

EC paper on ICANN: Applicable law

EUROPEAN COMMISSION

ICANN – informal background paper

Respect for applicable law

1. General description of the issue

ICANN's "Articles of Incorporation" state that:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

ICANN's role in determining who can enter the market for gTLD domain names (registries and registrars) under what conditions, and how such rules reflect applicable competition law, is therefore a central issue for competition authorities such as the European Commission.

The letters sent to ICANN just before the Singapore meeting, from the EU and US competition authorities followed earlier efforts by the GAC to get ICANN to justify its 2010 decision to reverse an earlier restriction (explicitly reconfirmed by the Board as recently as March 2010) on cross ownership by registries and registrars ("vertical integration"). This issue is particularly important given that the previous restrictions were originally introduced specifically to create a "level playing field" between registrars, to thereby promote competition in the interests of domain name users.

The ICANN Board decided in Singapore to reject the request of the competition authorities to suspend the implementation of the decision (to allow cross ownership) pending further market analysis and evaluation of the likely impacts on competition. This decision raises serious concerns about possible negative implications for competition, the level playing field at the registrars' level and a negative market outcome for consumers. Moreover, as pointed out by the GAC in Singapore, it may also expose gTLD applicants to conflicts with applicable law.

An additional and related problem is the limited possibilities that ICANN stakeholders, including governments and public authorities, have to contest ICANN Board decisions if they feel they are inconsistent with either ICANN's own by-laws or applicable law. Such stakeholders may perceive that litigation before a US court offers

a less appropriate "review mechanism" in relation to potential conflicts with international law and national law of third countries than in relation to US law. Extra-judicial alternatives for a redress may also be desirable to enhance the accountability of the IANA contractor in a manner that more flexible, more timely and more economical than litigation.

2. Possible initiatives

ICANN needs to pay more respect to its obligations as laid down in its Articles of Incorporation and mechanisms to ensure that those are abided by should be considered. If ICANN is unwilling to pay greater heed to the concerns of relevant public authorities on its own accord, then this requirement may be imposed externally via the IANA contract.

In addition, some form of independent review mechanism needs to be introduced in situations where stakeholders feel that a decision by the Board does not respect either ICANN's own by-laws or applicable law.

3. Possible implementation

The IANA contractor's rules should include a provision corresponding to the above-quoted provision of ICANN's current "Articles of Incorporation". This should be complemented with the wording included in the US Government draft "statement of work" in the recent Notice of Inquiry, which states that

"the Contractor shall act in accordance with the relevant national laws of the jurisdiction which the TLD registry serves".

ICANN has so far not satisfactorily addressed concerns regarding its compliance with its own rules, including its Bylaws and Articles of Incorporation. It has created rules and procedures that can be in breach of or negatively impact on the implementation of relevant international or national laws, in particular those in the economic sphere (such as competition and trademark law). Measures must be implemented to ensure the strict application of such provisions by the IANA contractor. Such measures may include putting in place appropriate extra-judicial review mechanisms to ensure that Board decisions are checked by an independent review body against such provisions, notably in cases where such decisions would not be prima facie in accordance with applicable laws, as described above.

4. Timeline for implementation of these modifications

Decision in Dakar and if not, additional provisions in the IANA contract: to be introduced by the USG in the next contract (start date to be confirmed, sometime between 30th September 2011 and 28th February 2012).