

CCWG-Accountability

Proposed Redraft Contingency 21

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1 Old

A government telecom minister instructs ICANN to re-delegate a country-code top-level domain (ccTLD), despite objections from many current registrants and user communities in the country concerned.

Consequence: *Faced with this re-delegation request, ICANN lacks measures to resist re-delegation while awaiting the bottom-up consensus decision of affected stakeholders.*

2 New

2.1 Revocation

A government official demands from ICANN to rescind responsibility for management of a ccTLD from an incumbent ccTLD Manager¹.

The IANA Function Manager is unable to document voluntary, specific, informed, unambiguous, affirmatively communicated, and freely given consent for the revocation from the incumbent ccTLD Manager.

¹Terminology in this document, such as replacing the previous *Re-Delegation* is taken from the Final Report of the ccNSO Framework of Interpretation Working Group ("FoI") <http://ccnso.icann.org/workinggroups/foi-final-07oct14-en.pdf>.

2.2 Unsupported Delegation/Transfer

A government official demands from ICANN to

- initially assign management responsibility (delegation); or
- assign previously assigned responsibility after a revocation for the management of a ccTLD (transfer) to a particular entity (Designated Manager)

The IANA Function Manager is unable to document

- that Significantly Interested Parties agree that the designated manager is the appropriate party; and/or
- that other Stakeholders had some voice in selecting the Designated Manager; and/or
- that the Designated Manager has demonstrated the required capabilities to perform the function;

or there are objections of many Interested Parties and/or Significantly Interested Parties.

2.3 Misconduct

There is significant misconduct by one or more parties involved in 2.1 on the preceding page and/or 2.2.

This comes to light after the revocation, delegation/transfer is complete and which if had it been known beforehand would have changed the outcome.

2.4 Existing Rights

The incumbent ccTLD Manager asserts existing rights in the ccTLD and demands, in terms of of the GAC 2005 principles², protection thereof.

Unable to recover investments and future earnings the incumbent ccTLD Manager institutes legal proceedings against the IANA Function Manager.

²<https://archive.icann.org/en/committees/gac/gac-cctld-principles.htm>, *inter alia* paragraphs 5.2.1 and 7.1

2.5 Issues

2.5.1 Authority

- The IANA Function Manager lacks the capacity to decide who can speak authoritatively for any given government³.
- It is unclear where the authority of the IANA Function Manager to *interfere*⁴ with ccTLD management (of third parties) derives from.
 - The Legal Subteam has been asked to add this issued to its list;
 - Secretary Strickland testified before the Committee on Commerce, Science, and Transportation United States Senate on 2015-02-25:

*[...]NTIA has fulfilled this temporary role not because of any statutory or legal responsibility, but as a temporary measure at the request of the President. Indeed, Congress never designated NTIA or any other specific agency responsibility for managing the Internet DNS. Thus, NTIA has no legal or statutory responsibility to manage the DNS.[...]*⁵
- It is even unclearer how this will be affected by transition of the stewardship.

2.5.2 Consent

- The IANA Function Manager currently lacks a procedure how to obtain consent.
- Should the incumbent ccTLD Manager not give informed, voluntary consent to a Revocation, a Revocation may affect intellectual property (and/or other) rights that the ccTLD Registry may have acquired as the result of delegation or which any entity may have acquired as a result of the management, administration or marketing of the ccTLD.

As as these rights may be substantial, the IANA Function Manager may incur significant liabilities.

³The GAC Principles 2005 suggest ways to solve this, but it has been difficult to achieve in past cases.

⁴For the lack of a better word.

⁵<http://www.ntia.doc.gov/speechtestimony/2015/testimony-assistant-secretary-strickling-senate-committee-commerce-science-and->

2.5.3 Revocation

- The IANA Function Manager, may revoke responsibility for the management of a ccTLD, without consent, only if the ccTLD Manager has substantially misbehaved, ie as the option of last resort.
- There is no Policy that requires or permits the IANA Function Manager to revoke responsibility for the management of a ccTLD without consent, for any other reason.

2.5.4 Delegation

- In order for responsibility for the management of a ccTLD to be delegated, an applicant (“Designated Manager”) needs to provide documentation of support by Significantly Interested Parties, Interested Parties and/or Other Parties (“stakeholders”), and the IANA Function Manager needs to evaluate and document this input⁶.
- The IANA Function Manager lacks the capacity to resolve conflicting support from stakeholders⁷.

2.5.5 Misconduct

- The IANA Function Manager lacks the capacity to evaluate the veracity of input provided by parties involved in Delegation, Transfer and/or Revocation procedures.

2.6 Existing Accountability Measures

The IANA Department currently issues a boiler plate report to the ICANN Board which approves this on the Consent Agenda and forwards to NTIA which relies on the Board’s certification and approves the revocation, delegation or transfer.

More to come...

2.7 Proposed Solutions

2.7.1 Framework of Interpretation Principles

The IANA Function Manager

- must document the process at hand comprehensively; and

⁶The Designated Manager must also satisfy some other (more technical) criteria.

⁷This has resulted in a stalemate in at least one Delegation (.EH) and a removal from the root in another (.UM)

- must document having adhered the Framework of Interpretation Principles; and
- *should act promptly to initiate the process of delegation or re-delegation in line with authoritative instructions showing the basis for the decision*⁸.
- must make all documentation available to the contending parties in Revocation proceedings; and
- must take no action until all accountability measures have run their course.

2.7.2 Further Accountability Measures

More to come...

2.7.3 Previous language:

The CWG may recommend an Independent Appeals Process (IAP) to handle such disputes. We will evaluate CWG proposed mechanisms when they are published.

One proposed CCWG measure would give the community standing to request Reconsideration of management's decision to certify the ccTLD change. [would require a standard of review]

Another proposed CCWG mechanism is community challenge to a management decision, referring it to an Independent Review Panel (IRP) with the power to issue a binding decision. If ICANN took action to re-delegate a ccTLD, the IRP mechanism could review that decision [would require a standard of review].

⁸GAC Principles 2005, paragraph 7.1