

ETNO Reflection Document in response to the discussion draft: “Affirmation Reviews – Requirements and Implementation processes” presented by ICANN



February 2010

Executive Summary

ETNO largely supports the discussion draft "Affirmation Reviews" presented by ICANN. However ETNO believes that there is ample opportunity for improvement in many areas.

ETNO is concerned that the proposed size of the Review Teams is far too small and these must be enlarged. The establishment of periodical reviews is a critical issue for the evolution of ICANN. Although the issues at stake go beyond the work of the Review Teams (the Board must consider the recommendations and take proper action), given the key role Review Teams play and bearing in mind the various major stakeholders of ICANN, a proper representation, diversity and balance must be found within each Review Team. ETNO proposes that additional members participate in the Review Teams and that GNSO is represented in all Review Teams by at least one member (more in the case of the Review Team on Accountability and Transparency and of the Review Team on Competition Consumer Trust and Consumer Choice).

Broader ICANN experience and expertise in the discipline(s) related to the review topic are key requirements and should be prioritized in the member selection criteria. Members selected from SOs/ACs must act in their own personal capacity; however certain linkage with the SO/AC they represent is expected. Periodic reporting as well as feedback to/from the respective SO/AC on key issues is necessary.

On the understanding that the first review on Accountability and Transparency must be completed by 31 December 2010, a deadline which creates many concerns about timing and quality of the work, ETNO proposes that this first review takes place as a pilot process and that a second review takes place soon after the first one (the second cycle could start in September 2011).

Introduction

ETNO¹ welcomes the opportunity to contribute to the consultation on the draft proposal “Affirmation Reviews – Requirements and Implementation processes” presented by ICANN, on how the reviews described in the Affirmation of Commitments (AoC) should be carried out and implemented.

ETNO member companies represent a significant part of total ICT activity in Europe and are the main drivers of broadband in the continent. ETNO is involved in ICANN since its inception and strongly supports the private multi-stakeholder model on which ICANN is built, as well as the transition of ICANN towards a fully independent and fully privatised international organization, yet accountable to all stakeholders.

The Affirmation of Commitments (AoC) is a crucial step in ICANN's evolution. ETNO has welcomed² the AoC, but has also stressed that ICANN and its community have a huge task: to make sure that the innovations and mechanisms introduced by the AoC not only work, but provide the appropriate framework to tackle potential problems effectively. The implementation of the AoC and particularly the establishment of the Review Panels is a critical issue for the evolution of ICANN, given the key role of these reviews.

ETNO largely supports the requirements and implementation processes outlined in the discussion paper. However ETNO believes that there is major opportunity for improvement and offers the following comments:

General Comments

1. Independency of the Review Teams

ETNO considers that the objective of the Review Panels is to check whether and to what extent the goals of the AoC are met and what needs to be done in that perspective, through a participative mode, which is one of ICANN's cornerstone principles. The objective should not be to judge, reconsider and possibly challenge specific individual policy decisions taken. For the last, everyone should be accountable according to his/her respective role. Furthermore, the review is not restricted to the work of the Review Teams, nor does it stop at the

1 The European Telecommunications Network Operator' Association (ETNO) is representing 41 major companies, which provide electronic communications networks over fixed, mobile or personal communications systems in 35 countries. ETNO is Europe's leading trade association and its member companies have substantial Internet operations. ETNO has joined ICANN's GNSO ISPCP and BC constituencies. More information about ETNO can be found at: www.etno.eu

2 <http://www.icann.org/en/affirmation/affirmation-reaction.htm>

delivery of recommendations. The Board must consequently consider the review recommendations and take appropriate action. Having clarified that, ETNO believes that the Review Teams do not need to be independent from the ICANN Board and staff. Given the nature and type of the review, the composition of the Review Teams (the Chair of the Board, the ICANN CEO and the chair of the GAC are members of the Board, members are representing SOs/ACs), the complexity and interrelations of the community, as well as the fact that the final reports go back to the Board, all these in ETNO's view prove that independency can't exist in absolute terms and this should not affect the validity of the review. By not calling upon the "independency"-principle, certain things are simplified i.e. there is no need for the Review Teams to make the final decision on the adoption of the review processes and of the terms of reference, once these have been approved by the Board – see page 11 of the draft.

2. Type of evaluation - Performance Indicators

Regarding the Review Conduct (section 1.4 of the discussion draft), ETNO recognises that choosing the appropriate evaluation approach and methodology is half the work of the evaluation. Certainly such review is not an easy task. Therefore, selecting terms such as "Participatory evaluation" and "Empowerment evaluation," unfamiliar to many even if some explanations are provided, creates confusion and uncertainty as to whether these are the proper methods. Moreover, these terms, according to the descriptive text leave the impression that external evaluation to a greater or lesser extent will be performed, which is not the case in our understanding. ETNO prefers instead the use of "Internal evaluation" based on experience, which could integrate where appropriate some elements/tools of external evaluation.

Regarding Performance Indicators (section 1.2 of the discussion draft) ETNO believes that certain flexibility is necessary from cycle to cycle, as well as certain testing. This is particularly the case for the qualitative indicators, which are more difficult to identify. Additionally, evaluation should not be based entirely on indicators, but on other tools as well (i.e. possible evaluations / reports carried out by Supporting Organisations, comparative studies, literature etc.). ETNO welcomes the fact that the community will be able to comment on the selection of the performance indicators, which must be clear and enjoy general acceptance. ETNO urges that Review Teams present a concrete proposal on performance indicators (and other tools to be used, as ETNO is suggesting) before the relevant public comment period starts and not wait for the community to make proposals during the consultation (as it is implied from the relevant bullet in page 12 of the discussion draft).

3. Supporting mechanism (external consultant)

As for the external consultant, described in Review Methodology (section 2 of the discussion draft and elsewhere), ETNO believes that Review Teams need certain resources to be able to carry out effectively the very difficult task. Therefore a supporting structure is very much needed. However, this structure in our view does not need to be necessarily an external consultant. It could well be ICANN staff who will be assigned to do this job, as long as they have a clear mission, which should be to facilitate the work of the Review Teams. If it is decided that an external consultant must be hired after all, it should be crystal clear that his/her mission will be to facilitate the review process, according to instructions given by the Review Team and not to evaluate. Therefore, ETNO can't accept that the external consultant will "guarantee that sound, consolidated evaluation practises are adopted" as it is mentioned in the 1st paragraph of page 11 of the discussion draft. Additionally, the external consultant is sometimes referred in the discussion draft as "external evaluator." As we have stated above, ETNO does not support an external evaluation and we will appreciate that the term "external evaluator" (where it refers to the job of the consultant) is replaced by the correct "external consultant."

4. Size and composition of the Review Teams

Regarding the size and composition of the Review Teams, ETNO recognizes that a small team could - in some cases - be more effective than a large one. But in this crucial Review process, representation and diversity are key elements. Bearing in mind the various major stakeholders of ICANN, a balance should be found in order to keep the teams efficient, effective and as diverse and representative as possible.

ETNO is concerned that the size of the Review Teams is far too small and it must be enlarged. More specifically, besides the persons who ex officio are members of the Review Teams and besides the experts (the number and expertise of which must be defined), ETNO suggests:

- for the review on Accountability and Transparency, two to four GNSO representatives (one or two per House), two to four ASO representatives (coming from different regions), two to four ccNSO representatives (coming from different regions), one ALAC representative, one SSAC representative, one RSSAC representative and an additional member from the GAC.
- for the review on Security, Stability, Resiliency, each of the SOs to have one representative on the Review Team (the rest as in the proposal).

- for the review on Competition Consumer Trust and Consumer Choice, GNSO to be represented by two members (the rest as in the proposal).
- for the review related to WHOIS, on the understanding that WHOIS issues are not only related to domain names but also to IP addressing, ASO to be added on that Review Team.

ETNO considers extremely important that the exact number of seats assigned to each SO/AC as well as the number of experts in all Review Teams is decided before any other action.

For obvious reasons, ETNO suggests an odd number of the total voting members per Review Team. Members of each Review Team should be able to take decisions on a consensus basis, without that being a strict rule. Majority (simple or qualified) could be applied, but in that case it must be clear which decisions are taken by consensus, which by qualified majority and which by simple majority. Additionally, explanatory / minority reports - where applicable - should be allowed. ETNO reserves its final position on this matter until there is a clearer picture of the composition of each Review Team and their decision processes.

5. Member selection criteria and identification of volunteer candidates

Regarding the member selection criteria, ETNO suggests that “ICANN experience and expertise in the discipline related to the review topic” are key requirements and should be prioritized. ETNO supports geographic diversity and gender balance, but given the size of the Review Teams, these criteria should be fulfilled to the extent possible, without rigid quotas. Members selected from SOs/ACs must act in their own personal capacity, however certain linkages with the SO/AC they represent is expected. In that sense, ability to act in a neutral way is essential and certain periodic reporting as well as feedback to/from the respective SO/AC on key issues are necessary.

As for the identification of volunteer candidates from SOs/ACs, on the precondition that the number of seats for each SO/AC has been assigned, ETNO prefers that each SO/AC proposes as many candidates as the respective seats assigned to it and selectors have the right to veto up to two times. Alternatively, there could be a pool of names for each SO/AC and the selectors can choose as many members from the respective SOs/ACs as the number of seats assigned to that particular SO/AC. In other words, as many pools as the relevant SOs/ACs and ETNO does not support at all the approach of one general pool with names from all relevant SOs/ACs. And although ETNO prefers the one candidate per seat with right to veto approach, the ultimate decision on the best approach should be left to the SOs/ACs, according to what fits best to their structure and internal procedures. Whether a veto power is exercised, or in the case of

selection from pools, ETNO would appreciate that the selectors provide an explanation.

6. Timeline of first Review on Accountability and Transparency

The first Review Team on Accountability and Transparency according to the AoC must conclude its review no later than December 31, 2010. Bearing in mind that a mechanism for the review does not exist and it is now been created, this strict deadline puts extreme pressure to everybody involved directly or indirectly in this Review. ETNO clarifies that the deadline set by the AoC must be respected. On the other hand, ETNO is extremely concerned that in this case the work might not be done completely, adequately and effectively. For this reason **ETNO proposes that the first Review on Accountability and Transparency takes place as a pilot (experimental) process and that a second Review takes place soon after the first one.** This solution has many advantages and is possible as the AoC strictly mentions that the review will take place no less frequently than three years; not every three years. We understand that this proposal has also disadvantages, as it will put extra burden to those involved and it will have to take place in parallel with two other Reviews scheduled for 2011. However, we strongly believe that the advantages are more important, thus it is worth examining. Furthermore, if the second cycle of the Review on Accountability and Transparency starts in September 2011, there will not be a problem with other Reviews going on in parallel, furthermore there will be enough time for the Board to implement the Recommendations of the first Review.

ETNO would also like to comment on the recently published permanent call for applicants for members of the Review Teams coming from the Supporting Organizations and Advisory Committees (SOs/ACs) of ICANN. Whilst we understand, given the time constraints, the necessity for a specific call for the first Review on Accountability and Transparency based on proposals / work in progress, we find rather unfortunate to issue a general permanent call for applicants, when the consultation on the Affirmation Reviews requirements and Implementation processes is still going on. We sincerely hope that ICANN will take the necessary structural action the soonest possible and reissue the call when the requirements and implementation processes have been agreed and adopted.