

CCWG-Accountability

Afnic comments

12/09/2015

afnic

About Afnic:

Afnic is a multi-registry operator of the top-level domains corresponding to the national territory of France (the .fr TLD and those of several of the overseas territories) and of French projects for new Internet top level domains (TLDs).

Afnic is a member of CCNSO, Centr, and APTLD.

General comments

At this point in time, Afnic would like to warmly thank all the stakeholders who have been involved in the CCWG – Accountability work. While, as adequately stated on ICANN homepage, “time is running out” for the IANA transition, the tremendous work done so far by CWG accountability, the ICG, and the CCWG, as well as the numerous comments yet sent on the last report from the CCWG, shows undoubtedly the power and the efficiency of the bottom-up multistakeholder model.

Before answering the questions asked by the CCWG-Accountability, Afnic would like to highlight some key elements of the context that led to this work. Since more than one year, various stakeholders, being inside or outside ICANN, have manipulated the concepts of accountability, transition, stewardship, backstop, powers of the community, statutory rights, independent appeal mechanism, binding decisions, removal of individuals from office, etc. applied to ICANN. While the theoretical approach is always a good way to start a work (at least, and bearing in mind that cultural diversity is a key enabler of a good international governance, French usually work that way...) it shouldn't divert us from our initial goal, which is :

*“The Enhancing ICANN Accountability process was developed to propose **reforms** that would see ICANN realize a level of accountability to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government. This contractual relationship has been perceived as a **backstop** with regard to ICANN's organization-wide accountability since 1998”¹*

In that sense, enhancing ICANN accountability, especially when it comes to work stream 1, **is not an attempt to fix all ICANN internal governance problems**, which are still numerous, as in any organizations. Like every organization, ICANN need to evolve and see its own processes, operations and accountability, strengthened periodically.

But in this very case, on the contrary, we are talking about **reforms** built on what works within ICANN, namely the **bottom-up multistakeholder approach**. These reforms must help reaching at least the same level of accountability ICANN use to have towards the US Government, but now towards the Global Multistakeholder Community.

If, doing that, it's possible to solve some recurrent problems faced by the communities inside ICANN, that would be a bonus, and that's definitely what Afnic expects to see in work stream 2.

¹ Ccwg report - Background

Shifting the powers from USG to an empowered multistakeholder community is, indeed, a change in ICANN governance mechanisms. We agree that each and every proposal made by the CCWG – accountability should be tested against the main risks the community has identified²², and we recognize the work done by the CCWG – accountability to test its own proposals already, involving external counsels as well as experienced members of the community.

In any case, Afnic is convinced that the proposal put on the table by the CCWG – accountability is **necessary and sufficient to allow the IANA stewardship transition.** Some points may still have to be refined or explained better, before going to the Board, which we will point out in the document.

Afnic is committed to participate, along with all interested parties, in the finalization of this proposal, in order to allow the IANA stewardship transition, as the ICANN accountability enhancement is required to fulfill the promise of a comprehensive, stable, sound proposal from the community to the NTIA.

Afnic would also like to insist on the paramount importance of respecting the timeline for doing so. Some flexibility may be needed to explore and fine tune all aspects of the proposal, but we are now talking in months, not in years. **Trying to implement the proposals to test them, before proposing it to the NTIA, seems impossible to us, and would be a diversion of the process itself.** As the proposals made are built upon a rough consensus of the community, we believe ICANN will simply have to commit to implement and enforce them, once they will be submitted to and approved by the NTIA.

Any further long and undetermined delay would surely lead to the failure of the transition process and as such, would endanger the multistakeholder model within ICANN, making it even more critical to strongly enhance its own accountability to the global community. In that unlikely situation, the work done by the CCWG – Accountability would be the only obvious and community wide discussed starting point for an ICANN accountability enhancement.

²² These risks are captured in the NTIA requirements mainly, but reflect what the bottom up multistakeholder mechanisms has found necessary. These requirements are also aligned with the Netmundial statement.

Do you agree that the CCWG-Accountability proposal enhances ICANN's accountability?

Afnic agrees with the four building blocks that have been identified by the CCWG that are to be put in place in order for the IANA transition to occur.

As for the [principles](#):

The distinction between fundamental and standard bylaws is a nice way to focus on the core mission of ICANN. The inclusion of the AoC within is a good illustration of what we mean by shifting from US Government to the Global Multistakeholder community.

As for the changes made since the previous version, Afnic welcomes the clarification of “private sector” (par. 206). We would definitely have preferred a definition sticking to the global consensus on what is the multistakeholder model³, notably because the multistakeholder model, in our view, cannot be led by any of the particular stakeholders.

This way of employing “private sector” to mean “what is not governmental” seems to be culturally deep rooted in some parts of the world; we can therefore accept this phrasing.

Afnic notes that an inclusion of “human right commitment” within ICANN mission has been decided by the CCWG upon rough consensus.

Afnic would suggest to reference to already agreed language within the United Nation System, recalling once again the consensus reached in the Netmundial statement:

*“Human rights are universal as reflected in the Universal Declaration of Human Rights and that should underpin Internet governance principles. Rights that people have **offline** must also be protected **online**, in accordance with international human rights legal obligations, including the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, and the Convention on the Rights of Persons with Disabilities.”*

³ Netmundial statement: « meaningful and accountable participation of all stakeholders, including governments, the private sector, civil society, the technical community, the academic community and users. »

As for the “**Empowered Community**”:

Afnic welcomes the simplification brought with the sole member model.

We acknowledge the comprehensive studies ordered by the CCWG to the external legal counsel, and, while recognizing it is of the essence of a legal advice to be contradicted by another one, we feel reasonably comfortable with the current advice because it validates the legal feasibility of changing the bylaws to transform ICANN into a sole member organization.

That being said, we feel that any alternative should take into account the necessity to having a “member model”, whether it’s a sole member or a SA/AC membership. Any other solution (no membership), within the current legal and regulatory environment (the California law) would make it impossible to simply replace the “contract” between ICANN and the USG by another “contract” between ICANN and the Global multistakeholder community.

That said, Afnic is of the opinion that the “member model” and in that case the “sole member model”, is the only possibility given by the Californian law to ICANN to enshrine the contractual nature of its duties towards the global multistakeholder community.

One of the main reasons why Afnic strongly supports this proposal is that not giving a legal existence to member(s) within ICANN would necessarily re-open the question of the jurisdiction ICANN has to comply with, before the finalization of the proposal, i.e. in work stream one.

Afnic agrees with the different powers given through the CMSM. Nevertheless, we feel that some refinements have to be brought before finalizing the proposal. Especially, the exact number of SO/AC willing to participate should be known for sure before the proposal is submitted. The combined powers of the SO/AC (voting AND having special advisory powers -for the GAC for instance - , or exclusive PDP powers (for the SOs) has still to be further discussed.

As such, we are pleased that the outcome of a PDP shouldn’t be challenged *per se* by the CMSM. In these cases, only the way it is implemented by the Board (i.e. the interpretation the board makes of this PDP result) could be challenged.

As for the **Board**:

Afnic supports the powers given to the community towards the board. We feel these powers, exercised rationally and carefully framed, as proposed by the CCWG, will have a very positive impact on the legitimacy of ICANN Board decisions. This is crucial to make sure that any ICANN Board decision, when accepted or not rejected by the sole member, will be enforced swiftly and much less susceptible to be challenged in courts.

Afnic wants to recall that mechanisms set by ACs and SOs for the removal of the board member they appointed should be transparent and aligned between constituencies.

Are there elements of this proposal that would prevent you from approving its transmission to Chartering Organizations?

We do not have strong opposition that could lead Afnic to advise not to transmit to Chartering Organizations. We therefore think, as said earlier, that some refinements are needed before this transmission. The opened discussions on stress test 18 and the power of the GAC, for instance, need to come to an end before this transmission in our view.

We would advise that this topic of possible capture of the structure by governments should be discussed extensively in the next weeks. We are not of the opinion that adding an advisory power to a voting power within the CMSM is *per se* an opened door to capture. Special and exclusive powers are given to various ACs and SOs. As a CCTLD registry and a CCNSO member, Afnic would strongly object, for instance, any attempt to remove from the CCNSO the exclusive power to conduct a PDP related to the CCTLDs. It doesn't prevent the CCNSO, in our view to be willing to participate to the CMSM.

The same applies for the GAC.

As for stress test 18, if we focus on the mechanisms that are currently in place, especially during the transition work, we are talking about "**rough consensus**" instead of "**consensus without any formal objection**".

Leaving to the GAC how it will in the future determine the best way to give advice is, in our view, probably the best option. Instead of trying to separate the "good advices" build upon formal consensus and the "bad ones", by majority, a smoother solution could be to state that a solution shall be considered as "not mutually agreeable" only by a rough consensus decision by the GAC.

These discussions shows how important the cultural approach to different concepts can differ from one region to another, one country to another.

That's the reason why Afnic reiterates its demand for including in the proposal some provisions clearly stating that **the IRP must comply with a minimum set of cultural, geographical and gender diversity**.

At this stage, we would like to emphasize that the "reasonable efforts" envisaged in the document, par. 12 of the IRP presentation, are far from satisfactory. Afnic would like to see, in the proposal sent to the Board, a binding proposal instead.

We suggest that at least one independent expert shall be chosen in each of the ICANN region, and that at least the panel should include three women and three men. This proposal wouldn't change the size of the standing panel (7).

Afnic is of the opinion that it is just impossible to prove that there is such a lack of expertise in some regions that achieving such a goal would be problematic. More, the current composition of the ICANN board itself shows that it's perfectly possible to achieve a gender and cultural diversity approach. Afnic would have, therefore, difficulties to accept that this important goal be only "reasonably" reached. /