

ETNO Reflection Document in response to the consultation “Improving Institutional Confidence” launched by ICANN

Executive Summary

ETNO welcomes the opportunity to comment as part of the ICANN consultation “Improving Institutional Confidence”.

ETNO supports the general direction proposed by the Presidents Strategy Committee. However, the document raises a number of serious concerns that need to be addressed prior to the expiry of the current JPA in order for ICANN to transition to a fully independent organisation.

Within this document ETNO has also proposed a way forward in a number of areas that should assist with that task.

General comments

ETNO¹ welcomes the opportunity to respond to the public consultation launched by ICANN on “Improving Institutional Confidence,” referring to the transition of ICANN. First of all ETNO understands “transition” as the transition of the organization from a single party oversight to a bottom up self governance approach.

ETNO strongly supports the multi-stakeholder model ICANN is built on, acknowledging the leading role of the private sector. In our view this model is essential for the stability and further development of the internet. The transition towards a truly independent ICANN affords an opportunity to introduce further improvements that will maximise benefits to all stakeholders.

¹ The European Telecommunications Network Operators' Association is representing 40 major companies from 34 European countries, providing electronic communications networks over fixed, mobile or personal communications systems. ETNO's primary purpose is to establish a constructive dialogue between its member companies and actors involved in the development of the European Information Society to the benefit of users. More information on ETNO can be found at: www.etno.be

Furthermore, ETNO would like to make the following specific comments on the "Transition Action Plan" presented by the President's Strategy Committee (PSC) on 16 June 2008 (the original PSC text for discussion appears in italics, while the ETNO comments are boxed):

Specific comments

The key requirements, for ICANN to fulfil its mandate are:

1. *ICANN will be sufficiently safeguarded against capture.*
2. *ICANN will be sufficiently accountable to its multi-stakeholder community and will preserve the principles of bottom-up development of policies by those parties affected, and will maintain the structures, practices and bylaws of the ICANN model that have been developed by the community – including their regular review.*
3. *ICANN will be internationalized, to allow it to meet the needs of the global Internet Community of the future.*
4. *ICANN will be financially and operationally secure.*
5. *ICANN will maintain its focus on organizational and operational excellence in performing its technical mission of ensuring safe and stable operations relating to the unique identifiers of the Internet, and of the IANA functions.*

ETNO endorses these requirements and believes that they reflect the key elements for a robust stable and secure ICANN in a post Joint Project Agreement environment.

The PSC considers the following initiatives may be appropriate to meet the objectives listed above:

1. To address freedom from capture

1.1. Ensure consensus or super-majority requirements for policy making, based on broad and diverse participation of affected stakeholders;

ETNO supports the view that consensus or super-majority requirements are major vehicles to protect against capture. In addition ETNO believes that fair and equitable processes are required to support broad and diverse participation.

1.2. Ensure recruitment and maintenance of large and diverse constituencies

In ETNO's view this is a major problem that ICANN has to address. Continuous outreach and engagement are necessary to avoid "apathetic" capture although that is not the only threat. Prior to transition safeguards need to be in place to ensure capture from any party can not occur, be that multi-governmental, multi stakeholder groups or even internal groupings within ICANN that represent specific interests

1.3. Maintain presence in a jurisdiction with strong anti-trust law;

We believe that ICANN's presence in a jurisdiction with strong anti-trust law is an important point. However, it should not be taken for granted that the US jurisdiction is the only jurisdiction and the current situation must not lock-in this arrangement for the future.

1.4. Continue to adopt best practice transparency measures;

ETNO supports this initiative noting that improvements in a number of areas are still required

1.5. Place limitations on cross-participation in councils and constituencies by single or related entities;

ETNO would like to note that an entity may have interests in more than one supporting organisation and in more than one constituency within a supporting organisation. As an example, a registry may operate as a ccTLD registry and as a gTLD registry. Furthermore, an ISP or network operator has interests in both IP addressing and domain names, therefore it should be able to get involved in both ASO and GNSO.

It would be unfair for any entity which has more than one legitimate role e.g. as both a ccTLD and a gTLD registry, or as an ISP with interests in IP addressing and domain names as described above, to limit its rights in only one council or constituency.

As regards cross participation in councils and constituencies ETNO would support a structure by which stakeholders with multiple interests can participate in ICANN. Such a structure needs to allow participation by entities across supporting organisations but in a manner that does not permit unfair or undue influence. Therefore ICANN should actively review the future organisation to ensure that such influence does not exist and place criteria to identify it and process to remedy it. Accordingly, ETNO does not support any bylaw amendment in order to prohibit voting again by the same individual or organisation in more than one of the related Advisory or Supporting Organisations. Within a Supporting Organisation ETNO also considers it essential that an entity who meets the set criteria can participate and contribute to the work in all parts of that Organisation for which it qualifies e.g. various GNSO Constituencies; although within any Supporting Organisation an entity should only be able to vote once and their voting rights should be clearly established and understood within each constituency. Additionally ETNO supports the idea that participants in councils and constituencies provide statements of interest to protect against conflict of interest and to ensure transparency.

1.6. Improve participation so that all relevant stakeholders around the world are able to interact with ICANN, including by establishing ICANN's presence in different jurisdictions.

ETNO supports this view to provide a right balance between sufficient presence and sufficient resources. In our view, ICANN's presence at a regional level (i.e. in Europe) allows proper participation of all

stakeholders. ICANN should also consider actively assisting and supporting outreach initiatives undertaken by its stakeholder groups.

2. To strengthen ICANN's accountability to its community

2.1. Implement a mechanism whereby the community can require the Board to re-examine a decision based on a proposed new structured and well defined process;

ETNO supports the principle of such a mechanism. This mechanism as being described in the "Improving Institutional Confidence in ICANN" document (paragraph 2.6) to our understanding will not satisfy the requirements set in the relevant principle. More precisely, ETNO would like to point out that in order for the community to be able to ask the Board to "re-examine a decision through two-thirds majority vote of two-thirds of the Councils of Supporting Organizations and two-thirds of members of Advisory Committees;" the community would require to have majority vote in more than one supporting organisation. This would not practically be possible because it would require a vote from supporting organisations on issues not relevant to their mission (i.e. ASO council voting on issues related to GNSO). In any case there is a clear need to ensure that every call for re-examination is clearly substantiated through the discussions within a Supporting Organisation and due process followed. A majority vote of one (either of the relevant supporting organisation, or of the GAC) should be sufficient to request the Board to re-examine the decision made.

All challenges to decisions made must occur with a reasonable timeframe. Once an appeal for reconsideration has been accepted it must be resolved within a set period. It must also be stated that the existing situation does not change until an appeal proves successful. Further clarification on the required timescales is necessary.

There is also a concern that the Board is placed in a position where it can be requested to re-examine a decision it made earlier with no external accountability. Measures should be in place to ensure that due diligence is undertaken whenever reconsideration takes place in order to prevent claims that its little more than a rubber stamping exercise of the previous decision. Transparency and accountability are essential here.

ETNO has also concerns regarding a decision of the GAC, by only taking into account the members present at a physical meeting and without any requirement on the level of participation necessary for that specific meeting. This could cause distortion in the decisions taken.

2.2. Construct an extraordinary mechanism by which the community can remove and replace the Board in special circumstances;

ETNO supports such an extraordinary mechanism and agrees that a collective replacement is a better option than individual Board members replacement. There should be a clear description of the way the "no confidence" vote procedure will be implemented and it should be made more precise.

2.3. Continue regular periodic reviews of ICANN structure, and of Reconsideration, Independent Review and Ombudsman functions;

ETNO recognises the utility of those mechanisms and believes that they must be maintained. Considering the ICANN complexity, linked to its functioning, to the technical domain covered and to the diversity of stakeholders involved, reviews conducted by external consultants can be subject to misunderstanding, or bias. Therefore, quite particular attention must be given to the selection of these consultants and the conditions under which analyses are made. Engagement with the community impacted remains an essential element.

ICANN should also take care to avoid making fundamental changes that appear questionable on the basis that 'if it doesn't work we can fix it next time', particularly when policy development work is at stake.

2.4. Enhance and expand contractual compliance and enforcement.

ETNO is of the opinion that contractual compliance and enforcement has recently been improved but further improvement is needed in this area prior to the transition of ICANN. A clear understanding of what elements of the contracts are enforceable, particularly those related to the implementation of consensus policy and the mechanisms for enforcement, forms part of this requirement. This is of fundamental importance but it must not be allowed to jeopardise the timeframe for transition.

3. To internationalize ICANN

3.1. Explore adjusting the bylaws to confirm ICANN's historic headquarter location in the United States, while allowing for the establishment of legal presence in other jurisdictions;

ETNO understands that in the short term for practical reasons ICANN's headquarters will remain located in the United States of America. But in the future all options must remain open. ETNO opposes any modification to the bylaws related to the requirement that the headquarters be based in the United States of America. This appears inappropriate and unnecessary. Historic reasons should not necessarily be used as a precedent for the future as other factors also impact that decision. Jurisdiction and the location of the organisations headquarters are separate issues.

3.2. Establish a subsidiary entity, or entities, in those locations whose jurisdictions best meet the defined objectives for ICANN subsidiary entities offices;

ETNO believes that a few ICANN subsidiaries in selected locations would be a positive evolution. However this should be carefully monitored and controlled and involve adequate dialogue with ICANN stakeholders at an early stage.

3.3. *Maintain and develop as required the physical location of ICANN staff and operations around the globe in offices that best allow ICANN to meet the needs of the global Internet community;*

ETNO supports this view but any related decision must be taken with respect to economic considerations and involve adequate dialogue with ICANN stakeholders at an early stage.

3.4. *Enhance efforts to make ICANN multilingual, including providing interpretation and translation services.*

ETNO supports current efforts to provide multilingual services for basic texts, but for other documentation these efforts should be concentrated on selected, widely understood languages. Improvements in translation and interpretation services are supported, whilst accepting financial constraints.

4. To Ensure Financial and Operational Security

4.1. *Maintain and enhance the current Reserves Policy;*

ETNO supports this view.

4.2. *Ensure Alternative Sources of funding to lessen dependence on current registries and Registrars funding;*

ETNO would like to highlight that registries and registrars are the main contributors to the ICANN sources of revenue, although in reality they are more of a collector rather than direct contributor. It is the users or registrants who effectively fund ICANN. Consideration should be given to alternative source of revenues e.g. from Regional Internet Registries managing IP addresses and ccTLD registries, as well as other options.

4.3. *Continue and enhance the business processes of ICANN, building on the experiences gained with Strategic Planning, Operational Planning and Budgeting to ensure international organizational best practices are achieved.*

The Strategic and operational planning cycles in conjunction with the budgeting activities are efficient tools and should be maintained and enhanced Full involvement of the ICANN community, coupled with transparency is essential.

5. To Maintain Secure and Stable operations

5.1. *Make recommendations for improving the efficiency and responsiveness of the IANA function, through the automation of processes;*

IANA is a fundamental component of ICANN, where excellence in operation should be a permanent requirement. But improvement should not only be focused on automation and ccTLD delegation. A program for

continuous improvement on all aspects of the IANA function should be developed.

5.2. Implement, after discussions with Verisign and the US Department of Commerce, the Root Server Management Transition Completion Agreement.

The transition to ICANN of the coordination and management of the ARPA TLD, and the root zone system, in particular to enable ICANN to edit, sign and publish the root and ARPA zones is an essential requirement. ICANN cannot be considered as an international independent body responsible to its stakeholders before this transition is fully completed.

Consultation Topics and Timeline for consultation

A. Have the key elements required for an un-capturable, accountable, internationalized, stable and secure ICANN post-JPA been accurately and sufficiently identified?

ETNO believes that the key elements have been well identified but the detail of how those elements will be realised is not clear.

B. Are the initiatives described sufficient to meet the objectives?

ETNO holds the view that ICANN is moving towards meeting the objectives, but is disappointed as it was anticipated more information on the transition mechanism would be put forward. This requirement was pointed out previously by many parties during the earlier JPA consultation. It is not sufficient merely to identify all of the key elements required for transition. A detailed plan with agreed milestones and procedures that will enable the set goals to be reached is just as essential. ICANN must take all steps to ensure this is also in place before transition. ETNO strongly urges attention is given to this point as the JPA will expire very shortly.

C. Is the timeline set out sufficient to allow sufficient community consultation, and bylaw changes and other implementation steps to occur?

In order for the transition to take place, ETNO believes there should be clear and detailed revision of the bylaws with the full consensus of stakeholders. As stated before the way ICANN will operate must be well defined before any implementation takes place and the transition is completed. Therefore, we request there should be a public comment period on a final draft version of a complete and detailed document that also addresses the additional aspects referred to above. By all means, the timeline for the transition sets ambitious goals for the ICANN community.

Expert Advisory Group

The PSC recommends the formation of a special Expert Advisory Group to assist with consultations on the Analysis and Design project.

ETNO supports this idea and encourages ICANN to ensure such a group has broad representation which reflects the diverse nature of ICANN's stakeholders