

Key Concerns Regarding the Current Set-up of the ICANN ccNSO

In fall 2003, the Legal and Regulatory Group of CENTR provided a thorough legal analysis of the ICANN ccNSO set-up as it is constituted in Article IX of the ICANN bylaws (cf. <http://www.centr.org/docs/2003/11/ccnso-legal-analysis.html>). While a few of the group's concerns have been rendered obsolete by the latest amendment to this article (cf. for more details DENIC's comment at <http://www.icann.org/legal/proposed-bylaws-corrections-11mar04.htm>), their vast majority remains valid. In particular, there continues to be deep concern about four major issues:

I. Binding Policies Developed through ccNSO

The bindingness of policies developed through the ccNSO is not limited to those within the scope of the ccNSO (cf. Article IX section 4 paragraph 10 of the ICANN bylaws). Therefore, such policies are binding on ccNSO members regardless of whether the concerned issue is within the ccNSO scope or not. In other words, the scope of the ccNSO is irrelevant in this most crucial instance. Moreover, the ICANN board is free to disregard a ccNSO recommendation and set a policy on the concerned issue at its own pleasure if the issue is not within the scope (cf. Annex B section 15 paragraph 5 to the ICANN bylaws). This leads to the somewhat absurd result that it is easier for the ICANN board to set policies regarding ccTLDs if such policies do not lie within the ccNSO scope.

Besides, the ccNSO can, in addition to its core responsibilities, also engage in any other activities authorized by its members (cf. Article IX section 1 of the ICANN bylaws). With that, the possibility is left open that the ccNSO decides to develop policies that are binding on its members besides the ccPDP and beyond the ccNSO scope. At the same time, it remains unclear how (in particular, with which majority) the necessary authorization would have to be given.

Finally, the exemption of a ccNSO member from a policy that conflicts with the law applicable to the member (cf. Article IX section 4 paragraph 10 of the ICANN bylaws) is problematic insofar as it is unclear who will determine whether a conflict with national law indeed occurs. The wording used in the bylaws, the attempt made to specify that the rules are binding, and a comparison with the ASO rules (which do not say anything at all about binding policies) suggest that it would not be sufficient if a ccNSO member just stated that the policy in question would breach its national law. Instead, it would then be ICANN that has the power to determine if that is the case. With that, however, comes a huge potential for legal conflict between ICANN and ccNSO members as well as a high risk for a ccNSO member if judged non-compliant by ICANN unsubstantiatedly.

II. ccPDP and ccNSO Scope

According to the ICANN bylaws' wording, the ccNSO scope and the ccPDP will "initially" be as defined in Annexes B and C (cf. Article IX section 6 of the ICANN bylaws). This implies that the current definition of both is just tentative and supposed to be changed once the ccNSO has become active. Attempts to enact such changes, possibly broadening the scope, would gain additional legitimacy from this clause and run contrary to the original intention to keep the ccNSO scope as narrow as possible.

Additionally, the definition of the ccNSO scope lacks the essential clarity already in its current form when it refers to "ccTLD name servers in respect to interoperability" (cf. Annex C to the ICANN bylaws). This lack of clarity appears as particularly worrisome in light of ICANN's generally very broad understanding of terms referring to operational issues (cf. Article II section 2 of the ICANN bylaws). If interoperability was understood to mean 'uniformity with common (e.g. gTLD) practices' this would represent a

significant back-door by which a host of topics which otherwise would seem to be unrelated could legitimately be included within the ccNSO scope.

Finally, the ccPDP de facto lacks a quorum for participation in member votes: If in the first vote less than 50 per cent of the ccNSO members cast their votes, the only consequence is that the voting process starts anew and is valid without any minimal number of votes cast (cf. Annex B section 13 to the ICANN bylaws). Consequently, in theory, only one voting ccNSO member could resolve a policy. With that, the ccPDP is highly at risk of capture, even more so as particularly the smaller ccNSO members that lack the resources to constantly follow the ccNSO procedures will often refrain from voting. On the other hand it is incomprehensible why a policy would be regarded as important and be implemented that apparently a vast majority of ccNSO members does not care about enough to vote.

III. ICANN Board's Ability to Amend Bylaws

The ICANN board can, at any time and at its pleasure, amend and change the bylaws without any participation of the ccNSO and without the ccNSO being able to object (cf. Article XIX of the ICANN bylaws). Whatever possible safeguards the ICANN bylaws contain with regard to the ccNSO, such safeguards can therefore be easily abolished. At the same time, of course, additional obligations for ccNSO members can be as easily put into the bylaws.

Further increased is the risk that adverse amendments will actually occur by the requirement that the board periodically review and, if need be, revise ICANN's structure (cf. Article IV section 4 of the ICANN bylaws).

IV. ccNSO Membership and Individual Relation with ICANN

The most crucial question with regard to the ccNSO is how ccNSO membership impacts the individual relation between a ccTLD and ICANN/IANA. Obviously, there is a significant impact for the duration of such membership. However, it is considerably more difficult to tell if and how the individual relation between a ccTLD and ICANN/IANA would be changed after that ccTLD first joined and subsequently left the ccNSO. After resigning, the ICANN bylaws cannot apply anymore to the former ccNSO member by virtue of their resignation. Yet it is possible that the former membership, albeit then terminated, still has a remaining impact. In particular, with becoming a ccNSO member, the concerned ccTLD has once recognised ICANN's overall function and there are valid concerns that ICANN could use this fact as (albeit frail) basis to initiate a "redelegation" of the concerned TLD.

As long as these issues are not solved, DENIC is unable to join the ccNSO – which is pretty unfortunate as DENIC does, as repeatedly stated, wholeheartedly support the concept of industry self-regulation and, consequently, ICANN.