

## **Questions from the CCPDP-RM to ICANN Legal regarding how ccTLD review mechanism decisions can be binding on ICANN.**

### **Questions to ICANN Legal:**

How can the panel's decision in the example below be made binding on ICANN and what is required to ensure this?

If the decision made via the mechanism proposed in this example cannot be made binding on ICANN, please explain in detail the reasons for this and identify, if any, the types of mechanisms which could produce a decision which would be binding on ICANN in the above example.

### **Introduction:**

The BWG (CCPD-RM Binding Working Group) was created to develop questions for ICANN Legal that would allow ICANN Legal to provide an opinion to the CCPDP-RM with regards to the question of the results of a review mechanism being binding on ICANN.

To allow ICANN Legal to provide the best possible opinion/response to the CCPDP-RM the question(s) should be based on a scenario which provides a maximum of details on which these question(s) will be based.

One of the most important details is what does the CCPDP-RM mean by binding. In the context of this exercise the BWG proposes that binding be defined as ICANN having to accept the results of the review mechanism and implement any relevant and effective corrective measures to the case being reviewed.

Next the BWG has chosen to use the Retirement Policy as the basis for its scenario because it provides a much more detailed framework than RFC1591 and its associated FOI. The BWG has also opted to use a variation of the current ICANN IRP as the Review Mechanism for this scenario because it is detailed, well understood by ICANN Legal and currently provides binding decisions in its cases.

The BWG understands that the CCPDP-RM has clearly indicated that a review mechanism like the ICANN IRP is not desirable and the BWG is not proposing that this review mechanism be considered as an option for the CCPDP-RM. However, using it in this thought exercise allows the creation of a very detailed scenario which should allow ICANN Legal to provide the CCPDP-RM with clear information with respect to binding.

### **Definition of Binding:**

For the purpose of this scenario, the CCPDP-RM defines binding as ICANN having to accept the results of the review mechanism and implement any relevant and effective corrective measures

to the case being reviewed (subject to similar conditions as per the IRP rules in section 4.3 (x) of the ICANN Bylaws).

#### **Scenario:**

The ccNSO recently accepted the draft retirement policy and will soon be forwarding it to the Board for adoption where it is expected that it will be adopted as is.

This policy contains two options for the manager of a retiring ccTLD to request a review:

- The IFO deciding that a change by ISO to the status of a 2 letter Latin ccTLDs which does not correspond to an ISO 3166-1 Alpha-2 Code Element (formerly known as an exceptionally reserved ISO 3166 ccTLD) justifies its retirement.
- The IFO refusing to grant the ccTLD manager of a retiring ccTLD an extension to the retirement period per the manager's application.

The focus of this scenario will be on the second option.

Specifically, it reads:

#### **4.4 Retirement Plan**

*After receiving a Notice of Removal, the Manager must decide if it wishes to request an extension to the Default Retirement Date.*

*If the Manager of the retiring ccTLD does not wish an extension to the Default Retirement Date stated in the Notice of Removal it is expected, but not mandatory, that the Manager produce a Retirement Plan for the ccTLD which would typically include:*

- *A copy of the Notice of Removal*
- *Date the ccTLD is expected to stop taking registrations, renewals and transfers that exceed the Date of Removal from the Root Zone. It is important to note that there is a reasonable expectation that the date provided is the earliest practical date for implementing this.*
- *Details of a communications plan to advise the registrants of Retirement of the ccTLD.*

*If the Manager of the retiring ccTLD wishes to request an extension beyond the Default Retirement Date stated in the Notice of Removal, it must produce a Retirement Plan which is acceptable to the IFO and is in accordance with the conditions listed below.*

***Granting an extension to the Default Retirement Date is at the discretion of the IFO and shall not be unreasonably withheld.*** *The Reasonable Requirements Document that the*

*IFO will have included with the Notice of Removal will describe the factors it will consider when evaluating a request for an extension to the Default Retirement Period.*

*A Retirement Plan which requests an extension shall include, in addition to the previously listed items, the following:*

- *The length of the extension requested (a maximum of five (5) additional years) including the proposed Date of the removal of the ccTLD from the Root Zone.*
- *The reasons for requesting an extension as well as an impact analysis which supports the reasons for making the extension request.*

*If the ccTLD Manager wishes to produce a Retirement Plan it must do so within twelve (12) months of the IFO having sent the Notice of Removal to the Manager of the retiring ccTLD. At its discretion the IFO can extend the twelve (12) month limit to a maximum of twenty-four (24) months in total after receiving a request for such an extension from the Manager. If the IFO grants such an extension it shall promptly notify the Manager of this.*

*If the ccTLD Manager submits a Retirement Plan to the IFO, the IFO shall provide a definitive response to the Manager regarding the request for an extension within ninety (90) calendar days of such a request being received by the IFO.*

*The response by the IFO, if positive, shall state the length of the extension which has been granted. If the response is negative, the IFO shall include the specific reasoning for the refusal. The approval of an extension request shall not be unreasonably withheld.*

*If the request for an extension is rejected and the ccTLD Manager believes that the rejection is unreasonable or is inconsistent with the Reasonable Requirements Document, it may appeal the decision by the IFO (see Section 5.2 of this Policy).*

*If the Manager of the retiring ccTLD and the IFO cannot agree on a Retirement Plan within twelve (12) months, or up to a maximum of twenty-four (24) months if the IFO has granted such an extension, of the IFO having sent the Notice of Removal to the Manager, then the IFO will promptly advise the Manager that the ccTLD shall be removed from the Root Zone 5 years from the date the IFO has sent the Notice of Removal to the Manager of the retiring ccTLD.*

In the proposed scenario the manager of the retiring ccTLD, who is a member of the ccNSO, has been sent a Notice of Removal by the IFO. The manager of the ccTLD has submitted a Retirement Plan which includes a request for an extension to the date of removal.

The IFO advises the manager that its request for an extension has been denied and provides a detailed explanation for its decision per the policy.

The manager believes that the rejection of the extension request is unreasonable or inconsistent with the Reasonable Requirements Document (which at the time of writing this scenario has not yet been published by the IFO).

The manager requests an internal review by the IFO which maintains its initial assessment of rejecting the extension request.

The manager, as a last resort, then promptly files a request for an external review of this IFO decision per the ccNSO Review Mechanism which would have been accepted by the ICANN Board as a ccNSO policy.

### **The Review Mechanism:**

The CCPDP-RM WG proposes that the review mechanism for this scenario **(AND ONLY FOR THE PURPOSES OF THIS EXAMPLE AT THIS TIME)** would be as similar as possible to the ICANN IRP where the focus of a breach of the articles of incorporation and Bylaws in the IRP would be replaced by the ccNSO's policy for Reviews, the Retirement Policy, RFC 1591, the FOI for RFC 1591 as adopted by the ICANN Board, the IFO's Reasonable Expectation document as well as any other relevant IANA documentation.

As such the Review Mechanism can only decide if the policies have been adhered to or not.

The objective in choosing this mechanism is to allow ICANN legal to have a clear understanding of the proposed mechanism for this question.

### **The decision by the mechanism:**

#### **OPTION 1 (original + PP addition of unreasonable)**

The panel in the review mechanism produces a final declaration that the refusal of the IFO to grant the extension is unreasonable and therefore goes against the Board approved policy for the retirement of ccTLDs.

#### **OPTION 2 (cobbed together during the meeting per EL suggestion)**

The panel in the review mechanism produces a final declaration that the refusal of the IFO to grant the extension is unreasonable and therefore goes against the, for example, ccNSO's policy for Reviews, the Retirement Policy, RFC 1591, the FOI for RFC 1591 as adopted by the ICANN Board, the IFO's Reasonable Expectation document as well as any other relevant IANA documentation.

#### **OPTION 3 (proposed by EL on the WG list)**

The panel in the review mechanism produces a final declaration that the refusal of the IFO to grant the extension is unreasonable or unfair.

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