

Dear CCWG Accountability,

Thank you for the opportunity to provide feedback on this second round report. At this stage, I am concerned about a number of potential shortcomings may negatively impact both competition and policy-making within the Internet Community. In this comment I explore these shortcomings and urge the working group to explain how this report already addresses them or how it will address them in a subsequent version.

The report does not describe a process, with clear guidance and thresholds, for the Board, mediator or a panel to determine whether complaints are spurious, repetitive or anti-competitive. There is no avenue for expediting complaints or for dismissing them early in the process. While ICANN, the Board or a panel could in theory dismiss complaints, in practice they have not done so.

Despite this lack of mechanisms to protect process integrity, process timelines are either vague, non-binding or have been extended. This includes a broadened disclosure process, a six month reconsideration process, no timelines on cooperative engagement, addition of mediation, and addition of en banc appeal of the independent review. This is troubling given that most current accountability mechanism timelines have not been met by ICANN or the panels to date. It would be helpful to explore what remedies might exist for ICANN, complainants and impacted third parties as a result of these extended processes.

Perhaps as a result of their vagueness, the proposed mechanisms are not described 'end-to-end' anywhere. However, one can easily imagine them taking two years and up to four if determinations are vague, are re-hashed or if there are additional 'in program' appeals such as those anticipated to exist within future new gTLD rounds with insufficient bright lines between them and this overall process. It would be helpful to have a full "end-to-end" process description with timelines, costs and resources involved on the part of ICANN, complainants and impacted third parties and considering the implications of in-program appeals. Such a description and infographic would outline best, expected and worst case scenarios.

In spite of this expansion of existing mechanisms, resources to handle complaints appear to have been reduced (i.e. all reconsideration requests are to be funnelled through the Ombudsman though no expansion of resources available to that office is considered, reduced number of panelists compared to the active pool available through ICDR, the entire board must look at all reconsideration requests, etc.).

It would be helpful to understand the working group's rationale for expanding access to these mechanisms while appearing to also reduce resources available to process them. A 'surge' in complaints as a result of a program or policy implementation by ICANN - such as an expansion of the number of generic top-level domains - does not appear to be addressed in the stress tests. This means that the maximum number of complaints that could be addressed by the Board, mediation or by the standing panel at any given time is not explored. A "pile-up" of extended, repetitive processes that impacts the Board, third-parties and policy making appears a serious risk.

For example, there are already reconsideration requests being filed on independent review outcomes (See RfR 15-7) and repeated filings of

reconsideration requests happening under the current regime (See RfRs 15-1, 15-5, 15-8, 15-9 & 15-10). Despite this, there seems to be no discussion about the risk of repeated use and re-use of the accountability mechanisms to extend or repeat consideration of the results of accountability processes in a slightly modified way. Indeed, the word 'finality' is not mentioned a single time in the document. It is therefore unclear what the end point of the accountability mechanisms are.

These proposed changes and current uses of ICANN accountability mechanisms point to increased impact on third parties going forward. However, there is no discussion of minimizing the impact of the process on third parties, despite the fact that many more third parties are now being impacted by accountability mechanisms than are actually using them, even under the current more restrictive accountability regime (8 parties on hold for Vistaprint IRP, 10+ parties on hold for Dot Registry IRP).

Overall, I am concerned about the chilling effect on ICANN staff dialogue and policy implementation, community policy-making, industry competition, and the overall drain on community resources as a result of the apparent lack of consideration of these points in this proposal.

I encourage the working group to update this document so that it clearly addresses each of these points, or to respond to these points explaining how they are in fact addressed already in the document or will be addressed as part of another work stream.

Thank you for the opportunity to comment and I wish the working group every success in its effort to strengthen the ICANN multi-stakeholder model.

-- Jacob Malthouse