

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 “Supports”.

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 proposal that 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 considers that describing this exception in Paragraph 61 under Recommendation 1, far from the Recommendation 2 table documenting the count of required AC/SOs has buried the proposal such 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 2 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 ICANNs 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 ICANN’s mission may have inadvertent results which severely impact its ability to properly carry out its intended mission.

36 ***Section on Content Restriction***

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

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

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

52 ***Market Mechanisms***

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

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

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

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

72

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

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

78 There are no doubt other examples as well.

79 *Neutral and Judgement Free*

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

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

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

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

90 *Consumer Trust*

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

95 **Recommendation 6**

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

100 **Recommendation 7**

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