

CENTR Response on ERC 5th Supplemental Implementation report

<http://www.icann.org/committees/evol-reform/fifth-supplemental-implementation-report-22apr03.htm#5>

Editor: CENTR Executive Committee

Executive Summary

CENTR welcomes the significant effort the ERC has undertaken to design an inclusive framework for industry self-regulation. Whilst the fifth iteration of the ERC report goes some way to accommodate the variety of the diverse ccTLD community, the ERC draft recommendations are silent or leave unaddressed several substantive issues.

To further better understanding of the key issues CENTR would appreciate dialogue directly the ERC.

To summarise:

CENTR urges that the ccNSO be an inclusive forum:

- the membership should be open to all ccTLD Managers.
- The entry criteria for participation in the ccNSO should have a low threshold.
- Any payment should be directly related to the cost based on an audited budget approved by ccNSO members in advance.

The vast majority of policy issues are and shall continue to be addressed at the local level.

Therefore the ccNSO scope needs to be very well defined and limited. There remains some confusion over the precise scope of the “matrix” but this is a constructive starting point and it is vital that the bylaws accurately reflect the limited scope of the ccNSO.

ICANN must operate bottom-up:

It is important that policies developed through the ccNSO policy process and submitted to the ICANN Board, are either ratified or remitted as the Board is not empowered to alter a consensus position. It has to be emphasised that the ICANN Board must not make policy decisions affecting ccTLDs that have not gone through the ccNSO policy process.

Voting and Council authority

This area still needs careful consideration. Since ICANN is a consensus driven organisation, it is desirable that decisions within the ccNSO be made with the broadest possible consent. In the spirit of geographical inclusion of members, one needs to ensure that decisions can only be binding if there is a clear majority in all ICANN regions.

Miscellaneous

Some of the issues raised at in the communiqué of the ccTLD Rio de Janeiro meeting http://www.wwtld.org/meetings/Rio/ccNSO_resolution.html have yet to be included in the ERC's report.

There could be significant benefit to the global community in the separation of the IANA (technical operation) and the ICANN Policy forums (GNSO, ccNSO etc), operated as two separately managed accountable entities under the general umbrella of ICANN's remit. As a basis for identifying the ccTLD manager the IANA should be advised to update it's database of contacts for each ccTLD to ensure it accuracy.

More detailed comments are submitted below and we look forward to working with the ERC to ensure the reform of ICANN brings the necessary changes to encourage the participation of the ccTLD community.

It must be emphasised that CENTR submits these comments as part of the interim debate surrounding the creation of the ccNSO. Our final response will only be possible after the draft ICANN bylaws on the subject are available and we have seen and considered the responses from other groups within ICANN, such as the GAC.

Introduction

CENTR acknowledges the intense effort and commitment of the members of the AG and ERC. We are substantially in support of the idea of a self-determined ccNSO within the ICANN process. However, further discussion is necessary to allow some remaining issues to be solved.

On 25th March 2003, the ccTLD managers meeting at ICANN Rio de Janeiro passed a resolution concerning the ccNSO. The full text of the resolution can be found at: http://www.wwtld.org/meetings/Rio/ccNSO_resolution.html

The resolution was forwarded to the ERC in order to indicate to them how the proposed ccNSO would be acceptable to the ccTLD community: the ccTLD managers and their Local Internet Communities. This contribution is based on and in support of the Rio resolution. While CENTR remains generally positive about the ICANN process and looks forward to participating appropriately within ICANN, it also wishes to emphasize that the recommendations and concerns of the ccTLD managers themselves must be taken into account if the ccNSO is to be supported and be successful.

The implementation of Rio ccTLD recommendations on ccNSO

Reading the ERC recommendations on the ccNSO, it is not clear to CENTR that the recommendations from the ccTLD Rio meeting have been taken into

account fully in the revised proposals. It is proposed to examine each in turn, quoting the clause in the resolution and giving CENTR's comments on it.

1. *Managers endorse the concept of an SO provided that it has the features set out in the clauses below.*

2. *Policies developed by the SO shall only be binding on its members when adopted by the Board of ICANN according to its bylaws and when limited to procedures providing for the entry in the IANA database of information relating to ccTLDs.*

The introductory description of the ccNSO in the ERC report is far too open: "...responsible for developing and recommending to the ICANN Board substantive policies relating to country-code top-level domains."

The limitation of the scope of policy-making to the IANA services had been specifically asked for by the ccTLD managers to ensure that the scope of the ccNSO is as lightweight as possible and only the necessary global policies are worked on. To build up trust in the future ccNSO, scope and membership need to be limited, clear and unambiguous.

3. *When such policies have been properly developed according to the rules of the SO and are sent to the Board, the Board's role is to ratify the policies, or remit them for further work to the SO.*

In accordance to the compiled Recommendations of the ERC (version 11 March 2003), which are as a whole quoted in the 5th SI ERC Report, point 15.5 could be interpreted in a way that this request is fulfilled. However, it is advisable that the ICANN bylaws state explicitly the role of the ICANN Board with respect to the ccTLD. This role is *only* to ratify or remit any recommendation from the ccNSO.

4. *Only policies properly developed through the SO can be binding on the members of the SO*

See point 3.

5. *A membership made up of Managers (including persons or other legal entities) entitled to or currently operating ccTLD registries who:*
(a) choose to join the SO;
(b) pay the agreed dues (which may be zero in some cases); and
(c) agree to abide by the rules of the SO and applicable ICANN bylaws.

The definition of a ccTLD manager is linked to the entry in the IANA database. We note that this acceptable as long as the services of the IANA are available in a non-discriminatory way for *all* ccTLDs regardless of their membership or not of the ccNSO, or of their contractual status with ICANN.

Additionally, the term from the IANA database, "Sponsoring Organisation" should be reverted back to "Registrant" as requested for more than 3 years by

the ccTLD community. To recall the point: the word “sponsor” has adverse implications to many native English speakers.

6. No policy development can be initiated until a minimum of 40 ccTLD Managers have joined the SO.

The recommendation of the ERC recommends a minimum of four managers from each region to be subscribed for the ccNSO, which would be 20 ccTLD managers and therefore far less than proposed by the ccTLD community. In addition, CENTR believes that there should be acceptable geographic coverage in the initial 40 members. It is quite unacceptable to choose, as stated in section 7 of the ERC report, the 9 ccTLD managers from the ccNSO AG. This is clearly in contradiction to the statement in the introduction to the report that the members of the AG contributed “in their individual capacities and ... based on their personal views and experiences”. This gives these 9 ccTLDs no particular status in the creation of the new ccNSO.

CENTR does not believe that, at least during the transition stage, there should be any requirement for ccTLD managers to provide “a letter recognising the role of the ccNSO within the ICANN structure, its policy development process and agreeing to adhere to the rules for membership and fees”. At this stage it is not known what the implications of this might be! To be inclusive, the transition membership should be available to all ccTLD managers as recorded in the IANA database.

7. A policy development process as defined in the Recommendations, and in which
(a) the opinion provided by the general counsel makes no value judgements on any policy or proposed policy;
(b) validity of voting by members should be conditional on the achievement in each poll of a quorum of either 50 members or 40% of the total electorate, whichever is the lesser;
(c) only policies receiving the affirmative vote of 66% of voters of each region shall be conveyed to the Board as an SO Recommendation.

a) It is not acceptable that the General Counsel shall state if a ccTLD issue is “likely to have lasting value or applicability”, this has not been changed from the original proposal. The General Counsel is there to provide ICANN with professional advice on the legality or otherwise of proposals which might be binding on ICANN.

b) Any mention of a quorum is missing in the ERC recommendation,. This would risk the possibility, for example, for 3 members out of 4 voting to bring a recommendation to the ICANN board. But not only that, the geographic diversity is not guaranteed any more in contradiction to one of the main planks of ICANN. If the ccNSO’s proposed policies are to have support of the ccTLD community, they have to have to be seen to be important, be proven to be of global significance and have almost unanimous support from the ccTLD managers. The different regions should each show majority support and the quorum should take the different regions into account. Although a very

detailed decision making process is provided, without a quorum, any decision is worthless, because words such as majority or supermajority lose their credibility. This is a basic democratic principle and CENTR believes it has been overlooked.

c) Is in principle established.

8. Has an additional reservations policy which provides that a member may reserve its right not to be bound by or implement a policy where for a member to do so would breach custom, religion, public policy or like constraint.

CENTR notes that this recommendation has been partly taken into account, and in a way that is not completely acceptable. The recommendation gives the ccTLD manager that has a conflict the opportunity to ask the council for an exemption. The exemption is granted if a minimum of 12 members of the ccNSO Council votes in favour of the application. CENTR would take a different view. If there is documentary evidence that a ccNSO policy will breach a nationally agreed policy, there should be no need for a vote to determine whether an exemption should be granted: the exemption should be permitted on declaration by the ccTLD without reference to a voting mechanism.

9. Voting appointments from the Nominating Committee are acceptable provided the ccNSO can make balanced contribution to the membership of the Nominating Committee. [abstention from .uk]

This will be an ongoing issue and needs to be sorted at some stage as the ERC recommendations do not appear to accept the ccTLD suggestions. CENTR believes that it would be more acceptable and encourage a large membership supportive of the ccNSO if other parts of the ICANN community were able to make their inputs into the ccNSO process by means of joint meetings and/or working groups. The vast majority of ccTLD managers are keen to hear the views of other parts of the ICANN structure, but have a primary responsibility for policy-making to their Local Internet Communities, within which these other stakeholders are welcome to participate. A Nominating Committee with only one ccTLD representative to appoint 3 voting Council members is *not* acceptable. See: http://www.wwtld.org/meetings/cctld/Bucharest2002/ccTLD_response_ERC.html

Further issues

All current ccTLD managers should be invited to form the Launching Group whose remit is to organise the first election. It is unclear how members of the Launching Group shall be (s)elected and what mechanics are required to ensure geographical representation. Thought need to be given to the structure of the initial ccNSO, the SO's budget and it's initial modus operandi.

It is unnecessary to call for the organisation of elections 120 days after the adoption of the bylaws while elections should only commence after a certain number of ccTLD managers have subscribed to the membership. A situation must be prevented where those who recommended (created) the rules then enforce them.

A time frame is missing, within that the General Counsel is free to submit his opinion regarding whether the issue is properly within the scope of the ICANN policy process as it pertains to ccTLDs.

It is unacceptable for anyone to start a Policy Development Process that is outside the scope of the ccNSO as described by the matrix or outside the mission of ICANN. This latter point should also be binding for the ccTLD community, in particular the ccNSO council. Therefore point 3 of annex A needs to be adjusted.

Final statement

CENTR recognises the positive attempts by the ERC to implement suggestions from the ccLTD community in the structure of the future ccNSO. While some recommendations especially with respect to the process are very detailed, others remain unclear. CENTR therefore reiterates its key policy statements:

- The role of the ccNSO is purely subsidiary. All issues that relate to the DNS and can be dealt with locally have to be fulfilled according to the needs of the Local Internet Community as the ccTLD managers have successfully done so in the past. It is for those proposing a new policy or policy change under the PDP to prove that this is *required* to be agreed globally, otherwise agreements should be part of persuasive best practice.
- Only a lightweight organisational structure is needed. Both the structure of the ccNSO Council and the PDP process are fundamentally too heavy in their design. Such processes are needed where mutual suspicion or intense commercial competition abound. ICANN should be aiming at inclusiveness and consensus.
- The ccNSO membership of a ccTLD manager is under no circumstances linked to the provision of IANA services. It is absolutely vital that existing ccTLD managers can continue to make changes to their entries in the IANA database without let or hindrance. Any fees associated with this must be ring-fenced and separate from the fees associated with the ccNSO.
- ICANN policies are only binding to ccNSO members when created through a proper process in the ccNSO and not conflicting with local laws, customs or nationally agreed policies.

CENTR submits these comments as part of the interim debate surrounding the creation of the ccNSO. Our final response will only be possible after the

draft ICANN bylaws on the subject are available and we have seen and considered the responses from other groups within ICANN, such as the GAC.

Editorial note

While the work of ERC and the AG was intense and progress is obvious towards a more lightweight solution, CENTR requests that a complete version of the final recommendations is published, which is not linked to older AG documents. The current style is confusing and does not simplify the review of the ERC proposals.

As a result, many CENTR members have criticized that the matrix is not part of the Fifth Supplemental Report. It is agreed that this is not true since the report is indeed linked to the Compiled Recommendations from the ccNSO Assistance group. Although it is not clear how much of the Compiled ERC Recommendations are part of the 5th ERC report, the links pretend that the Compiled Recommendations as a whole are part of the recommendation of the 5th ERC report, which is not likely and even contradictory. The scope and the matrix, or alternatively a clear scoping statement, need to part of the ccNSO as they have been the vital ground for the whole development. An indefinite link to the AG compiled recommendations is not sufficient.

Finally, a version that is related more to “plain English” than to a legal language would also give all the non-native English speakers and the non-lawyers the opportunity to understand the text without unnecessary complications.

Post Scriptum

Bart Boswinkel is both a member of the CENTR Excom and a member of the ccNSO AG. Bart is aware of CENTR's comments but does not have a formal position on the substance of the comments made by CENTR's Excom.