

“The Board shall notify the Chair of the Governmental Advisory Committee in a timely manner of any proposal raising public policy issues on which it or any of ICANN’s supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.”

ICANN bylaws, ARTICLE XI: Section 2. 1. h.

“With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall in those cases where the policy action affects public policy concerns request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.”

ICANN bylaws, ARTICLE III: Section 6. 1. c.

Reconsideration Request

Introduction:

When ICANN incorporated the above text into its bylaws, a new covenant was ratified between ICANN and those members of national governments, internationally recognized distinct economies, and multinational governmental/treaty organizations that participate in the Governmental Advisory Committee (GAC). This covenant acknowledged and clarified the role of governmental entities in the management of the Domain Name System and confirmed that they are to be accorded due deference with respect to public policy issues that are raised in proposals evaluated by ICANN’s supporting organizations and advisory committees.

At issue is (1) the failure of the ICANN Board to notify the Chair of the Governmental Advisory Committee that the ICANN-VeriSign settlement agreement raised such public policy issues that were, in fact, under consideration by the Generic Names Supporting Organization (GNSO) that had formally approved a Policy Development Procedure (PDP) for which public comment was being sought; and (2) that the ICANN Board acted precipitously without taking into account the fully-developed advice of either the GNSO or the GAC.

The ICANN Committee of the Board on Reconsideration will need to evaluate the following factors:

- (a) Did the proposal for an ICANN-VeriSign settlement agreement raise public policy issues?
- (b) Did the GNSO or any other supporting organization or advisory committee seek public comment on any of the public policy issues raised by the ICANN-VeriSign settlement agreement proposal?
- (c) As the bylaws call for a “timely response”, the issue of “timeliness” of decision taking must similarly be addressed; did the ICANN Board act in haste ahead of its scheduled Wellington session (which would have provided the GAC a formal setting in which to compose their advice to the Board)?
- (d) Were all currently available materials considered by all members of the Board?
- (e) Did the ICANN Board notify the Chair of the Governmental Advisory Committee in a timely manner that the ICANN-VeriSign settlement agreement proposal raised public policy issues?
- (f) Did the ICANN Board take duly into account any timely response to that notification prior to taking action?
- (g) Have third parties been substantially affected owing to policies adopted by the Board that were contained within the ICANN-VeriSign settlement agreement proposal?
- (h) Having been aware of the imposition of new fees/charges as stipulated within the ICANN-VeriSign settlement agreement proposal (a policy action affecting public policy concerns), did ICANN request the opinion of the Governmental Advisory Committee with respect to the public policy implications of such fees?

The public policy issues:

1. Traffic Data Mining -- On 3 February 2006, the following correspondence was posted to the GAC Public Forum:

“As I understand Article 6 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic

communications), users or subscribers shall be given the possibility to withdraw their consent for the processing of traffic data at any time. I would appreciate the views of European GAC representatives on the compatibility of the traffic data language in the proposed .com agreement (which, as I read it, does not allow for the withdrawal of user consent) with Directive 2002/58/EC.”

Traffic data mining has long been regarded as a public policy concern. As nationalities and distinct territories have started to establish laws dealing with this particular matter, an action that allows for traffic data mining on a global scale raises itself to the level of a major transnational public policy concern.

2. Price Cap Changes – an agreement that allows a monopoly to raise its prices gives rise to public policy concerns. Former ICANN counsel Louis Touton earlier addressed the topic of price caps and the public policy considerations:

“The registry agreements provide for price caps for domain-name registrations and other registry services because the sole-source basis on which those services necessarily must be provided creates the potential for abusive charges. Where a registry operator is placed in a position of market power (particularly customer lock-in) by virtue of its appointment by ICANN, it has been viewed to be appropriate to guard against abuses of this market power. This can mean that cost-plus-reasonable profit price caps are appropriate in some cases. Where market mechanisms are effective to restrain prices, on the other hand, it should not be necessary to establish price caps...

The treatment of economic/competition issues (such as the establishment of price caps) is a difficult role for ICANN, because of limitations both on ICANN's appropriate role and on its economic expertise. Some have expressed concern that the role of establishing price caps stretches beyond ICANN's appropriate mission, while others have noted that registry operators are placed by ICANN in a position of economic power, sometimes with little or no market-based restraints, that requires protective conditions including limitations on prices charged for sole-source services. This dilemma – the potential need for price restraints in some situations coupled with the general unsuitability of ICANN to supply those restraints – has led ICANN in the past to seek to rely on competitive mechanisms to establish price caps where possible (such as by allowing prospective operators to provide competitive bids of prices and then requiring them to adhere to their proposals). Although economic/competition issues are necessarily implicated by ICANN's activities from time to time, it has been remarked in the ongoing reform process that ICANN should establish means to obtain appropriate expert

advice from better-situated organizations to assist in addressing these issues.”

-- General Counsel's Second Analysis of VeriSign Global Registry Services' Request for Amendment to Registry Agreement

These above two examples illustrate that reasonable people can readily believe that public policy issues are implicated in the ICANN-VeriSign settlement agreement proposal.

The Supporting Organization Activities and Public Comment Periods

Did the GNSO or any other supporting organization or advisory committee seek public comment on any of the public policy issues raised by the ICANN-VeriSign settlement agreement proposal? The answer to this question is yes. The ICANN Board has already acknowledged that the GNSO was in the midst of a PDP whose outcome would in part be determined by public commentary on the proposed VeriSign settlement agreement:

"We also note the existence of a policy development process on new gTLDs and strongly believe that this policy development process should be informed by the results of the comments received on the proposed contract for .com and settlement with VeriSign." -- "Next Steps on Proposed .com Settlement", 24 October 2005 ICANN Board Meeting

Making matters even clearer was the 17 January 2006 GNSO Resolution:

"The GNSO Council resolves: That the ICANN Board should postpone adoption of the proposed settlement while the Council fully investigates the policy issues raised by the proposed changes."

If it couldn't be clearer than that, the GNSO next launched a secondary PDP on 6 February 2006 "on policies for contractual conditions for existing registries" in which the Terms of Reference included "Policy for price controls for registry services" and "Uses of registry data".

A blind man could see that ICANN's supporting organization was concerned about the public policy issues raised by the ICANN-VeriSign settlement agreement and acted responsibly to address the situation. The GNSO completed their Terms of Reference for this PDP on 28 February (the very same day that the ICANN Board jumped the gun by hastily approving the proposed ICANN-VeriSign settlement agreement without having had the benefit of either GAC input or fully developed GNSO advice).

The inappropriate timing of the ICANN Board decision:

Was there any legitimate reason that could justify the timing of the ICANN Board action? Was there any particular reason that was so pressing that the ICANN Board could not have waited for the guidance of the GNSO and GAC at Wellington? The answer to this question may be found in Board member comments:

CEO Paul Twomey remarked:

“as a community we now have a lot of other issues that are very pressing, and I hope that we find opportunities now to really talk to those. In particular, I think the whole issue of new gTLDs and how they introduced and the issues of internationalized domain names in the TLDs, to give just two examples, are defining issues for the ICANN community over the next year or two.”

Board Member Demi Getschko states:

“Giving that, as the available information to us points, we are really restricted on time to take this decision, and giving that there are a lot of more international and even more important issues to discuss, at this particular opportunity I'm voting to proceed.”

Board member Njeri Rionge states:

“I also have considered the amount of work, time and funds already spent on this subject, remembering that such money comes from the community, while we have many other pending issues for the Board, which are on hold due to the discussions on .com agreement. I have conclude that rejecting the agreement may not contribute to improve the agreement itself, and may postpone many other issues the community requires ICANN to address.”

Board member Vanda Scartezini states:

“I also have considered the amount of efforts, work, time and funds already spent with this subject, remembering that such money comes from the community, while we have many other issues in the Board's pipeline, and that are on hold due to the discussions about .com agreement”

Board members on either side of the issue have acknowledged the need to tackle pending issues as a justification for their decision to act on 28 February. The Board Committee on Reconsideration must now decide whether such justification was sufficiently compelling when weighed against the need to consider GAC and GNSO advice that would have been provided just a few weeks hence at Wellington. In the absence of a contractually defined deadline, I can see

no reason for embracing a decision ahead of all requisite counsel having been submitted.

The failure to consider submitted materials:

In the collection of Board member comments tendered, director Veni Markovski states:

“I think that the policy development in this case did not happen the way it should have (now, some question whether this *was* a policy development question). But I don't think it's ICANN's fault. I think it's a failure of the ICANN community, and the continuous processing in which it has been involved for quite a while. I told a number of times the ICANN community, during our meetings with them - don't just tell us the problems, we know them. Suggest the solutions, participate in their formation. That didn't happen.”

If Board member Markovski sincerely believes that members of the ICANN community did not participate in the formulation of solutions to the problems posed by the proposed ICANN-VeriSign settlement agreement, then he, for one, did not read the Public Comments which contained, at the very least, a proposal for an alternate funding mechanism which could have rendered moot the need for a .com price hike (see “A Registrant Counter-Proposal” at <http://forum.icann.org/lists/revise-settlement/msg00014.html>).

Further, as the strictures of the ICANN-stipulated PDP process were adhered to by the GNSO in conformance with timelines set by the Board and under the scrutiny of ICANN staff, director Markovski's remark reveals that he, at least, did not properly and fully review the discussions underway within the GNSO community (otherwise he would have known that policy development did in fact happen the way it should have). This director, and perhaps others, should be given a renewed opportunity to review the GNSO policy discussions that will form part of the basis for GAC commentary. You will note that the GNSO and GAC are scheduled to engage in discussion on issues of mutual concern in Wellington.

Final remarks:

A decision was reached by the Board with respect to the ICANN-VeriSign settlement agreement in advance of the receipt of formal advice from both the GNSO and the GAC – this is a violation of process that cannot reasonably be justified (as no contractual deadlines forced this decision to be made in advance of the receipt of such guidance).

As a dot com registrant I am materially affected by the ICANN Board decision to approve the revised ICANN-VeriSign settlement agreement; the provisions of this agreement will result in higher fees that I and all other dot com registrants must pay. I request a temporary stay of the Board's decision to move forward with a settlement agreement and believe that if the action is not stayed, harm will be occasioned – namely, serious public policy issues will remain unresolved while the dot com community will have to shoulder unwarranted and unjustified increases in registrant fees. Additionally, it would also not be wise for ICANN to sour an otherwise cordial working relationship with the GAC (having already alienated the entirety of the remaining ICANN community other than VeriSign).

On the grounds that ICANN should abide by its own bylaws, I ask the Board to reconsider their decision and await a formal response from the GAC on public policy issues raised by the ICANN-VeriSign settlement agreement before proceeding further.

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