

# CCWG Accountability – Problem definition

## For Advisor's review

23 January 2015

*"When I have one week to solve a seemingly impossible problem, I spend six days defining the problem. Then the solution becomes obvious."*

Albert Einstein

### 1. Problem statement

The Charter of the CCWG-Accountability defines the following problem statement:

The National Telecommunications and Information Administration (NTIA) has requested that ICANN "convene a multistakeholder process to develop a plan to transition the U.S. government stewardship role" with regard to the IANA Functions and related root zone management. In making its announcement, the NTIA specified that the transition proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model
- Maintain the security, stability, and resiliency of the Internet DNS
- Meet the needs and expectation of the global customers and partners of the IANA services
- Maintain the openness of the Internet.

NTIA also specified that it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.

During discussions around the transition process, the community raised the broader topic of the impact of the change on ICANN's accountability given its historical contractual relationship with the United States and NTIA. Accountability in this context is defined, according to the [NETmundial multistakeholder statement](#), as the existence of mechanisms for independent checks and balances as well as for review and redress.

The concerns raised during these discussions around the transition process indicate that the existing ICANN accountability mechanisms do not yet meet stakeholder expectations. Recent statements made by various stakeholders suggest that current accountability mechanisms need to be reviewed and, if need be, improved, amended, replaced, or supplemented with new mechanisms (see for instance ATRT recommendations). Considering that the NTIA has stressed that it is expecting community consensus regarding the transition, a failure to meet stakeholder expectations with regards to

accountability may create a situation where NTIA does not accept the IANA transition proposal as meeting its conditions. Thus reviewing ICANN's accountability mechanisms was considered to be crucial for the transition process.

The CCWG-Accountability reviewed these guidelines as well as took into consideration inputs from the session organized during ICANN 50 in London, on 26 June 2014, titled "Enhancing ICANN Accountability"<sup>1</sup>. Of particular interest were some questions raised by Professor Jan Aart Scholte<sup>2</sup>, from the University of Gothenburg:

- Accountability to whom?
- What is accountability?
- Accountability for what purpose?

The purpose of this section is to provide the preliminary view of the CCWG-Accountability on these fundamental questions, clarifying the issues at stake, in order to guide the work of the group going forward.

## 2. What is accountability?

The CCWG acknowledges the existence of various definitions of accountability, such as :

- „The condition or quality of being accountable which in turn means responsible; having to give an explanation for one's actions; answerable.” (Longman Dictionary)
- “Accountability refers to the implicit or explicit expectation that one may be called on to justify one's (beliefs, feelings and) actions to others” (Lerner, J.; Tetlock, P.E. 1999, p. 255)
- Another element is a “notion of personal responsibility for potential negative consequences of one's own behavior and actions on others”.
- Accountability may be achieved through the adhering to a framework of agreed rules and standards and of defined rights and responsibilities for those accountable and for those that an individual/entity is accountable to.

As a general concept, accountability encompasses processes whereby an actor answers to others for the effects on them of its actions and omissions. In the present case, then, accountability involves the processes whereby ICANN answers to its stakeholders for the impacts on those stakeholders of ICANN's decisions, policies and programmes.

Accountability is generally understood to comprise four dimensions. One, transparency, means that an actor (ICANN) is answerable to its stakeholders by being open and visible to them. A second, consultation, means that the actor (ICANN) continually takes input from and explains its positions to the stakeholders. Third, review means that the actor's actions, policies and programmes are subject to outside monitoring and evaluation. The fourth dimension, redress, means that the accountable

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<sup>1</sup> <https://london50.icann.org/en/schedule/thu-enhancing-accountability>

<sup>2</sup> Professor Scholte has since then been appointed by the Public Experts Group as an Advisor to the CCWG-Accountability

actor makes compensations for any harms of its actions and omissions, for example, by means of policy changes, institutional reforms, resignations, financial reparations, etc.

The CCWG-Accountability Charter also provides a helpful starting point to this key question.

Accountability in this context is defined, according to the NETmundial multistakeholder statement, as the existence of mechanisms for independent checks and balances as well as for review and redress<sup>3</sup>.

The definition clarifies how accountability can be achieved: by providing the appropriate set of mechanisms. The goal of the group is to enhance ICANN's accountability by elaborating proposals for enhancements or new mechanisms. The focus on this definition is therefore absolutely critical to the CCWG. However further clarity regarding the definition's various components is needed.

a. Transparency

With respect to *transparency*, accountability requires that an actor is visible to its stakeholders. In other words, the affected constituents must always, from the start to the finish of a given action, be able to see what ICANN is doing and how. In a situation of accountability, impacted circles should be able readily to discover what decisions are taken, when, by whom, through what procedures, on the basis of what evidence, drawing on what resources for implementation, and with what expected consequences. Without such information stakeholders are left ignorant and cannot effectively scrutinise ICANN; thus transparency is a sine qua non of accountability. Of course there are situations (such as criminal investigations) where public interest may require some temporary restrictions on the release of information. However, in accountable governance the default position is timely and full disclosure, and any exceptions to that rule require thorough justification.

b. Consultation

With respect to *consultation*, accountability requires that an actor explains intended actions to stakeholders and adjusts plans in the light of information, analysis and preferences heard from them. In other words, decision-taking is accountable when affected people are incorporated into the deliberations and have opportunities to shape the outcomes. In thorough accountability this participation extends across the policy cycle, from the initial agenda formulation to the final report. The consultation may be direct (involving the affected persons themselves) or indirect (involving mediating parties such as constituency groups). In the case of indirect participation the mediating agent ('the ICANN community') should in its turn be accountable to those for whom it purports to speak.

c. Checks and balances

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<sup>3</sup> The CCWG acknowledged that the CWG proposed a definition of accountability as such :  
"Accountability provides the ability for an independent entity to impose binding consequences to ensure the IANA Functions Operator meets its formally documented and accepted agreements, standards and expectations". It was felt that the CCWG definition was compatible with the CWG approach.

Checks and balances can be defined as: “a system in which the different parts of an organization (such as a government) have powers that affect and control the parts so that no part can become too powerful”<sup>4</sup>.

The group defines “checks and balances mechanisms” as a series of mechanisms put in place to adequately address the concerns from the various interested parties in the discussion and decision process, as well as to ensure that the decision is made in the interest of all stakeholders .

Examples include:

- Establishment of balanced groups of stakeholders to shape or define policy decisions (e.g. the composition of the GNSO Council and the ICANN Board of Directors)
- Ability to provide advice before a decision is made (e.g. Advisory Committees such as GAC, SSAC)

#### d. Review mechanisms

The definition of “review” is : “a formal assessment or examination of something with the possibility or intention of instituting change if necessary.”

With respect to *review*, accountability requires that the impacts of ICANN's actions on its stakeholders are thoroughly and externally monitored and assessed. Such evaluations might take the form of academic studies, civil society reports, judiciary proceedings, journalistic investigations, officially commissioned enquiries, parliamentary reviews, or testimonies of the affected persons themselves. Accountability entails an obligation on an actor to determine how affected circles have been affected. Impacted persons have a right to know how well the impacting agent has complied with its decisions and achieved the promised results. Stakeholders furthermore have a right to receive tenable explanations when outcomes have fallen short of expectations.

The group considers review mechanisms to be mechanisms that assess the performance and relevance of processes or structures, and provide non binding recommendations for improvement.

Examples include:

- Periodic structural reviews of SOs and ACs (as currently mandated in the ICANN Bylaws)
- AoC-mandated ICANN organizational reviews for Accountability and Transparency; Security, Stability, and Resiliency; WHOIS; and Competition and Consumer Trust.

#### e. Redress mechanisms

The definition of “redress” is : “remedy or compensation for a wrong or grievance”.

With respect to *redress*, accountability requires that an actor provides its stakeholders with compensation in cases where ICANN's actions have had harmful consequences for affected people.

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<sup>4</sup> Merriam Webster dictionary <http://www.merriam-webster.com/dictionary/checks%20and%20balances>

This compensation might take the form of apologies, policy changes, institutional reorganisations, staff reprimands, management resignations, economic reparations, or even incarcerations. In a situation of accountability, affected circles must be assured that affecting actors take responsibility for their actions and learn from any mistakes.

The group defines redress mechanisms as mechanisms that focus on assessing the compliance or relevance of a certain decision (as defined in the “purpose” section below), and has the power to confirm, cancel or amend the decision. Thus, an accountability mechanism of the “redress” category, always starts by “reviewing” the decision. However, its output is binding.

Examples include:

- State of California or jurisdictions where ICANN has a presence Court decisions
- f. Independence

The NETmundial definition of accountability relies on the existence of “independent” mechanisms. It is well known that independence is extremely difficult to define and assess as the demarcation of having no interest, having an interest and being conflicted is often unclear.

Notably, the group investigated two different views (non exclusive) in order to assess independence: independence of persons participating in the decision process, and independence of a specific accountability mechanism with regards to other mechanisms.

The group acknowledges that not all accountability mechanisms will have the same level of independence. Internal accountability mechanisms with high transparency standards might provide a first level of accountability and external, more independent bodies might act as last resort mechanisms.

*i. Independence of persons participating in the decision process*

The notion of independence is well researched. For instance Basic Principles on the Independence of the Judiciary were adopted by United Nations Congress<sup>5</sup>, including a section defining the independence of the judiciary.

Within Icann, section 3 of Article IV of the Icann bylaws define the notion of independence for members of the expected “omnibus standing panel”<sup>6</sup>.

In corporate governance through the notion of independent Director, which appears in many countries corporate governance codes of conduct. One definition is provided as such<sup>7</sup> :

*“For the purpose of this clause the expression 'independent directors' means directors who apart from receiving director's remuneration, do not have any other material pecuniary relationship or transactions with the company, its promoters, its management or its subsidiaries, which in judgment of the board may affect independence of judgment of the directors.”*

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<sup>5</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>

<sup>6</sup> <https://www.icann.org/resources/pages/bylaws-2012-02-25-en#IV>

<sup>7</sup> [Are we making a mockery of independent directors?](#) Dr. Madhav Mehra, President, World Council for Corporate Governance (circa 2004)

For the benefit of this CCWG, independence of a mechanism could be assessed through the independence of the persons involved in making or validating the decision along these lines:

The persons involved in making or validating the decision, apart from participating to this mechanism, do not have any other material relationship, transaction or professional aspiration with ICANN which may affect their independence of judgment.

It should be noted that such a definition has triggered an ongoing debate regarding the loss of the qualification of “independent” after a certain number of years of service as Board member in a company.

The group also noted that this definition was focused on “economic” independence, rather than political independence for instance. It was however considered that this addressed the most pressing expectation from stakeholders.

#### *ii. Independence of a specific accountability mechanism*

Considering the special nature of the multistakeholder model, which by definition empowers interested parties to participate and make decisions, the group considers that independence could also be considered as independence between the various accountability mechanisms.

Independence of two accountability mechanisms can be assessed through:

- Examining whether the persons making decisions in one of the mechanism are similar to the other mechanism
- Examining whether the persons making decisions in one of the mechanism are appointed by the persons in charge of the other mechanism
- Examining whether the persons making decisions in one of the mechanism have material relationships with the other mechanism that may affect their independence of judgment.
- Examining whether the persons making decisions in one of the mechanisms have conflicted interests in any of the mechanisms they take part.

### **3. To whom should ICANN be accountable?**

The CCWG-Accountability provides the following clarification (emphasis added), as well as a definition of stakeholders:

The CCWG-Accountability is expected to deliver proposals that would enhance ICANN’s accountability towards **all stakeholders**.

The term stakeholder should be considered for the CCWG-Accountability in its wider acceptance, for instance by relying on the definition provided by the European Framework for Quality Management (EFQM): a person, group or organization that has a direct or indirect stake or interest in the organization because it can either affect the organization or be affected by it. This includes but is not limited to all ICANN SOs and ACs.

The view of the group is that this definition is useful, and can be further clarified by illustrating which stakeholders can affect ICANN or be affected by ICANN, either directly or indirectly. These definitions may be referenced at further stages to clarify which parties may have standing ground to certain accountability mechanisms, should participate to certain groups to provide appropriate checks and balances, or assess the level of independence of certain existing or contemplated mechanisms.

The group also discussed references to pre-existing categories of stakeholders. The Tunis agenda for the information society<sup>8</sup>, outcome of the World summit on information society, mentioned “governments, the private sector, civil society and international organizations.” The Netmundial multistakeholder statement refers to “governments, private sector, civil society, technical community, and academia “.The group’s view was that these categories were not the most appropriate for the issue of Icann’s accountability.

a. Affected parties

Affected parties are individuals or entities upon which the decisions made by ICANN have an impact.

i. *Directly-affected parties*

The group classifies directly-affected parties as parties affected by ICANN’s decisions through contracts, individual decisions or policies. They would therefore include:

Stakeholder	Affected by contracts	Affected by individual decisions	Affected by policy	Comment
gTLD registries	X	X	X	
ICANN-accredited registrars	X	X	X	
Internet users			X	if a domain name is taken down for instance
gTLD registrants	X		X	through UDRP or WHOIS verification policies for instance
ccTLD registrants				through potential IANA performance issues if they affected security and stability of the DNS
Governments			X	including law enforcement agencies
IP Right owners		X	X	ex: UDRP, URS, TMCH...
Free speech and civil liberties advocates			X	
RIRs and RIR communities		X	X	through numbering allocation policies for instance
ISPs			X	through numbering allocation

<sup>8</sup> <http://www.itu.int/wsis/docs2/tunis/off/6rev1.html>

				policies for instance
<b>Registry services providers</b>			X	
<b>Domain name resellers</b>			X	
<b>ccTLD managers</b>		X		Mainly as far as IANA decisions are processed
<b>IDN ccTLD managers</b>		X	X	Affected by IDN ccTLD policy and some individual panel decisions
<b>IETF</b>		X		
<b>Dispute Resolution Providers, e.g. for UDRP and URS</b>	X		X	
<b>ICANN contractors such as the TMCH operator</b>	x		x	

Individual decisions in this context are decisions made by Icann on operational matters extending beyond policy (implementation or in case of necessity to interpret the policy).

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*ii. Indirectly-affected parties*

Other parties are affected indirectly by ICANN's decisions.

- Specific communities, industries or sectors of the economy (through the introduction of new gTLDs for instance)
- ccTLD registrars (through common business practices as well as trends in the market shaped by policy – such as new gTLD introduction)
- The root zone maintainer, through IANA Functions contract and its own contract with the Department of Commerce, or any future arrangement.
- DNS Name server operators (including root server operators, Internet Service Providers, private network DNS operators, through, for instance deployment of DNSSEC or IPv6)

**b. Parties that affect ICANN**

Parties affecting ICANN are parties that influence ICANN's decisions or actions, either directly or indirectly, or shape the environment in which ICANN operates.

*i. Parties affecting ICANN directly*

The group classifies as parties affecting ICANN directly the individuals or entities that participate directly in ICANN's decision processes. They would therefore include:

- Registry Stakeholder Group (RySG) and Registrar Stakeholder Group (RrSG)



- Commercial stakeholder group (CSG), i.e. Commercial business users (BC), Intellectual Property Constituency (IPC) and Internet Service Provider and Connectivity Providers Constituency (ISPCP)
- Non Commercial Stakeholder Group (NCSG), i.e. Non-Commercial Users Constituency (NCUC) and Not for Profit Operational Concerns Constituency (NPOC)
- Governments in the GAC
- Security experts (SSAC)
- Internet users (through ALAC)
- RIR communities (through ASO)
- ccTLD managers who are ccNSO members, as well as ccTLD regional organizations such as CENTR or APTLD
- NomCom nominees to the various groups
- Root server operators (RSSAC)
- The NTIA (currently) through the AOC
- ICANN Board
- ICANN staff and contractors
- Community members participating in public comment fora or corresponding with ICANN
- IETF (through arrangements regarding IANA and changes affecting internet identifiers)
- Auditors, (community) working groups, (external) review teams

*ii. Parties affecting ICANN indirectly*

Other parties affect ICANN or shape its environment, although indirectly, such as:

- The US Congress (through various audits and legislations that affect ICANN as a US-based organization and an organization in contract with the US government through NTIA)
- Governments that are not GAC members
- ccTLDs that are not ccNSO members
- Other entities working on communication policy such as the IGF, UN family of organization (CSTD, ITU), Internet Society, etc.
- (potential) domain name registrants through their buying / selling behaviours shaping the market.
- Future Internet users

#### **4. What are the purposes of ICANN's accountability ?**

This question mentioned by Professor Scholte in London raised a healthy and thorough discussion on the CCWG mailing list. Different perspectives were expressed, exposing clearly how different the views could be in the community about the ultimate goals and priorities of ICANN. However, the discussion was useful in enabling identification of four types of purpose that are relevant, within the limited scope of ICANN's mission and values :

- a. ICANN should be accountable to complying with its own rules and processes ("due process")

One of the key purposes of ICANN's accountability is to ensure that ICANN, when elaborating policies, implementing or enforcing them, follows the specific rules and processes that were set, either by its Bylaws or through the policies themselves. Stakeholders expect ICANN to abide to these rules since ICANN is empowered to affect their operations or environment through its actions.

This implies that accountability mechanisms must be put in place to address for example:

- Disregard of established procedures (such as binding advice not being followed, or the absence of PDP...)
- Decisions being taken outside of remit (a group or staff member taking a decision that extends beyond its mission)
- Violations of policy or process, such as decisions without material information

This particular purpose of accountability should not affect the ability to evolve the rules and processes themselves, when appropriate and following predefined rules and processes.

b. Icann should be accountable to comply with applicable legislation, in jurisdictions where it operates

Icann Bylaws state that :

*"The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations."*

Thus ICANN, like any organization, is accountable to comply with applicable legislation, in jurisdictions where it operates, as well as internationally agreed laws, including considerations of human rights as bounded by ICANN's mission and core values.

c. ICANN should be accountable to achieving certain levels of performance as well as security

Aside from compliance, ICANN is also expected to deliver certain services to certain stakeholders. These services are, among other things, related to the IANA function, but not only. The Global Domains Division within ICANN serves gTLD registries and registrars. ICANN also operates the L-root.

Like any professional organization, ICANN should be held accountable to provide these services at the appropriate level of performance. This performance can be expressed in terms of:

- Service levels (through, for instance, a Service Level Agreement), expressed for instance in terms of delay to service a request;
- Security level (especially for key infrastructure such as DNSSEC facilities) or data collected by ICANN;
- Cost to achieve the given levels of performance.

- d. ICANN should be accountable to ensure that its decisions are for the benefit of the public, not just in the interests of a particular set of stakeholders.

The term “public interest” is referenced several times in the Affirmation of Commitment between Ican and the US Government’s Department of Commerce<sup>9</sup>. Considering the differences of approach regarding the definition of this notion, which is not provided by the AoC, as well as the changing nature of the needs of the Internet and the Internet users, the group considers that one of Ican’s accountability purpose can be defined as ensuring that its decisions are, to quote the AoC, “in the public interest, and not just the interests of a particular set of stakeholders”.

The term stakeholder should be understood here as defined above in this document, including directly and indirectly affected parties as well as directly and indirectly affecting parties. Clarifying ICANN’s notion of public interest would however most certainly be highly beneficial to the organization by setting clear expectations with all stakeholders on what it can and cannot be held accountable to. The CCWG-Accountability took note that this action was alluded to in ICANN’s Strategic Plan.

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<sup>9</sup> <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>