

Regional Statement for Europe

Giovanni Seppia, regional representative

Background

On June 7, the ccNSO Chairman asked the Council of European National Top Level Domain Registries – CENTR to appoint a representative to solicit the Region's view on the issue, in accordance with section 8 of the ccNSO PDP rules (*“If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP Time Line.”*)

During the CENTR General Assembly in Trondheim, 16-17 June 2005, it was decided to appoint the CENTR General Manager as representative. The CENTR GA decision was communicated to the ccNSO Chairman on June 20, 2005.

On June 24, the CENTR General Manager received a letter from the Issue Manager which stated that Eva Frolich has been appointed as member of a ccNSO Council subcommittee to assist the Issue Manager and the regional representative to seek input from the European Region.

CENTR position

During the CENTR General Assembly held in Trondheim, Norway on June 16-17, 2005, CENTR members ratified unanimously the comments on the ccNSO process that were submitted to the attention of Paul Verhoef on April 4.

The CENTR membership comprises almost all the registries of the European region, with some exception such as Latvia, Estonia, and some countries of the former Yugoslavia.

As for the background of the CENTR document, on May 11, 2005, Bart Boswinkel, Interim Issue Manager, asked the CENTR General Manager to clarify the status of the letter sent to Paul Verhoef.

In order to explain the open, transparent and democratic process CENTR members reached the position outlined in the letter, the General Manager replied to Bart Boswinkel message highlighting the process phases.

- *During the CENTR GA in Zurich, November 2004, Paul Verhoef suggested CENTR members to gather in one single CENTR paper the main concerns of CENTR Community related to the ccNSO process.*
- *Action GA24.2 The Secretariat to compile a document highlighting members main concerns with the ccNSO bylaws.*
- *The CENTR Secretariat sent out the first message requesting for comments and inputs on December 16, 2004, highlighting that the main points should have been:*
 - *The nature of ccNSO, including its general principles and scope*
 - *The structure of ccNSO*

- ccTLD managers and ccNSO: relationships rules

The deadline was January 14, 2005.

- *A first draft of the document was circulated before the CENTR GA in Brussels where it was decided to create a working group to prepare a final draft of the paper to be submitted to Paul Verhoef as requested.*
- *Action 25.7: the Secretariat to coordinate a working group to prepare the CENTR comments to the ccNSO process.*
- *After a call for volunteers for the ccNSO working group, launched on February 24, 2005, on March 4, the ccNSO working group started officially to work with the following people on board: Olof Hallstrom (.se), Emily Taylor (.uk), Hilde Thunem (.no), Stephan Welzel (.de), Olivier Guillard (.fr), Richard Wein (.at), Nigel Roberts (.gg).*
- *The draft paper prepared by the working group and coordinated by the Secretariat was made circulating on the CENTR full members list on March 16 open for further comments that were taken on board.*
- *The second version was released on the FM list on March 18.*
- *An updated version was released to the FM list on March 21.*
- *An updated version was released to the FM list on March 27.*
- *An updated version was released to the FM list on March 29.*
- *An updated version was released to the FM list on March 30.*
- *Two updated versions were released to the FM list on March 31.*
- *The final version was sent to the FM list, Paul Verhoef and the ccNSO Council Chair, and uploaded on the CENTR website on April 3.*

The CENTR position is available at: <http://www.centri.org/docs/2005/04/comment-ccnso-process.pdf>

Additional comments

In his capacity as regional representative to solicit the Region's view on the ccNSO PDP, the General Manager coordinated his action with Eva Frolich.

The first message to the General Assembly list of CENTR on June 28. In the message, it was summarised and highlighted:

- The resolutions of the ccNSO Council which made the PDP process starting
- The CENTR decision to appoint the regional representative
- The matters on which comments and inputs are sought
- The purpose of the comment period and
- The time line of the comment period

All the registry managers were invited to submit comments and inputs to the regional representative, or, alternatively, to the Interim Issue Manager or to the on line email address.

Upon request of DENIC, the regional representative sent out on June 28, 2005, a clarification note on the role of the regional representative.

The first reminder was sent to the GA list on July 4, 2005, which was followed by a message to each single manager whose registry is a member of CENTR on July 6, 2005.

On July 15, 2005, the last reminder was sent to the GA list.

Eva Frolich sent messages to the registries of Latvia and Estonia.

At the time of writing this report, 16 July, 2005, the following inputs have been received:

.ac, reiterated the comments submitted last year (forwarded to the Interim Issue Manager)

.se, submitted new comments (see appendix 1)

.pt, not going to submit any comment

.lu, not going to submit any comment

.ch, not going to submit any comment

.cz, not going to submit any comment because they believe the ccNSO PDP discussions in Luxembourg were exhaustive

.de, .no, .uk submitted some further comments and clarification (see appendix 2)

Conclusions

The comments that were received during the “comment period 1” reiterated some of the concerns already expressed in the CENTR position.

In the opinion of the regional representative, some aspects of the process need to be highlighted:

1. the unfortunate time of the year that coincides with the European region summer holidays, which can be one of the reasons that are at the basis of the scarcity of inputs;
2. the complexity of the process, especially from the legal point of view, as some registries have pointed out to the regional representative;
3. the fact that the main concerns and comments were already expressed in the CENTR position;
4. the difficulty of liaising with those registries that are in the European region, but are not CENTR members, and follow rarely the events that occur in the Internet international scenario;
5. the discussion on the ccNSO PDP during the ICANN meeting in Luxembourg turn out to be useful to document a process that need to be as much all-inclusive as possible.

Appendix 1

.se comments/inputs submitted on July 5, 2005

The Foundation for Internet Infrastructure (IIS)
Secretary- General
P.O. 7399
SE 103 91 STOCKLHOLM
SWEDEN

Stockholm, 5 July 2005

Bart Boswinkel

Re: IIS views on the Issues report on “policy development process” concerning changes of article IX of ICANN by-laws, the ccNSO PDP and the scope of the ccNSO

The foundation for Internet Infrastructure (hereafter IIS) is the ccTLD manager of .se.

The IIS wants to express its appreciation of the willingness and openness that the ccNSO board has shown towards CENTR and its members while discussing the matters at hand, and when deciding to launch the Policy Developing Process (PDP). The IIS believes that the outcome of this cooperative process will be of benefit for all concerned parties and considers that this PDP also is an expression of good faith.

IIS also wants to state that it fully endorses the actions and statements carried out by the CENTR Secretariat but also wants to acknowledge that different CENTR members advocate for different viewpoints on the matter at hand. Also IIS have views that might not be fully reflected in the statement made by CENTR, but still IIS endorses the statement.

The issue report focuses on several issues. All of course also of concern to the IIS. However, before the IIS presents its views on these issues the IIS considers it necessary to draw your attention on the two major concerns it has regarding the matters considered by the issue report. These major concerns are -the complexity of the by-laws and therefore also of the processes that they establish. IIS believes that the complexity is of such magnitude that the by-laws become ambiguous due to the complexity. Our concern therefore is focused on the complexity rather than on all the different details of the by-laws. IIS is aware that this might not be considered a specific issue but never the less believes it to be important to draw your attention to this fact. The by-laws needs to be made clearer.

-a member of the ccNSO should never be bound by a decision of the ccNSO or by ICANN itself that falls outside of the scope of the ccNSO or of ICANN. The advantages and disadvantages that follow from the membership of the ccNSO must be foreseeable for any applicant. The IIS is aware of and appreciates that the by-laws

have procedural safeguards ensuring the interest of minorities. Even so the scope of the ccNSO and ICANN must be foreseeable in order to ensure that the decision to join the ccNSO is an informed decision and is based on a correct analysis of what consequences and advantages that may result from the membership.

Having stated our main concerns the IIS will briefly address some of the specified issues covered by the issue report.

i Article IX

Binding policy

IIS considers it necessary that a policy needs to fall within the scope of the ccNSO, according to the by-laws, in order to become binding policy and that no binding policy can have retroactive effect.

ii ccPDP (Annex B)

Membership quorum voting

IIS believes that a referendum/vote only may become binding if at least a certain number of members participate in the vote/referendum.

iv Other Comments

IIS do not believe that it is necessary due to legal reasons to formally incorporate the principle of subsidiarity in the by-laws. However it might rewarding from a pedagogical view to do so in a pre amble. When considering this issue IIS believes that the views presented by the Bush administration on the 1st of July 2005 concerning the administration of the Internet sheds new light on the necessity of considering an acknowledgement of the subsidiarity principle.

Finally IIS wishes to repeat that it endorses and supports the actions undertaken and initiated by the CENTR Secretariat in this matter and that it acknowledges the positive and constructive attitude shown by the ccNSO board when agreeing to the PDP.

Best regards

Olof Hallström

Appendix 2

.de, .no, .uk submitted on July 16

DENIC, Nominet & UNINETT Norid Collective Response to the ccNSO Issues Report regarding changes to bylaws, policy development process, and scope of ccNSO.

DENIC, Nominet, and UNINETT Norid welcome the opportunity to comment during the first comment period of the PDP process. We were able to make verbal input as guests at the ccNSO meeting this week and this document is our collective written response to the Issues Report published on 6 June 2005.

As we stated at the ccNSO meeting earlier this week, we welcome the initiative to consider changes to the bylaws. We appreciate the work that has been completed to date and hope for a positive outcome to the process, so that many more ccTLDs than at present may feel able to finally join the ccNSO.

General Comments

We are not submitting detailed drafting suggestions at this stage in the PDP process. However, we would be more than happy to work with you on detailed drafting should this be of assistance at a subsequent stage.

We support each other's comments and those of CENTR in this process. Please note that Nominet and UNINETT Norid also support the issues marked in the Issues Report as "only raised by DENIC". We note that, under 2.3 (d) two such points were also raised by Nominet in that the "Ability to set binding policies through authorisation by the ccNSO members without going through the mechanism of running a ccPDP" is the same as Nominet's point that "a policy can only be binding on members if it is on a matter than is within scope and created by using the ccPDP".

In addition, the "Ability by the Board to set policy in case a Supplemental Recommendation is not accepted" is in accord with Nominet's request that "no party (including ICANN's board) can make binding policy for the ccNSO unless within scope and through the ccPDP".

Comments on the Individual Issues

A – No binding policy for non-members of the ccNSO.

Issue question: Under the conditions enumerated in Article IX section 4.10 a ccNSO policies shall apply to members of the ccNSO by virtue of their membership . Is this language sufficiently clear?

Our collective response to this question is that this language is not sufficiently clear. It is clear that the ccNSO policies apply to the members of the ccNSO, but we feel that it should also be clarified that global policies agreed upon by the ccNSO cannot bind non-members.

B – IANA Services

Issue question: At article IX section 4.3 it is stated that ccTLD's managers receipt of IANA services is independent of membership of that ccTLD manager in the ccNSO. Is this language sufficiently clear?

Our collective response to this question is that whilst the language is clear regarding the situation while a ccTLD registry is a member of the ccNSO, it should also clearly express that termination of the membership does not effect the concerned ccTLD registry's receipt of IANA services. It is our collective view that receipt of IANA services should not be contingent upon membership of the ccNSO and declining to join, or joining and then leaving the ccNSO should not affect receipt of IANA services, or the relationship between the ccTLD manager and ICANN.

C – Amendment of the bylaws

Issue question: Under the current bylaws there is a provision (Article IX section 6) that deals with changes to Annex B and Annex C of the bylaws. Should the ICANN Board only be able to change or amend Article IX, Annex B and Annex C after consultation and the consent of the members of the ccNSO?

Our collective response to this question is that the ICANN board should only be able to change or amend any ccTLD/ccNSO-related part of the ICANN bylaws with the explicit consent of a supermajority of two thirds of the ccNSO members. Otherwise the carefully defined (and yet to be defined) safeguards for ccNSO members in those bylaws could be weakened or abandoned unilaterally and without consent from the members of the ccNSO. It should be noted that for the Regional Internet Registries a rule exists that prevents such unilateral changes in that their Memorandum of Understanding with ICANN can only be amended or supplemented consensually. We would suggest that the same rule should apply to the ccNSO.

D – Setting binding policies

Issue question: Under the current bylaws (Article IX section 4,10) a member of the ccNSO shall be bound by an ICANN policy if, and to only to the extent that this policy (a) has been developed through the ccPDP and b) has been recommended as such by the ccNSO to the Board, and (c) is adopted by the Board as a policy. Should a policy only be binding on members if and only to the extent the policy is on an issue that is within scope and has been developed through the ccPDP and is adopted by the Board?

In our collective view that binding policies should only be made on issues within the ccNSO's scope. The ccNSO should primarily be a forum for information exchange and discussion of best practices, not for developing binding policies. We strongly feel that for a policy to be binding, it must be within scope, go through the PDP procedure, be recommended by the ccNSO membership as a result of a membership vote and be adopted by the Board. It is also important that both the members of the ccNSO and registries considering joining the ccNSO have a clear understanding and appreciation of what they may be binding themselves to. It is our view that this can only be achieved when binding policies can only be made within the ccNSO's limited scope. We believe that there is no need to be able to create binding policies outside the ccNSO's scope. The ccNSO members and ICANN are free to deal with any issue outside of the scope in whichever way they determine to be appropriate, even if there is no binding policy.

As stated in the revised GAC principles, subsidiarity is a key concept. Most issues can and should be resolved at a local level. The principal objective of the ccNSO should be as forum for information exchange and for the development of non-binding best practice. Therefore, it should be possible for any issue of interest to ccTLDs to be discussed within the ccNSO regardless of scope. However, it is necessary that binding policies be confined to those within scope, as most issues should be dealt with locally.

E – Scope to setting binding policies

Issue questions: Can the ccNSO potentially set binding policies on its members on activities not defined in Article IX section 1 but authorised by its members? If so, is this an issue? If not, should the ccNSO be able to do so?

According to Article IX section 1 of the ICANN bylaws, the ccNSO can, in addition to its function according to the bylaws, engage in any other activities authorized by its members, and obviously, this could include the creation of binding policies. We feel that the ccNSO should not have this ability and that it must not be possible for the ccNSO Council to set binding policies outside of scope.

F – Changes to ccPDP and Scope

Issue questions: The use of the word “initially” in Article IX section 6 implies the scope for setting binding policies (and the ccPDP) will change over time. Should the ccNSO be able to change the Scope and the ccPDP over time? Should the ccNSO be able to change Article IX over time?

As this process clearly demonstrates it should be possible to change the ccNSO's scope, the ccPDP, and Article IX as well as any other ccTLD/ccNSO-related part of the ICANN bylaws. It is our collective view that the word "initially" in Article IX, section 6, is unfortunate as it implies that scope and ccPDP are fairly temporary. The deletion of the word “initially” would not make changes of the scope and the ccPDP impossible. However, it would make clear that the rules for the ccNSO are not tentative.

G – Applicable law exemption

Issue question: Where a policy developed through a ccPDP conflicts with the law applicable to the ccTLD manager, the policy does not apply to the manager. The law applicable shall always remain paramount. Should a process be inserted into Article IX section 4.10 that sets out how a decision should be made as to whether a ccNSO policy does conflict with the national law of a ccNSO member?

It is our collective response that a clear and simple rule in this regard should be inserted. The ICANN bylaws should clarify that to be exempt from a policy on the grounds of conflicting law, it is sufficient for the concerned ccNSO to declare that there is a conflict of law. Such a rule would mirror the requirements for a policy exemption on the grounds of conflicting custom, religion, or public policy, and it would avoid the risk of unnecessary and potentially costly legal disputes...

H – Initiating a ccPDP

Issue question: Under the current bylaws the ccNSO Council can initiate a ccPDP on matters which are within Scope and outside of Scope (Annex B section 2.b) Should it only be possible for the Council to initiate a ccPDP on matters that are within the Scope of the ccNSO?

It is our collective view that it should only be possible to initiate a ccPDP within scope. That is not to say that the ccNSO should only limit its discussions to issues that are going through a PDP process. Indeed, as discussed at the ccNSO meeting, given the duration, complexity, time demands and potential cost of the PDP process, it may not be desirable to have a series of PDPs, or a number of current PDPs at any one time. However, we feel that the ccNSO should be and in fact is free to use the procedure as enshrined in the ccPDP or parts of this procedure in other instances if ccNSO members so wish.

I – Membership quorum voting on PDP recommendations

Issue question: According to the current bylaws (Annex B section 13) a vote of the members is valid without a quorum. Should a vote of ccNSO members only be valid if at least 50% of the members have lodged a vote irrespective of the round of voting?

It is our collective view that it is imperative that a quorum of 50% of the ccNSO members applies to all rounds of voting. Otherwise, a small minority, or in extreme cases even one single ccNSO member, could set binding policies for the whole ccNSO membership.

J/K – Rejection of the PDP recommendations by the ICANN Board

Issue question: Under the current bylaws the Board can reject a recommendation of the ccNSO in case the Board determines by a vote of more than 66% of the Board that such policy is not in the best interest of the ICANN community or of ICANN (Annex B section 15). Should the ICANN Board only be able to reject a Recommendation or Supplemental Recommendation, as the case may be, in exceptional circumstances?

It is our collective view that there should be a presumption that ccNSO policy recommendations that have properly completed the policy development process, will only be rejected by the ICANN Board in exceptional circumstances and the policy, if implemented, would place the directors of ICANN in breach of their fiduciary duties to the company.

L – Ability of Board to set binding policies on issues not within Scope

Issue questions: Under the current bylaws an issue outside of scope can be considered in a PDP. In case the final recommendation to resolve the issue is a Supplemental Recommendation (Annex B section 15) and the issue is within scope according to General Counsel pursuant to Annex B section 2, the Board may not set a policy and the status quo remains. If the Council will remain able to initiate a ccPDP outside of Scope, is the ICANN Board able to set its own policy, if the issue is not within scope pursuant to the opinion of the General Counsel and in case the Supplemental Recommendation is rejected by the Board? If so, should this remain the case? If not, should this be introduced?

If, according to the ICANN General Counsel, an issue is outside the ccNSO's scope, the Board could potentially replace any ccNSO recommendation on an issue with the

Board's own policy. However, this issue would be resolved if, as we have already strongly suggested, the creation of binding policies was limited to issues within the ccNSO's scope.

M – Scope

Issue question: Should the Scope of the ccNSO be redefined?

It is our collective view that the definition of the ccNSO's scope should be clarified and limited to making policies for the IANA function as it relates to ccTLDs. This may comprise IANA procedures, including those related to IANA in the event of a registry change, and fees to IANA. We also feel that the scope should, as an introduction, state clearly the Principle of Subsidiarity; the fact that most ccTLD policies are local and should be set locally, unless it can be shown that the issue at hand can only be solved within an international framework.

Remaining Issues

Enforcement Procedures

One of the questions that remains unanswered in the Issues Report is which enforcement procedures, if any, ICANN will apply when a ccNSO member does not comply with the duly adopted global binding policy. While this question is not necessarily one that will be answered through a change of bylaws, it should not be forgotten as an important issue, both for those considering joining the ccNSO and for those already within the ccNSO.

ccPDP Process

We believe that the ccPDP process itself should be simplified. whilst we agree that it would be desirable to obtain more experience of running a ccPDP before one tries to simplify the ccPDP process, we feel that the complexity of the current ccPDP and the bylaws, may well be barriers to entry for many registries who have difficulties in understanding exactly what they are binding themselves to.

Remit of this ccPDP

According to Article XIX of the ICANN bylaws, the ICANN board can change or amend the bylaws. Currently, this includes amendments and changes of any ccTLD/ccNSO-related part of the bylaws, including those that are not part of Article IX and Annexes B and C. We understand that the present ccPDP does not deal with this unilateral power of the board as far as other parts of the bylaws than Article IX and Annexes B and C are concerned. In light of this we would like to emphasize that the exclusion of this issue from the current ccPDP should not mean that this issue will not be solved. Instead, it only means that the ICANN board will have to deal with this issue separately. However, even though the issue is not part of the ccPDP, we would welcome a request to resolve this issue by the ccNSO to the ICANN Board as one of the outputs of this process.

Finally and in closing, we would like to reiterate our appreciation to the ccNSO community, ICANN Executive and Board for their willingness and efforts to address the concerns that currently remain regarding the ccNSO. We are confident that the successful resolution of these long-standing issues will herald a new beginning for the ccNSO and enable it to act as a more inclusive body fully representing the needs of the ccTLD community.

Sabine Dolderer, Chief Executive, DENIC
Lesley Cowley, Chief Executive, Nominet
Hilde Thunem, Managing Director, UNINETT Norid

15 July 2005