nominet ®

3rd June 2015

Cross Community Working Group Accountability Initial Draft Proposal

Comments from Nominet UK

Introduction

Nominet is the registry for .uk Internet domain names. It is also the registry for the .wales and .cymru gTLDs, a back-end provider for a number of Brand-gTLDs, an Emergency Back-End Registry Operator and an ICANN accredited registrar. It is an active participant in ICANN and is a member of the ccNSO and the GNSO Registry Stakeholder Group.

Nominet welcomes the opportunity to contribute to the CCWG- Accountability Initial Draft Proposal. Nominet has followed the work of the CCWG carefully and contributed to the discussions.

Comments are submitted on behalf of Nominet by Eleanor Bradley, Chief Operations Officer.

General remarks

We are grateful to the CCWG for its detailed work and analysis and for its identification of clear opportunities for moving forward on improving ICANN's accountability mechanisms. Generally we welcome the approach followed by the CCWG. The practical mechanisms proposed give a good framework on which to build and we support the general approach.

The draft has a heavy focus on legal structures and mechanisms for use where trust and confidence have already seriously broken down. While we recognise that it is important to have such clear safeguards, we would like to see a little more focus on building confidence and trust – processes that encourage better understanding between the communities and with the executive and the Board. This could include jointly agreeing remedial action and only if there were a failure to act would it then lead into an escalation process, should that be necessary.

This is fundamental – ICANN itself is the community and, as an organisation made of different stakeholder groups, there should always be tensions between different interests. Processes need to be more consensual than adversarial, and more needs to be done between communities at an early stage in policy development to build shared understanding.

We are concerned that many of the mechanisms identified in the proposal will be massively disruptive – nuclear options. One result of sanctions of such consequence is that they are considered unusable. Sacking the Board – a Board that has been selected by the community and where many of the members can be held directly to account by their own community – seems to be a case in point. This is particularly so in that there is a small pool of community candidates willing to take on the role. (One could question whether there should be more rotation of community-appointed members on the Board to develop a wider pool of experienced and knowledgeable candidates.)

However, at a time of crisis in the organisation, it is hard to see who could step forward to populate a new Board at short notice and who will be able to command the trust needed to rebuild the organisation's confidence. The steps following sacking the Board or individual Board members need to be considered carefully, as do scenarios for rebuilding the organisation once the ultimate mechanisms have been triggered.

There does need to be some thought about how often processes can be triggered. The mechanisms will be seriously disruptive to the organisation if and when they are used and we would be concerned if there were to be a continued process that distracted the organisation – stakeholders and the Board – from oversight of the organisation or from developing a clear vision and strategy for the challenges and opportunities that we will confront. We would like to see there being clear cooling-off periods – in particular aimed at rebuilding trust in the organisation – before allowing another process to be launched.

There is a delicate balance between thresholds introduced to prevent frivolous use of serious – and potentially damaging – actions on the one hand and making mechanisms useless because it is nearly impossible to trigger those mechanisms. We recognise that the CCWG has attempted to reconcile this. To some extent, the balance is stark because there is no clear escalation process leading to the "nuclear" options of sacking individual Board members or the entire Board, or to vetoing the budget.

We recognise that it should not be possible easily to put aside mechanisms that are in place to assure accountability. There is a downside to this: while the processes might be relevant and appropriate now, this might not be the case in the future. It might be possible for a small minority to prevent necessary institutional change in the future, thresholds locking ICANN into process that are no longer appropriate. This is, of course, a difficult issue and we are aware that the CCWG has given it some thought.

We welcome more effective appeals procedures. It is obviously important to ensure due process is respected to underpin ICANN decisions. It is also reasonable that decisions can be challenged and to allow such processes to be well informed and effective. ICANN needs to have robust, clear and fair mechanisms to give credibility to its processes. Not least important would be to ensure that disputes do not drag on, undermining the organisation's credibility.

However, we do believe that some more thought needs to be given to the interests of parties that are not directly involved in ICANN, particularly those who might be seriously impacted by policy developed without their knowledge. It is fundamental to serving the public interest that mechanisms should include processes for receiving, understanding and responding to wider interests even when they come in late in processes. Appeals and reconsideration processes do not appear to provide affected parties any clear process and this favours decisions focussed on the ICANN community's own interests.

We welcome the approach of embodying the Affirmation of Commitments into ICANN's DNA and of building on the AoC reviews. This process has been criticised in the past as another layer of review ("ICANN reviewing itself to death") and has also excited little interest in the community. Yet as part of enabling the community, the mechanism provides a way of ensuring concerns are being heard and addressed. We believe that this process is fundamental as a way of building trust in ICANN and it could usefully be included earlier in the report: it is based on improving the organisation, rather than sanctioning it.

However, the processes are slow, greedy on volunteers' time and cumbersome (a year to review and even longer to implement: given the frequency of the reviews, one can be started before all the recommendations from the previous review have been fully considered).

Hence we welcome the proposals to increase the time cycle of the review process and of focussing reviews on areas of greatest concern. The requirement for an annual report on the state of improvements to accountability and transparency is a good idea: we think it should be a clear part of the CEO's report.

Detail

Mission, Commitments & Core Values

While we welcome the approach in this proposal, some of the wording needs more thought. (Wording like "to the extent feasible" and "where feasible," for example, rather negates ideas considered to be fundamental.) Given the significant role of the mission, commitments and core values in underpinning the new accountability structure, we would question why they should not be considered at the level of fundamental bylaws for allowing changes. Changes here should be at a minimum subject to rigorous debate and command good community support.

Mission (page 19)

Paragraph 56: This appears to duplicate text from paragraph 55, but with a different emphasis. We would note that ICANN does not coordinate the development and implementation of policy for ccTLDs except in exceptional circumstances.

3.2 Fundamental Bylaws

We support the general concept of fundamental bylaws.

3.2.3.3: While we recognise the need to have a high bar to changing a fundamental bylaw, this can also be an impediment to necessary change. We wonder whether some thought should be given to exceptional mechanisms that can define and assess necessary changes (addition of new, abrogation or amendment of existing) in exceptional circumstances, something akin to a constitutional conference.

4. Appeals Mechanisms

This process, of necessity, is complicated and heavy. Hence we welcome the statement in paragraph 16 (page 34) in favour of informal resolution. This could be usefully given more visibility early in the section.

We would also encourage some responsibility within ICANN for identifying who might be affected by the organisation's decisions and increased outreach to those communities which are not involved in ICANN should be part of the public interest commitment. This is particularly important when time-limits for submitting an appeal are short.

5. Community Empowerment

The discussion on "membership", "designator" and "unincorporated associations" under Californian law is not something we feel comfortable offering an opinion on. The argument is complex and it is not easy to see the real benefits of the different models through the detail provided.

We would, however, question the need to build complex legal structures within an organisation to allow the community to hold the Board it appointed to account. This seems to underline a lack of trust that needs to be addressed urgently: building new structures without developing trust in the organisation is not going to address the underlying issues.

5.2 Power: reconsider/reject budget or strategy/operating plans

Again this section shows a significant lack of trust in ICANN and its processes. This needs to be addressed. That the complex processes that ICANN goes through in developing strategy, operating plans and budgets, with open consultation, could lead to proposals being rejected by the community suggests something is seriously wrong. Some form of intermediary process – promoting dialogue between the executive and/or Board and the community – is needed to avoid disruptive processes.

5.3 Power: changes to "standard" bylaws

We have some concern that bylaws as fundamental as the mission, commitments and core values are not included as fundamental bylaws and treated as such (paragraphs 210-1), given that these are at the heart of the CCWG's proposals.