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 Comment Period 2 of the PDP process. We acknowledge the work involved in producing the latest report, and commend the Issues Manager on the report's thoroughness.

As stated in previous comments, we welcome the initiative to consider changes to the bylaws. We continue to hope for a positive outcome to the process, so that many more ccTLDs than at present may feel able to finally join the ccNSO.

Matters raised in the report

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

The report states that it is clear that a policy developed under the ccNSO does not apply to a ccTLD who has never joined the ccNSO, but that there is dispute as to whether ccNSO policies apply to a ccTLD manager after resignation as a member.

We support the report's recommendation that the bylaws be amended to set out the consequences of resignation from the ccNSO.

B – IANA Services

We support the principle that receipt of IANA services should in no way be contingent on ccNSO membership. We therefore welcome the report's recommendation in this regard.

However, the order of the sentence must be reversed to give the meaning intended, ie:

"A ccTLD manager's receipt of IANA services is entirely independent of any individual relationship the ccTLD manager has with ICANN or membership of the ccTLD manager in the ccNSO."

C – Amendment of Article IX

While the principle outlined in the proposal would constitute an improvement, it would only state that changes to Article IX *can* be achieved via the PDP and, within that framework, require the ccNSO's consent. What is necessary, though, is to ensure that changes can *only* be made with the consent of the ccNSO, which we believe also better matches the Report's intention.

Since it is not necessary to use the ccPDP for amendments to the bylaws this could be achieved by amending Article XIX with the following sentence:

"In order to become effective, a decision of the board to alter, amend, or repeal Article IX of these bylaws needs to be ratified by the ccNSO with a two-thirds (2/3) majority of its members."

The advantage of this solution would also be that it makes clear that the board can act only with a two-thirds vote, whereas the PDP, even when being used to amend the bylaws, does not require such a supermajority in the board's vote.

Regardless of this, we reiterate our position that not only changes of Article IX, the ccNSO's scope, and the ccPDP but changes of *all* ccTLD/ccNSO-related parts of the ICANN bylaws should only be possible with the explicit consent of a supermajority of two thirds of the ccNSO members. Otherwise, the board could easily bypass the ccNSO by putting new rules on the ccNSO and its members, for example, into a new Article IXa instead of amending Article IX.

In this instance, it should be noted that for the Regional Internet Registries a rule exists that prevents 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.

E – Binding policies outside ccPDP

The report requests further input on this point stating that it was "not clear […] if and to what extent the issue raised is actually an issue".

We remain convinced that there is an issue here as the bylaws do not rule out that the "other activities" the ccNSO can engage in may include the creation of binding policies outside the scope of the ccNSO and without using the ccPDP. Such policies could be called "ccNSO policies" and would be based on self-imposed membership rules of the ccNSO (which ccNSO members, according to Article IX Section 4.2, must adhere to).

Therefore, we believe that the bylaws should be amended to ensure that such "ccNSO policies" cannot be imposed on ccNSO members. This could be achieved by adding a clause in Article IX Section 1 that explicitly excludes the creation of binding policies from "other activities" of the ccNSO.

F – Changes to ccPDP and Scope

We support the proposal to remove the word "initially" from section 6.a and 6.b.

G – Applicable law exemption

The Report offers two options: (1) No changes and (2) a declaration combined with an expert legal opinion. DENIC, Nominet, and UNINETT Norid suggested a third – a simple declaration by the ccTLD manager.

We do not see that the extra requirement to produce a legal opinion makes the test any more valuable than a simple declaration by the ccNSO member, and in practice would add more complication (in terms of delay, process and potential dispute). In addition, it is not clear who would pay for the legal opinion and who would produce it – would it have to be an independent person, or the inhouse counsel of ICANN or the affected ccTLD registry? Furthermore, such an expert legal opinion would not solve the potential dispute between ICANN and the concerned ccTLD but simply change its focus: Under the current bylaws ICANN and the ccTLD would argue on whether the policy in question indeed conflicts with the ccTLD's national law – if an expert opinion was required, they would argue on whether this opinion is correct. With that, nothing would be gained so that we are convinced that the proposal adds uncertainty and complication rather than resolving it.

I – Membership quorum voting on PDP recommendations

We support the proposal that votes should be limited to a maximum of two rounds, with both rounds requiring a 50% quorum.

J – Rejection of PDP recommendations by the ICANN Board

Since the report requests more appropriate wording than the current proposal to simply use the words "exceptional circumstances", we would like to clarify that our referral to such

"exceptional circumstances" was not a drafting suggestion, as such wording would indeed be fairly wide, and hard to measure objectively.

However, we reiterate our previous suggestion that rejection should only occur where acceptance of the suggestion would put the ICANN directors in breach of their fiduciary duties to the company. The concept of "fiduciary duties" of directors in common law jurisdictions is a matter of general company law and is therefore well understood in case law and practice.

Therefore, a possible wording could be: *"The board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that the policy is so exceptionally flawed that to support it would be a breach of their fiduciary duties to ICANN."*

Interrelated Issues

D, H – Setting Binding Policies, Initiating the PDP

We support the proposed amendments to section 4.10 (solution 2).

We also support the notion that the ccNSO is best placed to determine whether or not an issue is within scope, but propose that the matter be resolved by a vote of the membership, not of the Council.

However, we believe that there is a way through on the issue of agreement as to whether or not an issue is within scope.

The fundamental purpose of the ccNSO is not to develop binding policy, but as a forum for information exchange and non-binding best practice. To be clear, there should be no bar to *discussion* of any issue – the objection is that issues outside scope should not be made into binding policies.

We therefore suggest that if there is no agreement between the ccNSO membership and ICANN's General Counsel that the issue at hand is within scope then it is considered to be outside the scope and no ccPDP can be initiated. Obviously, this would then only hinder the creation of a binding policy but not rule out the development of best practices for ccNSO members or a recommendation to ICANN on the issue.

K [used to be L] – Ability of Board to set binding policies on issues not within Scope

We note that the report considers this to be a non-issue. While we do not necessarily agree with this assertion we believe that it would be resolved by amendments to 4.10 which state that no ccPDP will be initiated outside scope. As a result, the ICANN board could not create binding policies outside the scope.

M – Should the scope of the ccNSO be redefined?

We believe that such a fundamental issue as the appropriate (re)definition of the ccNSO's scope should not be deferred to a further PDP. Doing so means that registries considering ccNSO membership have no clear understanding and appreciation of the actual range of issues for which they may be bound by ccNSO-developed policies. Such uncertainty could constitute a serious hindrance for those registries to join the ccNSO.

In light of this, we repeat our previous comment 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.

Other issues

Our previous comment highlighted the issue of enforcement of duly adopted policies. We note that the Report now states that there was no mechanism for enforcement. We also note that the Report refers to the views of the ICANN General Counsel as being that ccNSO membership constitutes no contract between the ccNSO members and ICANN. If this is the case, it becomes increasingly unclear why such an elaborate process of "binding" policy development is being set up.

Also, we reiterate our previous comment 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.

Finally, we would like to reiterate our appreciation to the ccNSO community and the ICANN Board for their willingness to address the concerns that currently remain with respect to the ccNSO. The successful resolution of all these issues will hopefully mark a new beginning for the ccNSO and make it a more inclusive body attracting a significant number of members and fully representing the needs of the ccTLD community.

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