

This is my response to the governance review consultation published in February 2007.

This response is written personally and does not necessarily represent the views of THUS plc or the Nominet PAB, although it is written with my experience of sitting on the latter and on boards of other industry bodies.

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General

This response addresses the issues of principle in the Nominet consultation. It assumes that there will be an opportunity to comment on the final drafting of any changes to the Articles before they are finalized for presentation to a General Meeting.

At least some Nominet members are concerned about the possibility of a takeover by parties hostile to their business model. It is always important to ensure that governance documents have been written so that they cannot be misused at a later date by a different group of people, this applies particularly in the case of Nominet.

Board composition

Nominet is a membership organisation. Among other things, this means that some of its governance arrangements are unusual. In some cases this is a mere accident of history but in others it represents a conscious view of the membership as to how such matters should be arranged.

I have no objection to an increase in the size of the board to 9 or 10 (but see my comments below); the size should be chosen to ensure the required skills can be added while, at the same time, not making the board large enough to become difficult to manage.

I have no objection to the introduction of appointed non-executive directors. However, such appointments should either be made subject to the prior approval of the membership or should require ratification on a relatively short timescale (e.g. within 3 months); apart from anything else, this will prevent the appointment process being used to get around the results of an election (e.g. by appointing an unsuccessful candidate who was preferred by the board). Note that this ratification would not require an EGM to be called; it could simply be a postal/electronic vote of the members. These directors should also be subject to a fixed term followed by explicit reappointment (if this is the intent, it is not clear from the consultation document).

I have no objection to a change in the number of executive directors, nor to removing the requirement for the chairman to be an executive director. However, Nominet should not make the mistake of requiring the chairman to be an appointed non-executive either; the type of directorship should be left open, even if normal practice would be (say) for him or her not to be an executive.

Unlike other respondents, I am happy for the words "up to" to remain for executive and appointed directors; if the board as a whole believes there is no good candidate for a position, there should be no requirement to fill it. I would go further and put only two restrictions: the board should be limited to 10 (or possibly 9) seats and the number of elected directors should be fixed (see below).

I disagree with the reduction in the number of elected directors. While I understand that the normal operation of the board means that voting rights are usually not relevant, having most of the board be unelected means that there is a risk that the elected members – or the membership that elects them – will feel "squeezed out" or sidelined. Such a reduction also significantly alters the ethos of the company; it is not a "minor" change. I would therefore recommend that:

- The elected directors constitute at least 40% of the board. As expressed below, I believe that there should be at least 4 elected directors, which would mean a maximum board size of 10.
- If the elected directors are a minority, they should have some kind of additional voting power available when necessary. I would suggest that, provided at least three elected directors are in agreement, they receive an extra vote and if all four are in agreement they receive an extra two votes.

I also disagree with the proposal to elect only one director each year. The fewer directors elected at each election, the less diversity of membership view is represented. The reasons are related to how STV works and aren't always easy to get across but, putting it very crudely, if one thinks in terms of "power blocks" (and I am not suggesting that the membership are organised like that) then the present system allows the two largest blocks to pick directors while the change to one person elected per year means only the largest block gets represented. While there may be other ways to resolve this, I suspect that they would be largely incomprehensible to the average member. I also am concerned that a change to one place is seen as a "simplification" and wonder whether the plan is to move from STV to First Past The Post. This would be a bad idea; even with only one place, STV provides more representative results.

Therefore I strongly recommend that Nominet continue to elect at least two directors at each election. I don't disagree with the proposal to increase the term of elected directors to three years, but this tail must not be allowed to wag the dog. Assuming that there is no desire to increase the number of elected places to 6, this is best managed by holding elections in two out of every three years with two places in each of those years.

I understand the desire to ensure "fresh blood" by putting a limit on the terms of service of non-executive directors. This principle should apply equally to appointed directors. I have a slight concern that Nominet might find several directors' terms of service ending in quick succession, leading to a lack of continuity, and I wonder if it might not be possible to find a way to address this, though I don't have any particular suggestions. I agree with Alex Bligh that this limit need not be enshrined in the Articles, and with his proposal to instead allow the executive to annotate election statements (but any annotation should be discussed with the candidate).

There was an issue with the specific wording proposed last year which meant that the executive would not actually be required to hold elections. I would not expect this mistake to be repeated.

I agree with the proposal to allow the board to co-opt to replace a vacancy in the elected directors, and that this position should last only until the next AGM. However, there is a small issue in how this interacts with my suggestion above about holding elections in two years out of three. If this is accepted, then I would recommend:

- If the vacancy arises when there is an election at the next AGM, the board has the right (but not the requirement) to co-opt a person to serve until that AGM.
- If the vacancy arises when there is no election at the next AGM, then a bye-election is to be held – within a reasonable time – for someone to serve until the next election.
- If this, or any other activity, means that at a subsequent election only one person's term has expired, then another elected director should be chosen by lot to ensure that there are always at least two places open for election.

Alternate Directors

I completely disagree with the proposal to allow the appointment of alternate directors. Alternate directors make sense in a normal company where at least some directors generally represent the interests of a block of shareholders: they allow a director to take a sabbatical from his position and appoint someone responsible to substitute in the meantime. However, they are completely inappropriate in an organisation like Nominet where the elected and appointed directors have been chosen as individuals (there may be an argument for allowing an executive director to appoint an alternate, but I am not convinced of the need). The effect of allowing these people to appoint alternates is to let them override the wishes of the membership without any comeback: nobody other than the appointer has any veto over this appointment (it is possible - but unclear - that a resolution at a General Meeting can order a director to revoke the appointment). The appointer isn't even responsible for the alternate's actions (see article 69 of Table A). The effect would be that a departing director could – by not formally resigning and appointing an alternate – select their own replacement contrary to the wishes of the electorate.

This is an area where Nominet is not “normal” and there is no need to introduce “standard practice”.

Incidentally, the board might want to consider formal arrangements for appointing proxies (who would have to be other directors) though, if the number of formal votes is as small as claimed, there may be little or no point.

Other changes relating to directors

I agree with the other changes proposed in section 3.2 of the consultation paper.

In relation to disqualification (3.2.4), this should *not* include a power to remove an elected director from office other than for statutory reasons such as bankruptcy. In particular, it should not be possible for the board to vote to remove an elected director simply because they disagree with his position or actions (I speak from experience here). If the remainder of the board are unable to work with a specific director, the correct course of action is to call an Extraordinary General Meeting to consider a resolution to remove that director; the board can then explain to the membership why they feel the removal is necessary, and can back it by taking a position of “he leaves or we resign”. The overriding principle, however, is that the membership’s choice is not overridden by the board.

There has been some disquiet concerning the last paragraph of 3.2.5 and the ability to pay “extra remuneration to directors who perform special services, such as travelling abroad on company business”. I do not disagree with the proposal, but the board might consider ameliorating this by adding wording such as “... services beyond the normal duties of their position ...”.

In respect of paragraph 3.2.9, I would suggest that the board be allowed to instruct conflicted directors to exclude themselves from discussions, provided that in any given situation all directors with a conflict are treated equally.

Policy

I agree that Nominet should be consulting the membership on policy issues. Further opinion will have to wait for explicit wording: I would not like to see wording that excluded consultation on other matters (e.g. technical standards) on the grounds that they were “not policy”.

Fees

The issue of fees and Article 19A is a contentious one that can best be summarised as “I wouldn’t have started from here”. However, now that the clause is in place (and it is worth remembering that, despite Malcolm Hutty’s name being attached to it, 75% of the voting membership approved it), we must consider the situation as it is, not as we might have liked it to be.

Article 19A is seen by various members as protecting them from one or more of what might be called “five evils”:

1. An increase in the membership or tagholder fees that would make it uneconomic for smaller operations to remain Nominet members.
2. A large increase in registration fees damaging the “pile it high sell it cheap” business model.
3. A large decrease in registration fees devaluing the perceived worth of a .uk domain name.
4. Application of discriminatory pricing, such as a lower price for the larger member.
5. Application of discounts for bulk registration, or other schemes which discriminate between members in practice even though they do not do so in name.

While I accept that there needs to be some flexibility in pricing if Nominet is not to end up with a huge surplus, and I accept that the existing mechanism is, at the least, clunky, any change needs to address these perceptions. Incidentally, I am not convinced that the board needs the ability to react *rapidly* to the market by changing prices, since the price applies for 2 years and there is a huge amount of inertia in the marketplace.

I would recommend that the following changes be made in this area. Firstly, separate out registration fees from everything else. There is no need for rapid changes to membership fees nor to tagholder fees (that is, any fee for having a tag; I am not referring to fees for specific services that are only available to tagholders, charges for credit, or any similar matter). Therefore changes in membership and tagholder fees can be left to a member vote.

Secondly, there should remain a commitment that all members pay fees on the same basis and that there should be no discounts for quantity or any other form of indirect discrimination. While it is unusual to codify such a matter in the Articles, it will provide comfort to those members worried about such matters.

Finally, the board should be given at least some control over pricing, but there should be limits on it. For example, a restriction that forbids changes in price of more than 50% (increase or decrease) would probably satisfy most of those concerned about Nominet disrupting the market while still giving the board enough control.

Naturally all of these requirements could be overridden by a vote of the membership. Furthermore, I would not object to this changing from a 75% to a simple majority, provided the present capping system for voting remained in place.