

Cross-Community Working Group on Naming-Related Functions

Public Consultation on Draft Transition Proposal, 1 December 2014

Draft Nominet Response

Introduction

Nominet is the registry for the .uk country code. It is a long-time participant in ICANN, a member of the ccNSO, an ICANN accredited registrar, the registry operator for .cymru and .wales new gTLDs and the back-end operator for a number of brand gTLDs.

We welcome the announcement by the US government that it intends to transition the stewardship of the IANA functions from NTIA to the global multi-stakeholder community. This announcement recognises that the multi-stakeholder model has reached a level of maturity that makes it a credible steward of this key resource. We have a real opportunity in front of us and Nominet is pleased to have had the opportunity to be a participant in the work of this cross-community working group.

We welcome the thorough work that the CWG-IANA Naming-Related Functions and are grateful for the effort that so many have put in to the preparation of this consultation draft.

General overview of our thinking in presenting this response

The NTIA's stewardship has been a model of good governance and we are conscious of the need to maintain this lightweight and impartial stewardship. We should build on the success of the current system. In particular, we recognise that the work of the IANA functions operator under the current contract has been good, and again we need at least to maintain the existing standards of quality and reliability of service delivery. The process used for defining the current contract, through two rounds of consultation has provided a good basis for the IANA functions operator's performance of a critical service.

NTIA has asked us to consider the transfer of stewardship, and not the transfer of the IANA functions operator. In the first instance, we would agree that there is no need to change the IANA functions operator. While we have to consider how to ensure the continued accountability and efficient delivery of a critical service, we believe that this could be done without complex structures or significant changes to the current operational environment, subject to significant safeguards in the ICANN bylaws and a clear mechanism to establish structural separation, should ICANN break the terms of the bylaws.

However, we also recognise the need to provide a coherent and mutually agreed proposal. We therefore look critically at the current draft and identify a number of areas where significant improvements can be made, primarily in simplifying structures and roles, and in identifying clear and very limited mandates for the different entities.

Structure of our submission

In the first section we look at the three questions in the invitation to comment on the CWG's draft proposal. In the second section we give an overview of the changes that we feel are vital to make the proposal acceptable. Finally, we give detailed comments on section 3 of the proposal.

We are grateful for this opportunity to comment and look forward to further discussion on developing a consensus final proposal.

Specific Consultation Questions

- **Input on possible modifications to the Independent Review of Board Actions (section 3.3 of the document)**

We do not believe that the ICANN Board currently has, or should have, any role in approving ccTLD delegations and redelegations beyond verifying that due process has been followed by the IANA functions operator. We would not see the ICANN bylaw provision for independent review of Board actions having much, if any, role in the case of the CWG draft proposal.

As noted in our detailed submission on the CWG draft transition proposal below, we are concerned about the duplication of different entities and mechanisms involved in oversight and review of the delivery of the IANA functions, with the risk of confusion and dispute, as well as opening an already overloaded process to forum shopping.

However, we could envisage a key role for strengthened bylaw provisions in the case of a simplified stewardship model directly based around ICANN, but with binding obligations and the potential to set up a separate entity should ICANN's stewardship fail to meet community requirements.

- **Input on possible modification to the NTIA's responsibilities acting as the Root Zone Management Process Administrator (section 3.4.3 of the document)**

We welcome the continued obligation for the IANA functions operator to publish all requests for changes to the root-zone file and WHOIS database and the publication of delegation and redelegation reports. We would note that the delegation & redelegation reports could be assessed in an *ex-post* review as part of the annual reporting cycle.

As outlined below in our detailed assessment of the CWG draft transition proposal, we do not think that the NTIA's theoretical role of certifying ccTLD delegation and redelegation decisions should be replicated, and we would have serious concerns about the mechanism proposed in section 3.4.3.2. This proposal fails to recognise the complexity of these decisions given (for example) the importance of national or local decisions, and the differences in culture and practice in different parts of the world. Subjecting the careful analysis that is needed by the IANA functions operator to the views of counsel, which is unlikely to have sufficient experience and understanding of these issues, is not appropriate.

We would also note that the role of any independent certification process would overlap and cause confusion with the role of the Independent Appeals Panel.

Subject to addressing the concerns identified for the role of an independent certification process, we could see some benefits from the IAP as part of the process. However, we believe that the IAP role in decisions associated with delegation and redelegation of ccTLDs (at least) can also only be based on assessing whether the IANA functions operator has carried out its role correctly: has it performed the relevant checks, is the documentary evidence in place, is there documented explanation and justification where criteria are applied in a different way depending on the particular case?

Hence we believe that any decision by the IAP should be limited to agreeing that due process has been followed and documented, or to referring the case back to the IANA functions operator for further consideration and explanation. It should not make a decision on approval or rejection of the decision: we do not believe that an independent body would have the experience and knowledge to do this.

- **Input on a specific (ICANN) alternative solution**

While we understand the motives behind the model being proposed, we are concerned about the scale of the changes and the roles of so many different players. The mandates of the proposed new entities are poorly defined and the currently identified work is onerous. In particular, the outline of the work of the Multi-stakeholder Review Team is large and, for a committee of volunteers, we wonder how it will be able to carry out all of its role in normal times, let alone when it is organising a rebidding process.

This is a major weakness of the proposal: an overloaded committee could easily be dominated by a few well-resourced people or organisations able to devote their time to the work of the MRT. Given the nature of the operation there are also likely to be concerns about good governance and handling of conflicts of interest.

We also have particular concerns about the Contract Co: while we recognise the reasons for the construct being proposed, unless it is supported to allow it to weather litigation, its shell-nature makes it vulnerable to attack and likely to be an unequal bargaining partner in any negotiations with much larger and better resourced organisations.

We believe that an ICANN-based solution could be operationally effective, subject to introducing real safeguards and controls. These could include, for example:

- An obligation for any new entities (CSC or MRT-like roles) that are created to ensure the independent oversight of the IANA functions operator to work in the interests of the wider stakeholder community and to engage with the wider community in making decisions and to be empowered to exercise any remedies for failure including ultimately a re-tender of the IANA functions operator role away from ICANN;
- Establishing these entities under new ICANN bylaws with a degree of independence from the Board and the staff of ICANN. These new bylaws should also clearly define their very limited mandates;
- Clear functional separation of the roles of policy development (and, in the case of gTLDs, the contracting and enforcement roles) from that of the provision of the IANA functions; and
- Limitations on making changes to these bylaw provisions for as long as ICANN performed the IANA functions operator role.

It would be easier for stakeholders to engage in a stewardship processes within ICANN (meaning ICANN as a platform for engagement, rather than simply the Board and staff of the company), than with overloaded committees that see themselves as having an independent existence.

However, we do recognise that time is short to identify a different approach to the cross-community working group's draft. Accordingly, we provide a detailed analysis of the CWG draft proposal: there is a significant number of major changes that would be needed to make this proposal viable, in particular to respond to the specific environment in which ccTLDs work.

Review of Draft Transition Proposal: Comments on Section 3

General

1. While we would prefer to see a solution more rooted in existing structures with appropriate safeguards, generally we could go along with the approach identified in the CWG on Naming-related Functions draft Transition Proposal, subject to significant simplification, improvements and safeguards. We could accept a solution based on all NTIA responsibilities being transferred to ICANN, again subject to very clear safeguards, in particular on the continued and strengthened separation of the role of IANA functions operator from ICANN's policy role and its contracting and compliance responsibilities for gTLDs. We recognise that structural separation might need to be an option in the case of serious and deliberate action (or inaction) by the ICANN Board, but we believe that provisions for this could be built in to the organisation's bylaws.
2. The organisational arrangements of the draft proposal are complex – probably too complex for volunteer committees. In particular, we would note the workload associated with action to terminate the contract and in managing rebidding processes would overload a committee of volunteers, which would make it open to capture by committee members resourced to take a leading role.
3. Serious thought needs to be given to limiting the role of the proposed entities to the minimum needed to ensure effective stewardship of the IANA functions.
4. It is important that the mandate of each entity is clearly specified and it should not be possible for the mandate to be changed without a full and open public process. We would also wish to see quite clear rules on membership of any committees to avoid individuals rotating from one entity to another, with the committees being dominated by a small group of people.
5. Transparency is fundamental to accountability. Through the proposal the expectation should be the publication of all documents. The proposed entities should not be gatekeepers to that information. In addition, any decision by, or report from, any entity (including the IANA functions operator) should be made public. We do not think any of the proposed entities should have any say whatsoever in the publication of reports from the IANA functions operator (and certainly not in the reports currently required under the NTIA contract) other than to ensure that the reports are being published in a timely fashion.
6. We are generally concerned at the confusion of roles in the process. In particular, proposals to replace NTIA's authorisation role (which currently is very lightweight) seem to introduce multiple reassessments of decisions at various organisational levels. We believe that this needs to be simplified substantially and roles need to be clarified. Any final proposal should avoid adding layers of bureaucracy or additional decision-making entities. It should also avoid creating gatekeeper functions.
7. We have serious concerns about authorisation or appeals processes. The issues that IANA deals with on the delegation or redelegation of ccTLDs are complex. Any process to assess decisions needs to be limited to checking due process and correct documentation of decisions, and should not be the final arbiter of the correctness of the decision itself.
8. There is a lot of detail still to be filled in. While some of this might be developed in parallel with the coordination process, we recognise that getting the detail right is important to the coherence of the proposal.

Detailed comments on section 3

Section 3.1: Introduction

9. First bullet: “the objective of the CWG is largely to replicate the roles played by the NTIA in the execution and oversight of the IANA Naming Functions as faithfully as possible”:

We do not believe that all of the roles need to be replicated. In particular, some of the identified roles – and in particular the role of authorising changes to the root-zone file – might no longer be needed. Others are very simple checks on process or on deliverable.

For the role of authorising changes to the root-zone file, we would note the liability risk for the entity carrying out authorisation.

10. Second set of bullets: We would note that the CWG-IANA needs to identify the issues that need to be addressed by the Cross-Community Working Group on Enhancing ICANN Accountability in good time to allow the CCWG-Accountability to prepare its proposals.

Section 3.2: Summary of the transition proposal

11. Contract Co: If the Contract Co has additional roles to the one it is being proposed to carry out, these need to be specified.

There should be a reference that, “The operation of the Contract Co would be based on the concept of maximum public transparency. The mandate and responsibilities of the Contract Co will need to be clearly defined and limited to its primary role. It should not be possible to change the mandate except through an open and transparent process.”

12. Multi-stakeholder Review Team: Again we believe that, “The mandate and responsibilities of the MRT will need to be clearly defined and limited to its primary roles. It should not be possible to change the mandate except through an open and transparent process” could usefully be added. This should be in the *chapeau text*.

First bullet: Cross-reference needs to be corrected (it is not Annex 3).

Second bullet: “**Within its clear and limited mandate**, making key decisions...”

Fourth bullet: Add “... raised by the Customer Standing Committee **or from elsewhere, subject to the clearly defined mandate of the MRT**”.

Fifth bullet: Elsewhere we refer to annual reports and this could be a useful timeframe for periodic reviews. It would be useful to clarify that the periodic reports should be ex-post assessments of performance against commitments and of conformity of decisions against the agreed policy framework. Reports need to be widely published and open to discussion.

Additional enforcement role: We have serious concerns about any enforcement role for the MRT except in the annual *ex-post* review on issues requiring subsequent corrective action if there appear to be systemic problems. Introducing an additional layer of authorisation or appeal for specific decisions is undesirable as it could introduce additional delays, might open liability for costs incurred because of delays, and could be open to abuse. In addition we would note that the complexity of some decisions (for example in the delegation and redelegation of ccTLDs) requires considerable knowledge and

experience and is not a role that could be performed by the MRT, the Independent Appeals Process or by an independent certification agent.

13. Customer Standing Committee: As with the other proposed entities, we would wish to see references to transparency, mandate and constraints on changing the mandate: “The operation of the CSC would be based on the concept of maximum public transparency. The mandate and responsibilities of the CSC will need to be clearly defined and limited to its primary roles. It should not be possible to change the mandate except through an open and transparent process.”

The nature of the CSC – representing the customers of the IANA naming functions – should be clearly limited to service level commitments, performance indicators and quality assurance. As such, while we see benefits from the Committee adopting open and transparent processes, possibly including liaisons from other communities, we would question the reference to including “additional individuals with relevant expertise.”

We would be concerned about extending the mandate of the CSC to receive and review delegation and redelegation reports, as appears to be suggested later.

14. Independent Appeals Panel: The role of the IAP – as distinct from that of the MRT – should be to address specific cases and in direct response to an appeal from an affected party. Its role is to provide a final step in cases where there is a real dispute – as might be the case in the redelegation of a ccTLD. However, we would be concerned if the role of the IAP were to be more than simply assuring that due process had been followed, with its actions limited either to accepting the decision or to referring the case back to the IANA functions operator to provide explanations. Similarly, the IAP should not be used to bypass or duplicate existing processes (for example, a direct review of Board actions) or to challenge the agreed policy framework. Nor should it be open to potentially abusive appeals from competitors or from “vigilante” or other “concerned” groups on the basis of the disputed value of a TLD to the Internet community.

Section 3.3: Summary of current arrangements/Continuation of existing arrangements

15. Independent Review of Board Actions: We do not believe that “delegation and redelegation of ccTLDs ... require ICANN Board approval prior to being submitted to the NTIA.” Table T5-5 does not identify what the actual role performed by the Board is, but we believe that the role is (and should remain) limited to assuring that due process has been followed and documented.
16. There needs to be a clear differentiation between the roles of the proposed Independent Appeals Panel (for specific decisions) and the Independent Review of Board Actions to avoid confusion between the different appeals processes and the risk of gaming the system.

Section 3.4.1: NTIA acting as the IANA Functions Contract Administrator – contracting functions

17. Do we need to address the potential liability of the Contract Co? The bylaws of the company need to be written quite precisely to limit its mandate and to allow it to ignore instructions from the MRT that are outside the MRT’s mandate. (We would have a serious concern about the MRT’s liability for its decisions and instructions, especially if there is any question of the committee exceeding its mandate.)

18. This section could again usefully note the obligation for the Contract Co to work with maximum public transparency in a clearly defined and limited mandate and that it should not be possible to change the mandate except through an open and transparent process.

Section 3.4.2.1: Customer Standing Committee

19. It would be helpful to indicate clearly that all the IANA functions operator's reports will be made public.
20. We have already raised our concerns about including "other individuals with relevant expertise" as part of the CSC.
21. More fundamentally, we would have concerns with the suggested role of the CSC to receive and review IANA functions operator reports. While we were happy for what we believed to be essentially a technical performance monitoring function, the role now seems to have expanded into another tier of evaluation. Rather a lot of different entities are being included in the process of reviewing decisions by the IANA functions operator. Other than to note that this confusion on who does what could lead to serious issues, there is also a concern on where liability would rest in the case of a legal challenge. We would also be worried about decisions being made by people without the right level of understanding or experience of the issues.
22. In line with the interpretation that the CSC should simply exercise a technical performance monitoring function, we believe that the first two bullets should be deleted. If not, we would question whether the CSC really has any clear role that could not be included in the MRT. Under no circumstances should the CSC review or comment on delegation or redelegation reports *ex-ante* as this would add another committee to the list of gatekeepers.

Section 3.4.2.2: Multi-stakeholder Review Team

23. We would suggest that, "The MRT would meet annually to review overall IANA Functions Operator performance and other concerns **and report to the global multi-stakeholder community.**" Current wording makes this committee very inward-facing. However, the decisions made by the MRT could have wide-reaching consequences and its conclusions should be properly understood and debated by the wider community.
24. Based on this view, "The responsibilities of the MRT **should be clearly defined and the mandate limited to:**" and most decisions should go out to full and open public consultation. (In particular, all the functions related to contracting decisions; negotiating and funding improvements to the service; and starting enforcement action should not be carried out without wide consultation.)
25. A number of the administrative roles (and in particular C.2.12.a-C.4.6) look more appropriate for the CSC (if the CSC is maintained): these are all operational issues best dealt with by technical experts who have an interest in maintaining quality of service.
26. We would also note the scale of responsibilities for this Committee, especially should there be performance issues with the IANA functions operator or during a periodical re-bid process. We have already commented on whether this is a tenable approach for a committee of volunteers.
27. One area where the MRT could take a leading role would be in preparing *ex-post* reviews of performance and decisions. This would help show where there are deficiencies and causes for concern that could be taken up with the IANA functions operator.

Section 3.4.3.2: Independent certification for delegation and redelegation requests

28. For reasons already explained, it is hard to understand the role of introducing a third party and a written opinion on ccTLD delegation and redelegation decisions. We do not believe that it is appropriate to introduce such a role and, bearing in mind the importance of local decisions in such case, we wonder how the third party would be able independently to verify the decision.
29. At best an independent counsel could establish whether due process had been followed and that satisfactory evidence had been produced to show this. But if a decision is contested, it would be more appropriate for the aggrieved party to take its case to the IAP to have the decision referred back for further consideration, should due process not have been followed or decisions were not properly documented.
30. As it is, we do not believe that the NTIA role has ever been to verify delegation and redelegation decisions – at best it has checked that due process has been followed. We therefore do not think this exact role needs to be replicated. An appeals process (limited, as already explained) should be sufficient.

Section 3.4.3.3: Independent Appeals Panel

31. The details of the appeals process would need careful consideration: its scope and who can challenge decisions need to be clearly defined to avoid abusive or inappropriate interventions. The IAP should be limited to affected parties or to those who can demonstrate that they will be adversely affected by the IANA action or decision. And as previously noted, it's mandate in assessing ccTLD delegation and redelegation decisions should be very limited.

Section 3.4.4: IANA Functions Contract between ICANN and the NTIA:

32. In the third paragraph of the introductory text we would like the last sentence qualified to show that the decision on revisions to, and evolution of, the contract is not solely a decision for the MRT: “[it] will be the responsibility of the MRT **in full and open consultation**.” Similarly in the fourth paragraph, we think that decisions on whether to rebid or not should be made in open consultation.
33. In the table in section 3.4.4 we would note the following issues, mainly related to the comments above:
 34. TERMINATION FOR CAUSE; ESCALATION: bullet 4. If the contract is terminated immediately, who will carry out this role until another contractor has been appointed? Sudden action should not be allowed as it essentially pre-empts the wider multi-stakeholder community and terminates the operation of a critical Internet function without an agreed successor contractor in place.
 35. COST/PRICE (current contract clause B.2). We do not think that it should be for the MRT to approve or otherwise the fees for service. We would note that many registries fund ICANN in part to pay for the provision of the IANA service (as part of the total funding needed to provide the range of ICANN's activities). We would suggest that it is undesirable to re-open budget discussions on these grounds.
 36. [Functional Separation]: does it need to be made clear that this functional separation is from ICANN's policy and gTLD contracting role.

37. Independent Evaluator: We have already commented on, and do not think that it is appropriate to establish, this role.
38. Delegation and Redelelegation of a Country Code Top level Domain (ccTLD) (C.2.9.2.c): final bullet needs to be revisited in the light of earlier comments. The Contractor should publish the delegation and redelegation reports, but it should simply need to request changes from the RZM.
39. Root DNSSEC Key Management (C.2.9.2.f): We are not aware of any discussion on the implications of the transition on DNSSEC functions performed by the IANA functions operator.
40. .INT TLD (C.2.9.4): We are not aware of any discussions about the implication of the transition on the operation of .int.
41. Inspection Of All Deliverables And Reports Before Publication (C.2.11): The second bullet implies a gatekeeper function on the dissemination of reports that the MRT certainly should not have.
42. TRANSPARENCY OF DECISION-MAKING: fifth bullet. It is not appropriate for IANA to hire independent legal counsel to provide advice on the interpretation of existing naming related policy. Clarification of policy should lie with the policy authority.
43. Program Reviews and Site Visits (C.4.1 and elsewhere): we see no need for site visits.
44. Monthly Performance Progress Reports (C.4.2): should be published
45. Inspection and acceptance (C.4.7): Again we do not believe that the CSC should have any power to restrict dissemination of reports.
46. INDEMNIFICATION (H.13): There is a question about whether the contractor could take action against the Contract Co, the CSC, the MRT or the IAP for requirements that went beyond the mandate of the organisation issuing an instruction or over the interpretation of contract conditions. This could be the case if there were a decision to rebid the contract.