

To: Samantha Eisner, ICANN Deputy General Counsel

Cc:

Göran Marby, President and CEO ICANN

Patricio Poblete, Chair ad-hoc group retirement of ccTLDs

Stephen Deerhake, chair ccPDP3 WG Review Mechanism

Dear Samantha,

In response to ICANN Legal's questions in the 05 April 2022 communication to the ccNSO Policy Development Review Mechanism Working Group (ccPDP3 RM WG), I would like to inform you that the ccNSO Council believes that ICANN Bylaws Section 4.2 (d) (i) (*Disputes relating to country code top-level domain ("ccTLD") delegations and re-delegations*) and ICANN Bylaws Section 4.3 (c) (ii) (*Claims relating to ccTLD delegations and re-delegations*) should be interpreted as to **include all disputes and claims** with respect to delegation, transfer, revocation and retirement of ccTLDs.

The ccNSO believes that the ccTLD retirement-related issues set-out in section 5.2 of the proposed ccTLD Retirement policy and other disputes or claims related to the retirement of ccTLDs should be excluded from ICANN's Reconsideration Process as well as the Independent Review Process for Covered Actions.

We also want to stress and re-confirm that all disputes and claims related to the delegation, transfer and revocation of ccTLDs should be excluded from ICANN's Reconsideration Process as well as the Independent Review Process for Covered Actions.

Questions from ICANN Legal

Recently, the ccNSO Council was informed about the potential issues ICANN Legal identified with respect to the proposed ccTLD retirement policy raised in its 05 April letter (see ICANN Legal 05 April 2022 Response to Binding Working Group of the ccNSO's Policy Development Process on Review Mechanisms Regarding "Binding" Appeals):

As there is specific reference in the Retirement Policy Recommendations to the ccPDP-RM in relation to two retirement-related issues, does the ccNSO consider both retirement issues set out at 5.2 of the Retirement Policy Recommendations as matters relating to delegation and transfer sufficient to both be excluded from the ICANN Independent Review Process?

If either or both of the items identified at 5.2 of the Retirement Policy Recommendations are not within the delegation and transfer exclusion from the IRP, then are the ICANN org and Board to understand that the ccNSO Council, through the Retirement Policy Recommendations, are seeking an additional IRP exclusion from the ICANN Bylaws?

Scope of ccPDP3 part A and B and their interdependency

According to the April 2017 Issue Report¹, the recommended Retirement Policy was **part A** of the third ccNSO Policy Development Process (ccPDP3). **Part B** of the ccPDP3 is about developing a review mechanism for specific decisions related to the delegation, transfer, revocation and retirement of ccTLDs. However, over time the reasons to combine the two efforts were overtaken² and after an extensive consultation it was decided to separate the two efforts. The ccNSO started working on the ccPDP3, i.e. on developing, first, part A and, afterwards, part B, with a clear understanding that decisions pertaining to the retirement of ccTLDs that were identified to be subject to a review, should be reviewed through the mechanism proposed under part B. This goal of part B is clearly stated in the proposed Retirement policy section 5.2, final paragraph: *“The Review Mechanism for relevant decisions pertaining to the Delegation, Transfer, Revocation or Retirement of ccTLDs is subject of a separate Policy development effort. Once that Policy is adopted by ICANN, the decisions mentioned above in this section shall be subject to the Review Mechanism.”*

For avoidance of doubt, although the two efforts are now carried out separately, ICANN is **not** expected to implement a review mechanism as part of implementation of the retirement policy, nor does the ccNSO expect that claims and decisions pertaining to retirement of ccTLDs should be subject to the Reconsideration and/or IRP pending the completion of ccPDP3 part B. The review mechanism referred to under section 5.2 of the proposed retirement policy speaks about the mechanism to be developed and proposed through part B of ccPDP3.

Our next steps

To avoid future ambiguity, we will ask the ccPDP3 RM WG and the ccNSO Working Group developing the policy for the selection of IDN ccTLD strings (ccPDP4 WG) to look at the need for further clarification of the ICANN Bylaws Sections 4.2 (d) (i) and 4.3 (c) (ii), and, if clarification is needed, ask them to make a recommendation to that effect.

Without pre-empting the outcome of the two aforementioned ccNSO Policy Development Processes, the ccNSO Council is of the opinion that additional clarifications may be needed. The relevant sections in the Bylaws referenced above, refer to terminology which in our view was overtaken by other terminology when it was included in the Bylaws in 2016. In 2015 the ICANN Board adopted the Framework of Interpretation³, which replaced the term “re-delegation”, including “unconsented” re-delegation, with “transfer”, and “revocation and transfer” respectively.

Further, both the ccPDP3 Review Mechanism WG and ccPDP4 WG will need to provide clarity whether they recommend that ICANN or IFO decisions identified in the proposed policy and pertaining the selection of IDN ccTLD strings should be included or excluded from

¹ <https://ccnso.icann.org/workinggroups/issue-report-pdp-rrm-10apr17-en.pdf>

² See ccNSO Report to the ICANN Board, section 3.1, <https://ccnso.icann.org/sites/default/files/field-attached/board-report-proposed-policy-retirement-cctlds-17sep21-en.pdf>

³ <https://www.icann.org/resources/board-material/resolutions-2015-06-25-en#1.d>

Reconsideration and the Independent Review Process for Covered Actions or the review Mechanism to be proposed under ccPDP3 Part B.

Conclusion

With respect to the questions raised in the 05 April communication, and for the avoidance of doubt, the ccNSO Council is of the view that the ccTLD retirement-related issues set-out in section 5.2 of the proposed ccTLD Retirement policy and other disputes or claims related to the retirement of ccTLDs should be excluded from ICANN’s Independent Review Process for Covered Actions and Reconsideration as well.

Further, and again to avoid any ambiguity, we also believe and want to stress that until both ccPDP3 part B and ccPDP4 have both been concluded all disputes and claims related to the delegation, transfer and revocation of ccTLDs should be excluded from ICANN’s Reconsideration Process as well as the Independent Review Process for Covered Actions.

We hope this answers the questions you have raised in April 2022. If you have any further questions, please do not hesitate to contact me or Stephen Deerhake, chair of the Review Mechanism Working Group.

On behalf of the ccNSO Council

Alejandra Reynoso
Chair of the ccNSO Council