

KEY QUESTIONS and ISSUES

The Co-chairs have worked with support staff to note the many questions posed during the webinars and elsewhere regarding the CWG proposal published on 1 December 2014. Further, we have worked together with support staff and the topic leads in order to collate and organise these. Where there appeared to be a common view within the CWG on the answer to a question, we have attempted to capture that view within this document. Where we believe that the answer to a question remains substantially open, including those for which an answer has not yet been developed, these questions are not reflected in this document; instead, they will be used to inform the further work of the CWG.

Q1: Why has a corporation - Contract Co – been proposed rather than an unincorporated entity?

A: The existence of a “legal entity,” i.e., one that has separate legal existence is integral to the CWG’s overall transition proposal. Only a legal entity can enter into binding, enforceable contracts. This is critical, as overall accountability for performance of the IANA Functions will rest on the ability to enforce the agreement and, if necessary, to change operators (by means of issuing a public tender or otherwise) for the IANA Functions Contract at some point in the future.

There are other types of entities with “legal personality,” such as partnerships, limited liability companies, trusts, estates, and joint ventures, but the non-profit corporation seems the most appropriate, as it does not require owners, partners or members.

Some have suggested that an incorporated entity might not necessarily be needed, by citing examples where they believed an ‘unincorporated’ approach had been used. The use of an unincorporated association raises numerous challenges. First, an unincorporated association is a membership entity, at least in the United States, and that raises a host of new issues. Second, in most U.S. states, an unincorporated association is not recognized as a legal entity. This is apparently true in a number of other jurisdictions, as well. As such, an unincorporated association cannot enter into contracts; if it does, they would likely either be void or considered obligations of the members. Third, an unincorporated association typically does not provide “limited liability,” i.e., the members would be jointly and severally liable for all debts, and, in the event of any successful litigation against the association, any settlement or judgment. This means that if some members were not in a position to pay a share of these debts, the more financially capable participants might have to pay more or even the entire amount. The use of informal groups or unincorporated associations may be satisfactory in situations where a legally-recognized contract is not necessary or where the risk of litigation is close to nonexistent. This will not be the case with the IANA Functions Contract. Finally, the use of an incorporated association may not provide any real advantage -- if an unincorporated association has legal standing under the laws of a particular jurisdiction to enter into agreements, it almost certainly will be considered to have that jurisdiction as its “domicile.”

Our sense was that many stakeholders would be unwilling to agree to proceed with contracting, enforcing the contract and a potential tender without the limited liability protection and other advantages afforded by the corporate form, for the reasons stated above.

Q2: In which jurisdiction would Contract Co. be incorporated?

A: This has yet to be discussed in detail, so it remains to be determined. It is worth noting, however, that choosing a particular jurisdiction does not confer immunity from litigation - if Contract Co. were to be a UK-based entity, it could still be sued, for example, by a Brazilian (or American) company. Further, depending on facts and circumstances, that lawsuit could be initiated in a jurisdiction other than the UK (e.g., Brazil or the U.S.). From a business certainty perspective, there is an argument that may favour U.S. jurisdiction, because the U.S. is where there has been the most litigation around domain names, so the established legal precedents may make for a more certain and predictable business and legal environment.

There may be a perception that partial or even full immunity from litigation or even national legislation may be available in other jurisdictions, such as Switzerland. It may be worth pointing out that many countries provide some form of special treatment, but this is generally restricted to international organizations, which criteria Contract Co would not meet. Moreover, many countries offer this treatment -- the UK, Italy, Canada, Switzerland, even the U.S. (so one does not necessarily have to change countries to secure this). Finally, immunity from litigation may be inconsistent with accountability, since litigation is a powerful form of enforcing accountability.

Q3: How would Contract Co. be funded?

A: This issue is currently being considered by the CWG, but several options may be available. The ongoing operating expenses of Contract Co. are not expected to be great, as it would have a limited purpose and scope, with little or no staff. Its directors would not be remunerated and any actual meetings that it may have to hold would likely be held in conjunction with regular ICANN meetings or via conference calls, virtual meeting rooms, etc.

It would require funding for the actual incorporation and preparation of organizational documents, for independent legal advice on the contract, as well as for things such as directors liability insurance.

The most obvious way to deal with these funding needs would be to require the IANA Functions Operator to pay for these costs as a condition that would be included in the contract.

Another way would be to ask the registries as direct IANA customers to voluntarily contribute funding or pay a fee for services, in particular should the community feel that accepting ICANN funds may somehow compromise Contract Co.'s independence.

Q4: How would Contract Co. deal with lawsuits?

A: This issue is currently being considered but a variety of options exist. Firstly, Contract Co., like any other corporation, would mitigate the risk of litigation by having access to skilled and independent legal advice both during the preparation of the IANA Functions Contract and any subsequent challenges in respect of its contents.

Secondly, the IANA Functions Operator could be required under the contract to indemnify Contract Co. in respect of any litigation involving Contract Co., including litigation that the IANA Functions Operator might initiate. This would reduce litigation risk by discouraging the IANA Functions Operator from using the courts to challenge Contract Co. Typically an indemnifying party also pays the other party's legal bills; this would serve to discourage litigation by ICANN even more. Note that ICANN (the current IANA Functions Operator) requires gTLD registries to indemnify ICANN in Registry Agreements.

Q5: How long would the term of the initial IANA Functions Contract be?

A: There are many possibilities, so this question is best approached from a needs perspective. It will likely require substantial community effort and engagement to finalize an initial contract, so there should be a period of stability - a minimum period during which both parties can work knowing that the contract need not be revisited, so that they might concentrate on other matters. When this has been discussed, the period most frequently suggested has been 3 to 5 years. There could also be the possibility, as exists in the current IANA Functions Contract, to give Contract Co. the right to extend the contract, if it so chooses, for predetermined periods. As an example, the current IANA Functions Contract contains two two-year extensions, at the NTIA's option.

It is worth noting that the proposed terms for the first post-transition IANA Functions Contract include provisions to allow Contract Co. to terminate the contract for cause, so should something unexpected happen during the initial contract period, this option would be available at any time.

Q6: What would be the composition of the Customer Standing Committee (CSC)?

A: This is also best answered from a needs perspective. The CSC will be responsible for reviewing a number of operational reports. For example, the IANA Functions Operator currently produces a monthly "Performance Standards Metrics Report" (see <http://www.iana.org/performance/metrics>) on their operational performance. (The NTIA under the current contract requires IANA to make these available to the public as well.) The CSC would take on the NTIA's responsibilities in this respect – it would receive and review these operational reports. Where the CSC notes persistent performance issues, it would notify the MRT, which could initiate efforts to resolve the issue, including remedial action. The CWG is considering whether the CSC would have some ability to resolve issues before escalating them to the MRT.

The composition of the CSC would likely be primarily made up of a number of representatives of registry operators because they are directly impacted and most readily able to evaluate operational performance. The CWG is still deliberating regarding whether additional individuals with relevant expertise and/or liaisons (or representatives) from other SO/ACs should be included. If the CSC would have no ability to act on its own in response to performance problems, then the composition of the CSC may not be very significant from a community point of view except with regard to having the requisite expertise and ability to identify service issues and to readily review reports and identify issues for possible MRT action.

Q7: What if the IANA Functions Operator failed to agree to participate in the binding Independent Appeals Panel Process?

A: Participation in the IAP process should be made one of the conditions of the post-transition IANA Functions Contract, which would permit the contract to be terminated and allowing the MRT to begin the tendering process for another supplier.

Q8: How would non-performance related issues be resolved?

A: The draft proposal offers two avenues for addressing non-performance related issues. Where, for example, IANA fails to respond to a request for a TLD delegation in a timely manner, this would in fact represent a “performance related issue” as there already exists a performance standard for such requests – 120 days for ccTLDs and 30 days for gTLDs. Thus, an individual registry could choose to elevate this issue to the MRT if they were unable to resolve the issue directly with the IANA Functions Operator.

Where a decision has been made by the IANA Functions Operator, it may be possible to challenge the decision, either under the Independent Review Panel provisions of the current ICANN bylaws (if it is a decision by the ICANN Board) or using the proposed Independent Appeals Panel. Standing to file appeals using the proposed new Independent Appeals Panel is still under consideration by the CWG.

Finally, when the MRT undertakes periodic reviews of overall IANA performance and management, much like the NTIA itself initiated in 2011, there would be an opportunity to address any recurring and systemic issues related to decision making.

Q9: The CWG’s Proposal states that “The CSC would receive and review IANA Functions Operator reports and escalate any significant issues to the MRT.” What is meant by a ‘significant issue’ and when would the MRT decide whether and how to act on it?

A: The CSC itself would determine, based criteria to be developed by the CWG, whether an issue is ‘significant’ and consequently what action to take. Depending on the nature of the concern, it could choose to raise it with the IANA Functions Operator before forwarding it to the MRT, in an effort to encourage remedial action. It is not intended that relatively minor issues be elevated to the MRT level if informal discussions between the CSC and the IANA Functions Operator might lead to improvements.

Q10: What would be the composition of the Multistakeholder Review Committee (MRT)?

A: The MRT would be a multistakeholder body with formally selected representatives from all of the relevant communities, with its exact composition yet to be determined.