

Legal Issues Regarding the ICANN ccNSO Set-up

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At their meeting in Ljubljana on October 16/17, 2003, CENTR's Legal and Regulatory Group discussed the legal set-up of the ICANN ccNSO according to the ICANN bylaws and identified critical points that this document summarises.

However, the group did not undertake any political or managerial assessment and believe that it is up to each single ccTLD registry to make the decision to join or not join the ccNSO.

I. ICANN Bylaws Binding on ccNSO Members

According to Article IX section 4 paragraph 2 of the ICANN bylaws, ccNSO members agree to "adhere to ICANN bylaws as they apply to ccTLDs". With this, any clause within the ICANN bylaws that concerns ccTLDs is directly binding on ccNSO members.

This is the case in spite of the fact that the application for ccNSO membership as published by the Launching Group complements the actual bylaws text by adding in brackets: "(Article IX and Annexes B and C of the ICANN bylaws)", because the bylaws prevail and cannot be changed or constricted by the application.

The bindingness of the ICANN bylaws as they apply to ccTLDs is of relevance in several instances:

1. ICANN's Mission

According to Article I section 1 of the ICANN bylaws, it is ICANN's mission to "coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN [...] coordinates the allocation and assignment of [...] domain names (forming a system referred to as DNS) [...] [and] coordinates policy development reasonably and appropriately related to these technical functions."

Since ccTLDs are domain names in this clause's sense the clause applies to ccTLDs so that ccNSO members are bound by it.

Materially, this means, first of all, that ccNSO members recognise ICANN's role as the body "coordinating" the "assignment" - better known as the "delegation" and "redelegation" - of ccTLDs.

How far this mission reaches is difficult to detect. However, it becomes clear that "coordination" in the bylaws' sense significantly exceeds the mere intermediation between different parts of the Internet when Article II section 2 of the ICANN bylaws is taken into account. This clause states: "Nothing in this Section is intended to prevent ICANN from taking whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry [...] or other emergency". This can only mean that the bylaws consider such steps as being part of ICANN's mission, and it is obvious that such a step can also be the "redelegation" of a ccTLD. A ccNSO member would have to accept this notion and be bound by it. Also, the mentioning of "financial failure" demonstrates that the ICANN bylaws have a very broad understanding of apparently technical terms like "operational stability".

At the same time, ICANN's "coordination" function with regard to "delegation" and "redelegation" particularly precludes that a ccNSO member could ask that a "redelegation" be dealt with only on the local level without any ICANN involvement.

Furthermore, ICANN's mission as it binds ccNSO members means that ccNSO members recognise ICANN's competence to set policies "related" to its coordination function which then obviously includes policies on "delegation" and "redelegation" (as, for example, enshrined in the GAC principles).

Covered by this competence is, in principle, also any policy on the management of a ccTLD registry when it is "related" to the subject of ICANN's mission. According to Article I section 2 of the ICANN bylaws, this includes in particular "the operational stability, reliability, security, and global interoperability of the Internet" as well as the task to "promote and sustain a competitive environment" and the recognition that "governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations".

However, it must be taken into account that Article IX section 4 paragraph 10 of the ICANN bylaws states that ccNO members are bound by policies "to the extent, and only to the extent" that such policies have been developed through the ccPDP.

One possibility is to read this clause as superseding ICANN's general policy setting competence as it derives from ICANN's mission. On the other hand it is as well feasible to regard this clause as referring only to the special policy setting procedure of the ccNSO and with that just complementing the more general competence of ICANN without constricting it.

An argument for the latter view is Annex B section 15 paragraph 5 to the ICANN bylaws which states: If a policy recommendation within the ccNSO scope has been turned down by the ICANN board, the board "shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved". This clause means that the ICANN board can set a different policy than the recommended one if the issue is not within the scope – which would not make much sense if the ccNSO members would then not be obliged to follow this policy under the aegis of ICANN's general mission.

In any case this issue needs clarification in the bylaws.

2. Fees

Article XVI section 5 of the ICANN bylaws gives the ICANN board the power "to set fees and charges for the services and benefits provided by ICANN with the goal of fully recovering the reasonable costs of the operation of ICANN and establishing reasonable reserves".

Since ICANN currently performs the IANA function and with that provides a service to the ccTLDs, this clause applies to ccTLDs and thus binds ccNSO members. That means, the ICANN board can set IANA fees to be paid by ccNSO members.

Additionally, it is possible to say that the ccTLDs also benefit from ICANN's overall coordination role and with that, also, then this clause applies to ccTLDs with the result that the ICANN board could set general ICANN fees to be paid by ccNSO members.

Entirely independent of such ICANN fees are the additional "membership fees" that the ccNSO itself will set according to Article IX section 4 paragraph 2 of the ICANN bylaws. In this regard, however, it remains unclear how such membership fees relate to the "fees to be paid by ccNSO members to defray ccNSO expenses" as defined in Article IX section 7 paragraph 3 of the ICANN bylaws.

II. Binding Policies Developed through ccNSO

Article IX section 4 paragraph 10 of the ICANN bylaws states: "Policies shall apply to ccNSO members by virtue of their membership to the extent [...] that (a) the policies have been developed through the ccPDP [...], and (b) have been recommended as such by the ccNSO to the Board, and (c) are adopted by the Board as policies [...]".

1. Irrelevance of the ccNSO Scope

By not referring to the scope of the ccNSO as defined in Annex C to the ICANN bylaws, this clause means that policies developed through the ccNSO and adopted by the ICANN board are binding on the 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.

2. Exemptions

According to Article IX section 4 paragraph 10 of the ICANN bylaws, a ccNSO member is exempt from a policy developed through the ccNSO if that policy "conflict[s] with the law applicable to the ccTLD manager which shall, at all times, remain paramount".

The problem with this exemption, however, is the fact that it is unclear who will determine whether a conflict with national law indeed occurs.

Obviously, it would not be sufficient if the concerned ccNSO member just declared that there is such a conflict as in that case the bindingness of policies would, in fact, become subject to the ccNSO members own discretion. By carefully defining the bindingness and possible exemptions, however, the bylaws themselves show unmistakably that real bindingness is intended. Further clear this becomes when the set-up of the ASO is taken into account

according to which the ICANN bylaws do not say anything at all about binding policies.

In light of this, it would be ICANN that has the power to determine if a policy conflicts with a ccNSO member's national law.

Furthermore, Article IX section 4 paragraph 11 of the bylaws states: "A ccNSO member may provide a declaration [...] stating that (a) implementation of the policy would require the member to breach custom, religion, or public policy [...], and (b) failure to implement the policy would not impair DNS operations or interoperability, giving detailed reasons supporting its statements. After investigation, the ccNSO Council will provide a response to the ccNSO members declaration. If there is a ccNSO Council consensus disagreeing with the declaration [...] the response shall state the ccNSO's Council's disagreement[...]. Otherwise, the response shall state the ccNS Council's agreement [...]. If the ccNSO Council disagrees, the ccNSO Council shall review the situation after a six-month period. At the end of that period, the ccNSO Council shall make findings [...]."

Surprisingly this clause defines a very complicated procedure for the declaration provided by the ccNSO member and the ccNSO council's reaction, yet is silent on the actual legal consequences. With that, in fact, the declaration, be it agreed to or not by the council, does not exempt the concerned ccNSO member from the policy.

3. Implementation

Annex B section 16 to the ICANN bylaws states that after adoption of a ccNSO policy recommendation "the Board shall, as appropriate, direct or authorize ICANN staff to implement the policy". In this clause, it is not entirely clear how far such implementation exactly reaches in that it can even mean that ICANN staff will enforce the policy, even more so as the bylaws do not contain other enforcement rules. Besides and in any case, this clause means that ICANN staff will interpret the policy and, in case of a possible unclarity, fill in missing details. With that, too much power might be given to ICANN staff.

4. Additional Policies

According to Article IX section 1 of the ICANN bylaws the ccNSO can, "in addition to its [...] core responsibilities", also "engage in other activities authorized by its members". This clause leaves the

possibility 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.

5. Policies and ccNSO Council Nominees

According to Article IX section 4 paragraph 8 of the ICANN bylaws, nominees for the ccNSO council, “by accepting their nomination, [...] agree to support the policies committed to by ccNSO members”. At least theoretically, this could be read in a way that council nominees are not allowed to aim at abolishing or amending such policies, and if that is not the intention of the clause, it should be clarified.

III. ccPDP and ccNSO Scope

1. Tentativeness

According to Article IX section 6 the ccNSO scope and the ccPDP will “initially” be as defined in Annexes B and C. 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.

2. Unclarity

According to Annex C to the ICANN bylaws the ccNSO scope is defined as regarding policies on “ccTLD name servers in respect to interoperability”. This definition is totally unclear which appears as particularly worrisome in light of Article II section 2 of the ICANN bylaws that shows a very broad understanding of terms referring to operational issues (cf. Section I.1).

3. Regional Organisations

According to Annex B to the ICANN bylaws, the regional ccTLD organizations (like CENTR) are the main channel for ccTLDs to give input to a ccPDP. In light of this, it appears inappropriate that regional organizations are allowed to fulfil this role only if they have been “designated” by the ccNSO council and that the ccNSO council may “de-designate” and with that exclude them from participation (cf. Article IX section 5 of the ICANN bylaws).

4. Board Vote

According to Article XII section 2 paragraph 1 of the ICANN bylaws, the board can delegate certain functions to board committees with down to two members. Since the bylaws do not determine anything contrary, also the final board vote on ccNSO policy recommendations can be delegated to such a board committee. If the ccNSO representatives on the board are not members of that committee, they will then not be able to participate in the vote.

5. Quorum

According to Annex B section 13 to the ICANN bylaws the member vote on a policy recommendation requires that 50 per cent of the ccNSO members cast their votes. However, if this quorum is not being reached the voting process starts anew and is valid without any minimal number of votes cast. This means that there is, in fact, no quorum at all so that, in theory, only one voting ccNSO member could resolve a policy.

IV. ICANN Board's Ability to Amend Bylaws

According to Article XIX of the ICANN 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. 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.

In this regard, emphasis must also be put on the fact that, according to Article VI section 7 of the ICANN bylaws, the members of the ICANN board are not representatives of their constituencies but obliged to act in ICANN's best interest. With that, even the ccNSO representatives on the board are hindered to represent just ccTLD community interests.

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

On the other hand, according to Article III section 16 of the ICANN bylaws, the board needs to publish its meeting agendas before its

sessions so that ccNSO members will at least get informed about intended amendments in advance. However, the board could also decide to pass bylaws amendments in accordance with Article VI section 19 of the ICANN bylaws, and in that case prior notice need not be given to the public.

Nevertheless, one might derive comfort from the fact that after any bylaws amendment it is possible to put a reconsideration request to the board or ask for an independent review (cf. Article IV sections 2, 3 of the ICANN bylaws).

V. 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, as laid out in Section I, 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 remain changed after that ccTLD first joined and subsequently left the ccNSO. At least it is impossible to rule out that in this case the status quo ante will resurge.

Article IX section 4 paragraph 3 of the ICANN bylaws states: "Neither membership in the ccNSO nor membership in any Regional Organization [...] shall be a condition for access to or registration in the IANA database." This clause is pretty clear and means that no ccTLD that does not join the ccNSO will suffer any disadvantages in respect of the IANA database.

After that, the aforementioned article says: "Membership in the ccNSO is independent of any individual relationship a ccTLD manager has with ICANN or the ccTLD's manager's receipt of IANA services." Clearly, this means that any individual relationship (e. g. in form of a contract with ICANN) has no impact on ccNSO membership. However, the same does not apply the other way around so that ccNSO membership does impact the individual relation between ccNSO members and ICANN/IANA. For the duration of ccNSO membership, this is obvious in light of what has been described in Section I. For the time after a possible resignation from the ccNSO, on the other hand, a provision within the ICANN bylaws does not have any impact anyway as the legal fate of a former ccNSO member is no longer the bylaw's to determine.

Obviously, becoming a ccNSO member means to enter into a contract with regard to ccNSO membership as such. If a ccNSO member then resigns its membership it is possible that this contract, 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 it is doubtful that this recognition can ever be taken back.

Furthermore, ICANN can, as pointed out in Section 1.2, set fees for its services, particularly for the provision of the IANA function, to be paid by ccNSO members. If ICANN does so and if a ccNSO member regularly pays such fees for some time, it is well possible that this would be regarded by a court as the conclusion of an unwritten contract that would remain valid even if the ccTLD left the ccNSO. Part of this contract would at least be the recognition of ICANN/IANA's overall role with regard to the DNS and the obligation to pay fees to ICANN/IANA.

Finally, it needs to be emphasised that any changes to the membership application letter or the addition of a cover letter explaining the applying ccTLD's view on the impact of ccNSO membership would hardly have any effect as the actual bylaws text will always prevail.