

CCNSO – DRDWG

This report records a consolidated overview of comments received on the 4 public consultations on delegation, re-delegation with consent, re-delegation without consent and retirement of ccTLDs. The Public Consultation period ran through from November 30, 2010 to 11 February 2011.

1. Background

In November and December 2010 the delegation, re-delegation and retirement working group (DRDWG) of the ccNSO published 4 reports which were open for public consultation, as follows:

- Report on the delegation of ccTLDs (November 30, 2010)
- Report on the Re-delegation of ccTLDs with the consent of the incumbent operator (November 30, 2010)
- Report on the re-delegation of ccTLDs where the incumbent operator does not consent (December 21, 2010)
- Report on the Retirement of ccTLDs (November 30, 2010)

The objective was to inform and solicit input and comment from the community on these 4 reports seeking to verify that:

- All the issues have been identified? If not, please indicate what should be included.
- Are all identified issues relevant? If not, please provide a reason?
- Will the recommendation of the DRDWG resolve the short and long term issues identified?
- Would you propose alternate recommendations and if so, why?

The public comments period closed on 11 February 2011.

During this period 2 submissions by 2 individuals were received, relating to the report on re-delegations without consent of the incumbent operator. All submissions are archived at: <http://forum.icann.org/lists/>.

Neither of the comments submitted addressed the questions raised.

The first submission by Pascal Forchon raised some general questions which were considered by the DRDWG and a formal response was provided to Mr. Forchon by the Chair of the DRDWG (please see Annex A for a copy of the response).

The second submission by Eduardo Diaz brought up a point that was initially in a previous public consultation of the DRDWG. Unfortunately although the point was considered and discussed within the working group, it could not be included in the report because there was no publicly available documentation from ICANN on this case (given it was considered an administrative re-delegation and not the subject of an IANA report nor a decision by the ICANN Board). It should be noted that the working group did feel that it was appropriate to note in its final report that any actions which effectively result in the re-delegation of a ccTLD, regardless of process, should be considered in the development of a “Framework of Interpretation”, as recommended by the DRDWG.

Annex A - Reply by the Chair of the DRDWG to P. Forchon.

Dear Pascal Forchon,

Thank you for your comprehensive input to the Public Consultation of the Draft Report of the ccNSO's Working Group on Delegation, Redelelegation and Retirement of country-code Top-Level Domain Names which we welcome.

As a preamble to responding to your input, it might be helpful for us to set out what the Working Group is, in detail, since our mandate is very clearly defined, and it seems that from the context of the questions you ask, that you believe the Working Group can somehow represent ICANN, which it, for the following reasons, cannot.

If, in this, the Working Group's response to your submission, our responses might appear less than comprehensive, or even apparently evasive, please understand that is the inevitable result of our mandate, and not because of any reluctance of the Working Group or of any of its members to see that searching questions such as yours are comprehensively answered.

Purpose

The purpose of the working group is to advise the ccNSO Council whether it should launch a policy development process to recommend changes to the current policy for delegation, re-delegation and retirement of ccTLDs. It is a ccNSO body, and does not represent ICANN..

Composition of WG

The Working Group comprises volunteers who have been chosen by the ccNSO Council, mostly on the basis of readiness to engage in the work.

In view of the above, the Working Group is not, therefore, empowered or authorised by ICANN (a public benefit corporation established under the laws of the US state of California) to represent or answer on behalf of ICANN.

Our responses to you, below, are therefore the informal (albeit unanimous) views of the constituent members of the Working Group only, and they should not be taken to have the status of an official response from ICANN.

Despite (or perhaps because) several members of the WG are legally qualified in different common-, and civil-law jurisdictions, in particular, regarding those questions where you seek answers to legal or equitable conundrums, the WG feels that only legal advice from a professional or, ultimately, a judgment in the appropriate jurisdiction could answer your queries, and that our response, regrettably, is that such questions are outside the scope of our mandate, even though all the Working Group members would very interested in the eventual answers.

With the above in mind, the Working Group has the following observations to make in response to your submission.

Question 1.

In cases where the assignment or delegation of a TLD Registry pre-dates ICANN, and the Registry does not have an agreement with ICANN, what legal basis does ICANN have to make changes to that assignment?

In response to your first question, it seems clear to the Working Group that it is difficult to assess the legal basis upon which ICANN makes such decisions,

The only method of requesting delegations and redelegations that has been used since the incorporation of ICANN has been through making application to the IANA and by subsequent approval or otherwise by the ICANN Board.

No party has contested a redelegation in any other forum.

ICANN submits a recommendation for a root zone change to the U.S. Department of Commerce. The Department reviews the recommendation to ensure ICANN has followed the agreed procedures for processing root zone changes. The Department then authorizes Verisign to make the recommended change..

For all the reasons set out above, the Working Group is therefore unable to provide you with an apparent legal basis for the decision making process.

Question 2.

Does ICANN or the Working Group feel this advice is not valid? Please explain why.

In response to your second question, the Working Group did not find any significant variance between the latest version of the GAC Principles and the earlier RFC1591 policy statements.

Within the context of the ICANN decision-making processes, the GAC Principles are stated to be 'advice to the ICANN Board' and are not binding policy. However, under the ICANN By-Laws, the Board shall take into account any advice it received from the GAC, and if the Board makes a decision which appears to go against GAC advice, the Board must explain its reasons for doing so to the GAC.

The Working Group has therefore not taken the position that the 2005 GAC Principles are 'invalid', and the Members of the Working Group feel that the status of that document remains exactly as it was expressed to be by its authors, that is to say, 'advice to the ICANN Board'.

Question 3(a).

To ignore legal process promotes dictators and juntas acting without due process. Where there is contentious issue, why is it inappropriate for Courts to decide, or for the law of the jurisdiction where the Registry is based to clarify the framework under which a Registry operates?

In response to your question 3a, the Working Group do not consider it inappropriate for Courts to make decisions where contention arises, and do not feel our reports make any suggestion otherwise.

The Working Group considers that the law of the jurisdiction where the registry is established is the appropriate law to apply in any question over the relationship between the registry and the IANA.

The Working Group notes that there appears to be no decisions relating to our work that have been made by Courts in any jurisdiction.

Question 3(b).

Registrants have a contract based on the laws of the jurisdiction of the Registry; What are the reasons why the working group is promoting ICANN to work in a manner which may be destabilizing to the user community?

Your question 3(b) starts with a statement which may (or may not) be the case within individual ccTLDs.

In some Top Level Domains (such as .com) the registrants do not have a contract with the registry at all, only with the registrar, and registrar contracts are usually under the contract law of the jurisdiction where the registrar is located. We understand that some ccTLDs may operate similarly, while in other ccTLDs there may be contracts between the registry and registrant.

For that reason, the Working Group therefore believes the first sentence of your question 3(b) is not an accurate reflection of the reality.

Furthermore, you suggest that the Working Group is 'promoting ICANN to work in a manner which may be destabilizing to the user community'

As stated at the beginning of our response to your submission, the Working Group is mandated to 'advise the ccNSO Council whether it should launch a policy development process to recommend changes to the current policy for delegation, re-delegation and retirement of ccTLDs'. We reject the suggestion that the Working Group is in any way promoting or procuring destabilisation.

In its 12 years of existence, ICANN has been the apparent sole decision maker relating to delegations, redelegations and retirement of ccTLDs, and no other forum has been used.

The members of the Working Group are unanimous in seeking to bring about greater accountability and transparency in the way ICANN makes decisions.

Question 4.

Will ICANN pay compensation to the impacted parties where ICANN intentionally by virtue of a Board Decision, (and subsequent makes changes at IANA,) commits legal tort and impacts directly or indirectly the operation and customers/users of a TLD Registry?

The answer to your question four appears to the Members to be outside the scope of the Working Group's Mandate, and we recommend you address your query directly to ICANN's General Counsel.

Question 5.

ICANN must follow US laws, however Registries must follow the laws of their jurisdiction. If ICANN sets processes that enable US laws/corporations to dominate and in the interest of user stability, ICANN's processes trigger a fragmentation away from the IANA Universal Root; Will ICANN pay compensation to former users of the Universal Root for reconfiguration of their systems to a new ROOT system that in the interest of stability encompasses both the exiled and newly appointed Registry communities?

The answer to your question five appears to the Members to be outside the scope of the Working Group's Mandate, and we recommend you address your query directly to ICANN's General Counsel.

Yours faithfully

Keith Davidson
Chair – ccNSO Delegations / Redelegations Working Group

7 February 2011