

CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

Comments on the IANA Naming Function Agreement¹

The Centre for Communication Governance appreciates the continued efforts at increasing participatory transparency during the IANA Transition.² Since the scope of this call for public comments³ is limited, these comments do not discuss any substantive issue within the IANA Stewardship Transition Coordination Group (ICG) Proposal.⁴ However, given that this is the final stage of implementation of the IANA Transition, the inconsistencies noted below need to be resolved before the IANA Naming Function Agreement⁵ (Agreement) can be finalised.

These comments highlight the inconsistencies and ambiguities noted between the Agreement and other documents, such as the ICG Proposal, Public Technical Identifiers (PTI) bylaws and ICANN bylaws.

1. ICG Proposal⁶

The Agreement relates to Part 1 of the ICG proposal, which was developed by the names community. A closer reading of the Agreement with the ICG Proposal revealed some missing details regarding community oversight, overriding effect of part 1 of the ICG proposal,

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² The Berkman Centre notes participatory transparency as the process through which stakeholders and the general public are involved in decision-making, such as public comments. See 'Accountability and Transparency at ICANN: An Independent Review', The Berkman Centre for Internet and Society, (2010) p. 15, available at <https://www.icann.org/en/system/files/files/review-berkman-final-report-20oct10-en.pdf> (last accessed 8th September, 2016).

³ Call for public comments on the IANA Naming Function Agreement, available at <https://www.icann.org/public-comments/iana-naming-function-agreement-2016-08-10-en> (last accessed 6th September, 2016).

⁴ IANA Stewardship Coordination Group (ICG) Proposal, available at <https://www.icann.org/en/system/files/files/iana-stewardship-transition-proposal-10mar16-en.pdf> (last accessed 6th September, 2016).

⁵ Draft IANA Naming Function Agreement, available at <https://www.icann.org/en/system/files/files/proposed-iana-naming-function-agreement-10aug16-en.pdf> (last accessed 6th September, 2016)

⁶ *Supra* note 4.

operational and architectural changes. Certain inconsistencies were also noted between the ICG proposal and the Agreement over key personnel.

- a. Community oversight:** The ICG proposal consists of three parts, which were individually developed by the customer communities related to domain names, number resources and protocol parameters.⁷ Through their policy and oversight over the three functions, these communities have had a direct operational/service relationship with the IANA Functions Operator (IFO) for decades⁸ and their inputs thus have special authority. According to the names community, a satisfactory transition proposal should include the ability of the multistakeholder community to be able to ensure that ICANN acts according to community requests vis-à-vis IANA names operations.⁹ Accordingly, the proposal also states that the community should have the ability to require the selection of a new IFO as they relate to names, if necessary after attempting remediation.¹⁰ However, there is no mention of this in the Agreement.¹¹ Since this has a direct bearing on the future of PTI as the IANA functions operator, it must be included within the Agreement as well.
- b. Overriding effect:** The ICG Proposal takes into account the possibility that performance of non-names IANA functions may be subcontracted to PTI.¹² In this eventuality, it states that these new agreements cannot override Part 1 (Domain Names) of the ICG Proposal (and by extension, the Agreement).¹³ This is to ensure that future agreements do not impinge on the names functions.¹⁴ This provision is not in the Agreement. Now that number and protocol functions are also subcontracted to PTI,¹⁵ it is recommended that a section to this effect should be included.

⁷ *Supra* note 4 at para X003 at p 3.

⁸ *ibid.*

⁹ *ibid* at para 1104 at p 49.

¹⁰ *ibid.*

¹¹ *Supra* note 5 at Section 9.3 (a) at p 13. The Section while stating the procedure for a future transition fails to mention the involvement of the multistakeholder community in the remediation and appointment of the successor IFO.

¹² *Supra* note 4 at para 1105 at p 50.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ See 'Subcontracting Agreements', Post-Transition IANA Overview, available at <https://www.icann.org/en/stewardship-implementation/post-transition-iana> (last accessed 8th September, 2016).

- c. Operational and Architectural Changes:** The Proposal states there should be a standing committee that may step in when there are changes proposed to the internal functioning of the IFO.¹⁶ This becomes important as no external approval is required for these changes. However, there is no mention of the standing committee in the Agreement.
- d. Key Personnel:** The CWG in its proposal has included a draft agreement that outlines key provisions to provide guidance for the final IANA Functions Transition Agreement.¹⁷ The draft provides for the appointment of Key Personnel consisting of the 1. Qualified Programme Manager, 2. IANA Functions Programme Manager and 3. IANA Function Liaison for Root Zone Management.¹⁸ The Key Personnel stipulated in the proposal are different from those provided in the Agreement which consist of the 1. General Manager, 2. Director of Security and 3. Conflict of Interest Officer.¹⁹ The duties of the Qualified Programme Manager in the proposal are similar to that of the General Manager in the Agreement,²⁰ but since the duties of the other Key Personnel have not been laid out in the ICG proposal it is difficult to understand if their roles have been taken into account in the final agreement. With regard to the duties of the Director of Security²¹ and the Conflict of Interest Officer,²² it is not clear how effective their roles would be owing to the fact that they have no implementation powers under the agreement.

2. PTI Bylaws²³

In accordance with the ICG Proposal, PTI was incorporated as a subsidiary of ICANN. This non-profit, public benefit corporation has been set up in California with the sole purpose of carrying out the IANA Functions on behalf of ICANN. These bylaws govern PTI. It is noted that the Agreement could benefit from certain details mentioned in the PTI bylaws, such as the appointment of key personnel.

¹⁶ *Supra* note 4 at para 1156 at p 61.

¹⁷ *ibid* at Annex S.

¹⁸ *ibid* at p 151.

¹⁹ *Supra* note 5 at Section 4.9 at p 7.

²⁰ *ibid* at p 150 for the duties of the Qualified Programme Manager. For the duties of the General Manager refer to *supra* note 5 at Section 4.9 at p 7.

²¹ *supra* note 5 at Section 11.5 at p 15.

²² *ibid* at Section at Section 4.9 (b) at p 7.

²³ Proposed bylaws of the Public Technical Identifiers (PTI), available at <https://www.icann.org/en/system/files/files/revised-pti-bylaws-18aug16-en.pdf> (last accessed 7th September, 2016).

- a. **Appointment of Key Personnel:** The Agreement is silent about the procedure for appointment of key personnel, as are the PTI bylaws. However, the bylaws do provide a list of additional qualifications that apply to the appointment of Directors under Section 5.3.²⁴ These restrictions should apply to the appointment of key personnel as well, to avoid conflicts of interest.

3. ICANN Bylaws²⁵

ICANN's existing bylaws were amended to incorporate the recommendations proposed by the IANA Transition Proposal package.²⁶ Certain inconsistencies crop up when the Agreement is read with the amended bylaws. For instance, the powers of the Customer Standing Committee are much weaker in the Agreement as compared to the ICANN bylaws. There is a need for greater clarity with respect to the appointment of key personnel.

- a. **Budget:** Section 10.2 of the Agreement discusses PTI's obligations regarding preparation, submission and monitoring of the annual budget, in accordance with the PTI bylaws. It also refers to the 'Approved IANA Budget'. The ICANN bylaws²⁷ make a reference to two kinds of budgets: an IANA Budget which is to be made by ICANN, and a PTI Budget, to be prepared by PTI. This Article should be amended to reflect the two different budgets that are being discussed in this section.
- b. **Customer Standing Committee (CSC):** The bylaws provide for the formation of a CSC as a monitoring body to ensure customer satisfaction over PTI's performance of the IANA naming function.²⁸ The CSC is also authorised to escalate certain matters to the GNSO and ccNSO, which have the authority to further escalate the matter and even ask for a special IANA Function Review (IFR).²⁹ A special IFR has amongst other powers, the power to recommend a separation process which entails the

²⁴ *ibid* at Section 5.3 at pp 4-5.

²⁵ Amended ICANN bylaws, available at <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf> (last accessed 7th September, 2016).

²⁶ This consists of the ICG proposal and the CCWG-Accountability proposal.

²⁷ *Supra* note 25 at Section 22.4 (b) at p 121.

²⁸ *ibid* at Section 17.1 at p 90.

²⁹ *ibid* at Section 17.1 at p 91. Reference to this feature of the escalation mechanism has also been made in the ICG Proposal, *supra* note 4 at para 1139 at p 56.

transition of the IANA function to a successor IFO.³⁰ However, this is not provided for either under Performance Monitoring in Article VII, or Escalation Mechanisms in Article VIII of the Agreement. Though the proposal gave the CSC stringent power to ensure compliance, these powers have been diluted in the Agreement.

- c. **Appointment of Key Personnel:** ICANN has a clear conflict of interest policy to ensure that its Directors, Officers, Board Liaisons and Key Employees act in a fair and independent manner that is in the best interests of the organisation.³¹ Accordingly, there are restrictions in place for the appointment of certain positions.³² As mentioned in 2.a. (Appointment of Key Personnel) above, the PTI bylaws list certain restrictions for the appointment of Directors, in order to prevent a conflict of interest. Similarly, the ICANN bylaws also provide such a list.³³ These restrictions should apply to the appointment of key personnel as well, to avoid conflicts of interest.

General concerns:

There are also some general concerns based on reading the Agreement:

- I. **Confidentiality clause:** The confidentiality clause detailed under section 12.1 of Article XII states that *“Contractor agrees, in the performance of this Agreement, to keep the information furnished by ICANN or acquired or developed by Contractor in performance of this Agreement and designated by ICANN, in the strictest confidence.”*³⁴ This may create a conflict with the Transparency provisions in section 6.1.³⁵ It is recommended that this clause be made subject to Article VI,³⁶ to ensure that PTI functions in an open and transparent manner.

³⁰ *ibid* at Sections 18.12-19.4 at pp 105-119. If the Special IFR recommends a separation process, a Separation Cross Community Working Group (SCWG) will be formed to review issues and make recommendations. The SCWG is then empowered to make a recommendation ranging from ‘no action required’ to the recommendation for a new IFO or the reorganization of PTI.

³¹ ICANN Conflicts of Interest Policy, available at <https://www.icann.org/resources/pages/governance/coi-en> (last accessed 8th September, 2016).

³² *Ibid* at Article II.

³³ *Supra* note 25, Section 7.4 at p 44.

³⁴ *Supra* note 5 at p 15.

³⁵ *ibid* at p 9.

³⁶ *ibid*.

II. Survival of terms: Section 9.4³⁷ lists the clauses that survive termination of this Agreement. The Customer Mediation Process under Section 8.1³⁸ is not mentioned here. This mediation process is a remedy available to customers of PTI, if a customer service complaint does not get resolved through the other complaint resolution processes.³⁹ Therefore, it is important for this clause to survive termination, so that ongoing mediations do not get affected.

³⁷ *ibid* at p 14.

³⁸ *ibid* at pp 11-12.

³⁹ *ibid*.