

Legal Issues Regarding the ICANN ccNSO Set-up

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Binding ICANN bylaws I

- ccNSO members agree „to adhere to ICANN bylaws as they apply to ccTLDs“ (Article IX section 4 paragraph 2)
- ccNSO members are bound by whole ICANN bylaws where they concern ccTLDs
- not just by ccNSO rules
 - constriction in membership application form („Article IX and Annexes B and C“) obsolete as bylaws prevail

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Binding ICANN bylaws II

- 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 identifiers systems. In particular, ICANN [...] coordinates the allocation and assignment of [...] domain names [...] [...] and coordinates policy development [...] related to these technical functions.“ (Article I section 1)
- ccTLDs are domain names so that clause applies
 - ccNSO members are bound by ICANN's mission

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Binding ICANN bylaws III

- ICANN's "coordination" function rather broad
 - ICANN can take "whatever steps are necessary to protect the operational stability of the Internet in the event of financial failure of a Registry [...] or other emergency" (Article II section 2)
- ICANN's "coordination" function explicitly aims at "assignment" of domain names, aka "delegation/redelegation" of ccTLDs
 - ICANN involvement then imperative

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Binding ICANN bylaws IV

- ICANN's policy setting function on "delegation/redelegation"
 - includes, for example, GAC principles when adopted/acted upon by ICANN
- ICANN recognises that "governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations" (Article I section 2)

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Binding ICANN bylaws V

- ICANN's policy setting function regarding "the operational stability, reliability, security, and global interoperability of the Internet" (Article I section 2)
 - ICANN has policy function on ccTLD management in general
- ccNSO members bound by policies "to the extent, and only to the extent," that they have been developed through ccNSO (Article IX section 4 paragraph 10)
 - superseding ICANN's general policy setting competence or just complementing it?
 - if issue not within ccNSO scope, ICANN board can replace ccNSO recommendation with own policy (Annex B section 15 paragraph 5)

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Binding ICANN bylaws VI

- ICANN's competence to set fees
 - „The board may set fees and charges for the services and benefits provided by ICANN, with the goal of fully recovering [...] the costs [...] and establishing reasonable reserves [...]“ (Article XVI section 5)
- ICANN provides services to ccTLDs (at least IANA) and ccNSO members have “benefits”
 - ccNSO members are bound by ICANN's competence to set fees
- ICANN can set fees
 - in addition to membership fees (Article IX section 4 paragraph 2) / fees to defray ccNSO expenses (Article IX section 7 paragraph 3)

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Binding ccNSO policies I

- „Policies shall apply to ccNSO members [...] to the extent [...] that the policies have been developed through the ccPDP [...], and have been recommended [...] to the Board, and are adopted by the Board [...]“ (Article IX section 4 paragraph 10)
 - no reference to ccNSO scope
 - ccNSO members are bound even if policy need not be within ccNSO scope
 - scope definition irrelevant

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Binding ccNSO policies II

- if issue not within ccNSO scope, ICANN board can replace ccNSO recommendation with own policy (Annex B section 15 paragraph 5)
 - easier for ICANN board to set policies on ccTLD issues when issue not within scope

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Exemptions from ccNSO policies I

- „Policies shall apply to ccNSO members [...], provided that such policies do not conflict with the law applicable to the ccTLD [...]“ (Article IX section 4 paragraph 10)
 - who decides whether policy conflicts with national law?
 - certainly not concerned ccNSO member
 - otherwise policies would, in fact, not be binding and careful definition of bindingness would be superfluous

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Exemption from ccNSO policies II

- „A ccNSO member may provide a declaration [...] stating that implementation of the policy would require the member to breach custom, religion, or public policy [...], and 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 member's declaration. If there is a ccNSO Council consensus disagreeing with the declaration [...] the response shall state the ccNSO Council's disagreement [...]. Otherwise, the response shall state the ccNSO Council's agreement [...]. If the ccNSO Council disagrees, the ccNSO Council shall review...

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Exemption from ccNSO policies III

- ...the situation after a six-month period. At the end of that period, the ccNSO Council shall make findings [...]“ (Article IX section 4 paragraph 11)
 - very complicated and elaborated procedure
 - but no actual exemption
 - ccNSO member is bound by policy regardless of conflicting local custom etc.

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Further Details I

- implementation of ccNSO policies
 - after adoption of a policy the ICANN board "shall, as appropriate, direct or authorize ICANN staff to implement the policy" (Annex B section 16)
 - enforcement included in "implementation"?
 - ICANN staff to interpret policy and fill in the details

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Further Details II

- additional policies
 - ccNSO can, "in addition to its [...] core responsibilities", also "engage in other activities authorized by its members" (Article IX section 1)
 - includes setting of binding policies outside ccNSO scope and ccPDP
- council nominees and existing policies
 - nominees for ccNSO council, "by accepting their nomination, agree to support the policies committed to by ccNSO members" (Article IX section 4 paragraph 8)
 - can nominees oppose existing policies?

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ccPDP and ccNSO scope I

- ccNSO scope and ccPDP
 - "shall initially be" as stated in Annexes B and C (Article IX section 6)
 - tentative and thus implying that there will be expansion
- ccNSO scope
 - „ccTLD name servers with respect to interoperability" (Annex C)
 - unclear
 - worrisome as ICANN bylaws have broad understanding of terms referring to operational issues

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ccPDP and ccNSO scope II

- regional organizations
 - main channel for ccTLD participation in ccPDP
 - "designated" and possibly "de-designated" by ccNSO council (Article IX section 5)
 - ccNSO council decides whether and which regional organizations can participate
- board vote on ccNSO recommendation
 - ICANN board can delegate tasks to board committees (Article XII section 2 paragraph 1)
 - includes vote on ccNSO recommendations
 - possibly ccNSO representatives on the ICANN board not in such committee

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ccPDP and ccNSO scope III

- quorum in member vote on ccNSO recommendations
 - 50% of the ccNSO members required to cast vote, if this quorum not reached, second round of voting without quorum (Annex B section 13)
 - in fact, no quorum

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ICANN bylaws amendments I

- ICANN board can amend bylaws (Article XIX)
 - includes ccNSO/ccTLD-related parts
 - safeguards can be abolished
 - obligations can be added
 - not a decision of ccNSO
 - no participation of ccNSO
- periodic review and revision of ICANN structure required (Article IV section 4)
 - increases possibility of amendments

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ICANN bylaws amendments II

- in case of amendments
 - ccTLD representatives are obliged to decide in ICANN's (not ccTLDs') best interest (Article VI section 7)
 - however, usually ICANN board will have to announce intention to amend bylaws in advance (Article III section 16)
 - exception: Article VI section 19
 - afterwards reconsideration request or independent review possible (Article IV sections 2, 3)

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ccNSO and individual relation I

- how does ccNSO membership impact individual relation ccTLD-ICANN/IANA?
 - for duration of membership: ccNSO member bound by ICANN bylaws
 - after resignation from ccNSO: probably remaining changes as ICANN's role has once been recognised
- "Neither membership in the ccNSO nor membership in any Regional Organization [...] shall be a condition for access to or registration in the IANA database" (Article IX section 4 paragraph 3)
 - ccTLD not being a ccNSO member does not suffer disadvantages with regard to IANA function

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ccNSO and individual relation II

- "Membership in the ccNSO is independent of any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services" (Article IX section 4 paragraph 3)
 - individual relation (e. g. ICANN contract) does not impact ccNSO membership
 - but not the other way around
 - for duration of ccNSO membership clear impact by ICANN bylaws
 - situation after a possible resignation cannot be defined by ICANN bylaws

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ccNSO and individual relation III

- contract between ccTLD and ICANN/IANA
 - on ccNSO membership
 - if ICANN sets fees and ccNSO member regularly pays
 - unwritten contract may derive
 - remains valid after possible resignation from ccNSO
 - includes recognition of ICANN/IANA's role
- amendments to membership application or cover letter irrelevant
 - ICANN bylaws prevail

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