

Draft Summary of ALAC Issues with CCWG Proposal 3

Recommendation 2

The ALAC rejects the reduction of AC/SO “Supports” from 4 to 3 in all four powers that would otherwise require 4.

The main rationale provided was the fear that Fundamental Bylaws would potentially become unchangeable. The ALAC supports that rationale, and indeed has previously raised the issue of ICANN not being able to evolve as necessary. As such we would support the change for just that power. The ALAC cannot support the entire Board Recall should be triggered by just 3 AC/SOs. Moreover, the ALAC believes that the other two powers requiring 4 supporting AC/SOs should also remain unchanged.

The ALAC also believes that describing this exception in Paragraph 61 under Recommendation 1, FAR from the Recommendation 2 table of required AC/SOs is buried the proposal to the extent that other reviewers may not even be aware that it was there.

Lastly, as described, the exception only covers the situation of 4 AC/SOs exercising their power. Thus if 3 AC/SOs opt to recall the Board, 1 AC/SO objects, and 1 AC/SO abstains, the Board would be recalled. But if 3 AC/SOs opt for recall and two abstain, then the power would not be exercised. It makes no sense that the same three AC/SO could exercise the power in the light of a formal objection, but could not exercise the power in the absence of the objection.

The ALAC agrees that AC/SOs should establish rules with a target of replacing interim directors within 120 days, but does not believe that the Bylaws should include wording that says such rules will ENSURE a replacement within this period. Such wording, in the absence of remedy or penalty if the target is not met, is pointless.

Recommendation 4

The ALAC has previously raised the issue that in the absence of a guarantee that the AC/SO or its leaders will be able to raise “reasons for director removal or Board recall without threat of being sued for defamation (in any of its forms), such removals may never be possible. Such limitation of liability might come in the form of pre-appointment letters ensuring that no action will be taken by removed directors, but other guarantees might be possible. The ALAC understands that this might be treated as an implementation issue, but believes that it must be identified as a requirement in the final proposal.

Recommendation 5

The ALAC has multiple serious concerns with the changes to ICANN’s Mission, Commitments and Core Values. Over and above the specific issues raised below, the ALAC has a grave concern that the wording used to restrict of ICANN’s mission may have inadvertent results which severely impact its ability to properly carry out its intended mission.

35 ***Section on Content Restriction***

36 The notes to drafters imply that ICANN’s mission may be restricted to the issues identified in registry
37 Agreement Specification 1 and Registrar Agreement Specification 4. This is incorrect. These
38 Specifications identify ONLY what areas of the contracts are subject to immediate and unilateral change
39 based on a GNSO PDP (properly enacted and approved by the Board). There are many areas of contracts
40 that are not subject to these specifications, were established by negotiation or other means outside of a
41 PDP (or prior to the existence of a PDP) and the ALAC has concerns that such areas could be subject to
42 an IRP and nullification.

43 The ALAC agrees with the grandfather clauses protecting existing contracts, but wants a legal opinion
44 that such grandfathering will allow these contracts to be renewed without change to the areas in
45 question. Moreover, the ALAC is concerned that there are still hundreds of New gTLD applications that
46 are not yet contracted, and this is likely to be the case by the time the new Bylaws are put in place. The
47 requirement for a level playing field (for example ensuring that the current PICs are still honoured for
48 these as yet unsigned contracts) implies that these future contracts must be covered as well.

49 In short, anything which would allow an IRP to invalidate the current contractual terms is not
50 acceptable.

51 ***Market Mechanisms***

52 A current Core Value reads “Where feasible and appropriate, depending on market mechanisms to
53 promote and sustain a competitive environment.”

54 The proposed new text omits the first phrase. The ALAC believes that this is not acceptable. On pressing
55 the point, the example given to justify the removal is that *“ICANN does not possess the requisite skill or
56 authority to intervene in the competitive market, and its Registry Service Evaluation Process (RSEP)
57 recognizes that (by flagging potential items for review by sovereign competition authorities).”*

58 A brief review of the RSEP Shows that it includes the following steps.

- 59 1. After the Registry submission of the RSEP request, and ICANN's completeness check is
60 completed, General Counsel reviews the RSEP request for potential competition issues.
61 The main factors evaluated are: [details omitted – see
62 <https://www.icann.org/resources/pages/prelim-competition-issues-2012-02-25-en>
- 63 2. Based on the analysis, General Counsel reaches a preliminary determination on the competition
64 issues (i.e., no significant competition issues or significant competition issues could be raised).
- 65 3. If preliminary determination is that no significant competition issues could be raised, the
66 competition review is complete.
- 67 4. If preliminary determination is that significant competition issues could be raised by the RSEP
68 request, ICANN, through the General Counsel, will refer the matter to the appropriate
69 competition authority

70

71 Thus the RSEP demonstrates that ICANN does and must be able to exercise judgement related to
72 completion issues. If it cannot, these steps of the RSEP would be subject to elimination by an IRP.

73 ICANN of course is not the ultimate judge on whether there is a competition issue, but without the
74 ability to make judgement calls, it would be required to subject EVERY RSEP to external authorities, a
75 situation that would be untenable.

76 *Neutral and Judgement Free*

77 The proposed text of a Bylaw commitment is “Preserve and enhance the neutral and judgment free
78 operation of the DNS, and the operational stability, reliability, security, global interoperability,
79 resilience, and openness of the DNS and the Internet”.

80 The ALAC has raised concerns over implying that ICANN is responsible for such operation of the entire
81 DNS. The reply received was that this was an NTIA requirement.

82 In fact, the wording used was that the NTIA was committed to a transition ensuring “The neutral and
83 judgment free administration of the technical DNS and IANA functions”.

84 The ALAC has no problem with the NTIA requirement, but believes that widening the administration of
85 the technical DNS and IANA functions to the operation of the DNS (a world-wide service) is scope-creep
86 in the extreme.

87 *Consumer Trust*

88 The ALAC believes that the commitment in the AoC to Consumer Trust, a reaffirmation in section c of
89 AoC clause 3 with is at the same level as that in section a which reaffirms the requirement to act in the
90 public interest is not related purely to the New gTLD program and warrants a reference in the Article I of
91 the ICANN Bylaws.

92 **Recommendation 6**

93 The ALAC supports the inclusion of Human Rights in the Bylaws, but the commitment of carrying out the
94 WS 1 “in no event later than one year after Bylaw xx is adopted” is not acceptable. What would the
95 penalty be if this is not met? Is it possible that ICANN could be found in violation of its bylaws if the
96 deadline is missed (and 1 year is a VERY short time for ICANN!)?

97 **Recommendation 7**

98 The ALAC accepts that if an IPR is used to resolve conflicting panel decisions, it must be only for
99 decisions that are made under some future policy framework, and that such a framework would have to
100 describe the prerogatives of such an IRP ruling. However, the CCWG Proposal must be explicit in saying
101 that.