the data, including personal data, concerning the entries in paragraphs 2 and 3 **shall be considered to be of public interest and may be accessed by any third party.** For reasons of legal certainty, the entries in the Register shall be kept for an indefinite period of time.*"

The consent may be withdrawn at any moment, according to Article 7(3) of the GDPR, if ever given – "*The data subject shall have the right to withdraw his or her consent at any time. [...]*"

In the context where there might be cybersquatters, among others, and as a general scope in order to protect also the rights and interests of the owners of IP rights, of public authorities, etc, the disclosing of the data of the holders of .eu domain names in the WHOIS database,

including natural persons, should not depend on the consent given or not, withdrawn or not, by the holder of the .eu domain name.

The legal basis for disclosing such data should be the public interest, as these data are of public interest as is the case of the data regarding the holders of EU trade marks.

## **f) EURid**

The positive role of EURid as the Registry in charge has to be underlined for the important achievements reached in these years. New registrations of domain names are increasing after a period of stagnation of few years ago that was experienced by all the main gTLDs and ccTLDs. Furthermore .eu has still the highest renewal rate in the business that it is also confirmed in 2017 and in the first quarter of 2018 around 80% against 73% that is the average renewal rate of the other domain name Registries.

In 2015, 97% of the Registrars described themselves as “satisfied or extremely satisfied with the services provided by EURid”.

“Trust” has become a mantra for EURid that has started a program of suspension of abusive domain names. In 2017, around 20126 domain names were suspended while only in the first quarter of 2018 the suspended domain names are in the range of 30.000 to eliminate those domain names that could have false statements in them. This means to take the Trust mission seriously in order to protect the public of consumers and in particular the weakest persons that more than other needs more attention and protection.

## **g) ADR**

Finally, also the ADR.eu proceedings are going on quite well and the peculiarity of the .eu ADR proceeding that is well known to be the “double OR system” should not be changed and rather should become the standard of all the ADR proceeding world-wide.

The financial incentives to reduce the arbitration fees should be continued and possibly established by the Implementing Regulation or the Concession Contract with the .eu Registry.

## **h) Brexit**

Article 18 ‘Transitional provisions’:

*“1. Domain name holders that have domain names registered pursuant to point (b) of Article 4 (2) of Regulation (EC) No 733/2002 shall retain the rights on the existing registered domain names under the .eu TLD.”*

In the above provision it is established that domain name holders who met prior eligibility criteria can retain rights on existing names. This provision could conflict with the possible outcome of the Brexit negotiations and with the Notice published by the Commission on the impact of Brexit of 28 March 2018.

It should be added a provision that takes care of the new political situation vis à vis UK citizens and residents after the Brexit and that would rule the new scenario even from a transitional point of view.

### III. FINAL REMARKS

We hope that the above comments are of help and will be given due consideration. We would be happy to further elaborate on any of the aspects mentioned above.

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ECTA, which was formed in 1980, is an organisation concerned primarily with trade marks and designs. ECTA has approximately 1,500 members, coming from all the Member States of the EU, with associate Members from more than 50 other countries throughout the world. ECTA brings together those practicing in the field of IP, in particular, trade marks, designs, geographical indications, copyright and related matters. These professionals are lawyers, trade mark and patent attorneys, in-house lawyers concerned with IP matters, and other specialists in these fields. ECTA does not have any direct or indirect links to, and is not funded by, any section of the tobacco industry.



The extensive work carried out by the Association, following the above guidelines, combined with the high degree of professionalism and recognised technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognised expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU member countries;
- European Union Trade Mark Regulation and Directive;
- Community Design Regulation and Directive;
- Organisation and practice of the EUIPO.

In addition to having close links with the European Commission and the European Union Intellectual Property Office (EUIPO), ECTA is recognised by WIPO as a non-Government Organisation (NGO).

ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy.