



national

internet

domain

registries

the European association of

CENTR Comment on the Cross Community Working Group (CCWG) Accountability second Draft Proposal

9 September 2015

The CENTR community welcomes the opportunity to present its opinion on the second, public draft of the CCWG-Accountability paper relating to Work Stream 1 that aims to improve and refine ICANN accountability mechanisms prior to the IANA Stewardship transition. CENTR is also pleased that several points of the feedback provided with the CENTR Board comment to the first draft were taken on board at the time of refining the initial paper.

We would like once more to acknowledge the complexity of the work and compliment the dedication of the working group membership and ICANN staff for having managed to produce this second draft. Therefore, we respectfully and constructively submit our views on the key points of the second proposal.

Community Mechanism as Sole Model

Regarding the Community Mechanism as Sole Member, the CENTR community is glad that the working group further investigated the possible, available options and found a model that removes the problematic requirement for some SOs and ACs to become legal persons as well as it avoids the problem of differential statutory rights between SOs and ACs that become members and SOs and ACs that were not members, associated with the Empowered SO/AC Membership Model.

At the same time, we would like to highlight once more the importance of non-ccNSO members to be associated at all levels of the process, discussion and decision-making. The ccTLD regional organisations could be instrumental to ensure the full representation of non-ccNSO members.

The current proposal is for the three SOs (ASO/GNSO/ccNSO) to have 5 votes each while two ACs, GAC, ALAC would have 5 each, with the RSAC and the SSAC having two each. The only other point of reference we currently have on voting is the composition of the voting members of the ICANN Board. Of the 7 ICANN voting members chosen by the SO/AC community, 6 are SO's and 1 is an AC. Therefore, the proposal represents a significant shift of authority in favour of the AC community, a justification for which is not provided in the proposal. CENTR understands the principle of keeping the overall accountability mechanisms as much multistakeholder as possible. However, we would like to request that the CCWG further investigate and eventually document the voting mechanism as some of our members have expressed serious concerns regarding the lower weighting ratio attributed to those organisations that are mostly involved in the day-to-day ICANN business.

When reading that *"the Sole Member would have no officers or directors and no assets"*, we welcome the notion that no extra layers of unnecessary, bureaucratic administration are to be created, but fear that unfortunately a sort of *"secretarial body"* will be necessary. As a matter of fact, in the second draft we also read *"those SOs and ACs make their decisions as to how to allocate their votes internally"*. This implies the need to set coordination mechanisms internally and at inter-constituency level. In doing so, we recommend the establishment of a coordinating and secretarial body within the model, as well as a wise balance between the need of such mechanisms and the goal to maintain any new structure operational as well as keep it cost and time-effective.

Appeals mechanisms

We are fully supportive of *“a standing, independent – review – panel of skilled jurists/arbitrators who are retained by ICANN and can be called upon over time and for various unrelated issues to resolve disputes regarding whether ICANN is staying within its limited technical Mission and acting in accordance with ICANN’s Articles of Incorporation and/or Bylaws”*.

We would also like to endorse that *“decisions regarding ccTLD delegations or revocations would be excluded from standing, until the ccTLD community, in coordination with other parties, has developed relevant appeals mechanisms”*. Considering the very special nature of the ccTLD environment and the numerous stakeholders that might be involved in a delegation or redelegation process at local level, this exception shall be seen as due.

We note the inclusion of a reference to the removal of ccTLD delegation and redelegation decisions in *Reconsideration Process Enhancement” to the letter that the CWG Stewardship sent to the CCWG on the exclusion of ccTLD delegations and redelegations from “any appeal mechanism developed by the CCWG-Accountability section 5.2 “”*. However, the CCWG proposal is silent on the significance of this paragraph in this context. Considering that exclusion or inclusion of these issues in the reconsideration mechanism was never discussed by the CWG nor its Design Team B which looked at the larger issue, CENTR requests that this is not included.

Concerning the “delegation/redelegation” of a ccTLD, we take this chance to invite the CCWG to adopt the more correct terminology as recommended within the Final Report of the Framework of Interpretation Working Group to ensure jargon consistency among any future document.

Regarding the IRP autonomy, we remain concerned about its appointment and funding. We would like to receive proper reassurances that IRP administration and management are kept independent from ICANN staff and Board as much as possible. Furthermore, we recommend regular reviews of the panel reliability, responsiveness, independence and transparency especially considering that the CCWG-Accountability proposals foresee the IPR provisions to be adopted as Fundamental Bylaws.

CENTR is also concerned that the CCWG’s proposal may not be fully meeting the sixth of the dependencies for the CCWG that the CWG set out (page 21) in its proposal, which is the following:

*“6. **Appeal mechanism.** An appeal mechanism, for example in the form of an Independent Review Panel, **for issues relating to the IANA functions**. For example, direct customers with non-remediated issues or matters referred by ccNSO or GNSO after escalation by the CSC will have access to an Independent Review Panel. The appeal mechanism will not cover issues relating to ccTLD delegation and re-delegation, which mechanism is to be developed by the ccTLD community post-transition.”*

While we do note that the CCWG has indicated that it believes that it meets this CWG’s dependency where it states:

*“5. **Appeals Mechanism** CCWG-Accountability proposals include significant enhancement of ICANN’s existing appeals mechanisms, including the IRP. The IRP will be available to TLD managers to challenge ICANN decisions **including with respect to issues relating to the IANA functions** (with the exception of ccTLD delegations and redelegations, as requested by the CWG-Stewardship).”*

However, when one reads the specifics the CCWG’s actual proposal for an enhanced IRP indicates (page 39) it says that *“The role of the Independent Review Process (IRP) will be to...hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws...”*. CENTR’s concern is that since PTI will be the sole entity

responsible for the exercise of the IANA functions and since PTI, being a separate legal entity from ICANN, cannot be considered to be 'ICANN' nor comprised of ICANN staff, it will not be bound by any ICANN bylaw in respect of the existing or enhanced IRP. It appears that the enhanced IRP would not apply to PTI and therefore, not in respect of IANA decisions. We believe that this element must be fully clarified in the next document iteration.

Accountability requirements

We are glad that section 8 of the second draft is fully dedicated to accountability requirements and, more specifically, addresses the topics of diversity, ICANN staff and ICANN SOs and ACs accountability. As stated in our previous comment, any enhancement of any accountability process must be linked and strongly supported by actions that improve the accountability, literacy, culture and attitude of all those involved.

Any new accountability body must indeed take into due account the diversity principle to ensure the broadest possible representation against the elements listed in paragraph 441. However, we believe that the diversity principle would not need the establishment of any specific body for it to be enforced across the existing or newly formed bodies. We are also surprised to read in paragraph 443 the need to discuss "Rotation of the ICANN meetings in all the ICANN regions" in Work Stream 2 as we are under the impression that this is the philosophy adopted by ICANN so far. Furthermore, regarding the recommendation to improve ICANN's effectiveness in promoting diversity, we fully support the advice to "establish a full inventory of the existing mechanisms related to diversity for each and every ICANN group (including Stakeholder Groups, Constituencies, Regional At-Large Organizations, the Fellowship program and other ICANN outreach programs)" and recommend their careful review, especially of the Fellowship and other ICANN outreach programmes so that they are meant to support and involve new participants, instead of the "usual suspects".

With reference to ICANN staff accountability, we welcome "the creation of a Code of Conduct, transparency criteria, training, and key performance indicators to be followed by Staff in relation to their interactions with all stakeholders, establishment of regular independent (internal + community) surveys/audits to track progress and identify areas that need improvement, establish appropriate processes to escalate issues that enable both community and staff members to raise issues". We recommend any new process to be kept simple and easily accessible by both staff and community representatives.

At the same time, considering the new responsibilities to be played by the SOs/ACs, we are warmly backing the enhancement of accountability layers at their level, particularly the introduction of further mechanisms that they may have in place to be accountable and be held accountable to their respective constituencies, stakeholder groups and/or organisations

Implementation Plan and Timing

We appreciate the level of detail found in Section 12 which explains the next steps to be taken and their timing. We would however recommend a more in-depth assessment of the risks that may impact the proposal implementation, including time-related risks as we think that certain timeframes are too tight in light of what the community experienced with – for instance – previous changes in the ICANN modus operandi and/or Bylaws.