

EC paper on ICANN: Corporate governance

EUROPEAN COMMISSION

ICANN – informal background paper

Applying the highest standards of corporate governance

1. General description of the issue

The original structure of the ICANN Board and related staff and policy making processes reflects the time when the multi-stakeholder governance model was set up (in 1998) when the Internet was still in "its early stages". The ICANN model has generally worked well until very recently. As the Internet has become more economically, socially and politically important globally, and as ICANN's decision-making increasingly impact on important public policy interests (including on international and national rules and regulations), the need for the original governance architecture to be revisited has become more urgent. To date, ICANN as a public interest organisation that implements policy decisions which affect the operation of the Internet does not meet the required standards of independence, transparency and accountability.

Already, as ICANN has evolved, there has been general agreement that it has needed to adhere to higher levels of accountability and transparency (as stipulated for example in the Affirmation of Commitments). The implementation of the Accountability and Review Team recommendations can contribute to raising the current standards. However these recommendations do not sufficiently address the more fundamental issue of the independence of Board members and staff, for ICANN to maintain legitimacy as a public interest organisation, it must be seen as being able to take decisions independently of various interests present in its community.

In this sense, there are legitimate concerns related to the current situation which is characterised by a lack of independence of the Board since its members can include employees of organisations that a) are contractually involved with ICANN already and b) stand to gain significantly in a financial sense depending on which decisions ICANN take on particular issues (especially as these same stakeholder are also the major source of ICANN funding through registry and registrar fees)

In addition, at the end of their term, currently even Board members without such direct connections can subsequently take positions in organisations that have benefitted from Board decisions.

Last, but not least, Board members (except the Chair) are not directly remunerated by ICANN and have to rely on third parties for salary. ICANN has therefore a "volunteer" Board to manage, under considerable pressure of economic interests, a public resource.

All these facts raise real and substantive problems of conflict of interest that are not addressed adequately by ICANN's current governance rules.

Beyond the Board, possible conflict of interest extends to ICANN staff who can be employed (at least for part of their time) by a private organisation that has a direct interest in ICANN's activities. Furthermore, the growth in ICANN staff salaries in recent years appears to be directly related to increases in ICANN's revenues, suggesting a de facto incentive for staff to favour policy options that maximise revenue growth, even when these may conflict with the broader public interest.

2. Possible initiatives

The future contractual arrangements between the US Government and the body managing internet names needs to identify which internal governance rules should apply to that body (and be set out in its by-laws) in order to ensure it abides by the highest standards of corporate governance and in particular provides the strongest possible safeguards against conflicts of interest.

Those internal governance provisions (applicable to both board and staff) should spell out:

- i. clear rules defining what constitutes a potential or an actual conflict of interest of board members and staff both prior to, during and after their mandate;
- ii. implementing measures to avoid the occurrence of such conflicts of interest during their mandate (transparency on revenue and assets, direct or indirect stakes including of relatives, etc.)
- iii. independent control mechanisms;
- iv. penalties in case of breach of rules.

In application of the 4 above-mentioned provisions, these rules must be accompanied by clear enforcement mechanisms. Simple declarations on the existence of a conflict of interest without efficient and effective provisions to deal with such situations are useless.

More specifically, it should not be allowed that a Board member comes from any contracted party. There also needs to be clearer limitations on retiring Board members working for contracted parties (e.g. for at least 2 years). This change should be accompanied by adequate remuneration of Board members (as the Accountability and Review Team has already recommended) to ensure their independence and reward their professionalism.

Furthermore, the current Nominating Committee Procedures need to be revised to

ensure that Board candidates are truly free from potential conflict of interest issues, and that they are suitably qualified to meet the complex and time-consuming tasks faced by the ICANN Board.

An alternative to this could be that the Board members match the independence of the Board of the food safety authority where Members are not national nominees but are still expected to govern in the EU Public interest.

3. Possible implementation

For the European Commission it is essential that the implementation of these provisions properly address the competition concerns raised in its letter dated 14.6.2011 to ICANN and in particular redresses the concern expressed in point 19 thereof: " It should be noted that ICANN's current board governance rules allow contracted parties such as registrars to have seats as directors and that this has indeed been the case in the past.

Besides, ICANN appears to depend to a substantial extent on the funding by registries and registrars and thus by parties that have a direct financial interest in its decisions. Both issues may cast doubts on the impartiality of its decision-making."

Necessary IANA contract amendments:

- The current provisions of the IANA contract related to "Organizational Conflicts" already foresee measures to "mitigate" the effects of the conflict of interest discovered after award of the contractor position, but these need to be substantially strengthened to ensure that the supervisory body (e.g. Board of Directors) for the IANA contractor must not contain representatives from any organisation that can materially benefit from any policy-making decisions of that body.
- More specifically, the relevant provisions of the IANA contract might be modelled following the standard practice of the Commission and other international organisations when dealing with external contractors, i.e. including contractual provisions stating that:

"The Contractor shall take all necessary measures to prevent any situation that could compromise the impartial and objective performance of the Contract. Such conflict of interests could arise in particular as a result of economic interest, political or national affinity, family or emotional ties, or any other relevant connection or shared interest. Any conflict of interests which could arise during performance of the Contract must be notified to the Commission in writing without delay. In the event of such conflict, the Contractor shall immediately take all necessary steps to resolve it."

"The [Commission] reserves the right to verify that such measures are adequate and may require additional measures to be taken, if

necessary, within a time limit which it shall set. The Contractor shall ensure that his staff, board and directors are not placed in a situation which could give rise to conflict of interests. The Contractor shall replace, immediately and without compensation from the Commission, any member of his staff exposed to such a situation."

"The Contractor shall abstain from any contact likely to compromise his independence."

"The Contractor shall pass on all the relevant obligations in writing to his staff, board, and directors as well as to third parties involved in performance of the Contract. A copy of the instructions given and the undertakings made in this respect shall be sent to the [Commission] should it so request"

- Contractors must provide evidence regarding steps they will take to ensure that they do not materially/financially benefit from the operation of the IANA functions. Specifically, the operating costs of the IANA functions must be "ring-fenced" from other budgetary elements, and a separate revenue stream introduced to ensure transparency on financial "neutrality".
- Members of the supervisory body for the contractor should commit to rules preventing their employment, directly or indirectly, after retirement and for a period of [2] years thereafter, from the Board, by any third party separately contracted to the main contractor during either the period of Board activity or for [2] years thereafter. Such rules shall be subject to a positive advice of the GAC and will after approval be published. Adequate control mechanisms and sanctions in case of breach shall also be drawn up, and be subject to a positive advice of the GAC.

Other steps that need to be taken within ICANN:

- ICANN Board members should be full-time, professionally paid professionals with requisite skills (e.g. relevant financial, legal and technical skills) and with no outside employment. A remuneration policy will need to be developed. Remuneration for Board members will need to be set at a level which ensures their independence and enables ICANN to attract the best qualified candidates from around the world.
- The Nominating committee should publish a full list of candidates to ensure full transparency and improve confidence on the selection procedure. All candidates shall publish a statement of possible conflicts of interest, of sources of revenue and of their patrimony (according to a standard format). Those candidates who are elected to the Board shall submit a statement indicating how they will remediate all possible conflicts of interest; the statement of their accounts and patrimony shall be published and updated once a year.
- ICANN should ensure that staff cannot hold additional jobs which raise possible conflicts of interest.
- ICANN shall set up an ethical committee composed of independent auditors to

control the correct application of the provisions regarding the independence of Board and staff members.

4. Timeline for implementation of these modifications

- a. 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)
- b. Remuneration for Board members: the ICANN Board already indicated in Singapore that this ATRT recommendation will be subject to further study and consideration but no deadline was indicated. The Board should commit to implementing remuneration by the end of 2012.
- c. The Board should instruct the nominating committee to publish a list of candidates and associated information on possible conflicts of interest as part of their selection procedure and next call for candidates. (The current procedure is already underway and ends in September 2011. The next call is due early next year).
- d. The Board should instruct the ICANN CEO to review staff contracts by end of September with a view to implementing "full-time" sole-employer clauses by the end of 2011.
- e. The Board can set up a board of independent auditors by the end of 2011.