

CCPDP-RM – Non-Binding Mechanism – Independent Advice Review Mechanism

- DRAFT

Objective:

Develop a review mechanism for IFO decisions that would meet most of the requirements of the CCPDP-RM WG except for being binding on ICANN. Such a mechanism could be used prior to the parties launching an arbitration or court proceeding.

Summary of the proposed mechanism:

- Administrative objectives:
 - The mandate of the Panel is to decide if:
 - If the IFO properly followed its procedures and applied these fairly in arriving at its decision; and
 - If the IFO decision being reviewed is consistent with RFC 1591, the CCNSO FOI for RFC1591 as approved by the ICANN Board as well as any other policies which apply to CCNSO members and is approved by the ICANN Board.
 - Low cost (10,000 to 100,000\$US maximum including all administrative and panelist costs for both parties).
 - Fast – less than 90 days to return a decision.
- The Administrator
 - A non-conflicted individual who is a SME wrt ccTLDs, the IFO and ICANN and who is selected by the CCNSO (similarly as to how the ICANN Board selects its Ombuds).
 - The office of the administrator will be funded by ICANN in a fashion similar as to how ICANN funds the Office of the Ombuds.
 - Fees collected by the Office of the Administrator will be handled by ICANN.
 - The fees collected by the Administrator may be used to fund the Office of the Administrator, panelists, and any associated legal costs. Any annual surpluses will set aside by ICANN for the ccNSO to administer, according to rules to be developed by it, for purposes of funding CCNSO members who wish to apply for an Independent Advice Review but cannot pay the fees.
- The Panel:
 - Would be managed and supported by the Administrator.
 - Is to be constituted of 3 subject matter experts (SME) wrt ccTLDs and the rules and procedures governing them but are not required to be lawyers (1 selected by the plaintiff, 1 selected by the IFO/ICANN and 1 by mutual agreement of both (failure to agree on a third would require the Administrator to select the final

Commented [BT1]: Comments made during the 202110013 call of the CCPDP-RM

Commented [BT2]: New text to address MS comment.

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Commented [BT3]: Maarten Simon – Need to consider if we add that the processes were followed correctly and fairly.

Commented [BT4]: Eberhard Lisse – 10,000\$US is not low cost and is a die in the ditch issue. Not against some pain but this lower amount is unreasonable for very small cc's. Maybe a system based on the fee bands for CCNSO members – once or twice the annual fee (up to a maximum). EL email 20211014 - And to weed out further frivolous appeals but on the other hand making this mechanism available also to the smallest/poorest Managers, we need a fair and reasonable fee mechanism, for example taking the size brackets of the ccNSO contribution as the base.

from which flows
we either make the non-binding mechanism fully mandatory (and free) before availing oneself of the binding one, or we make appropriate fee/cost requirements.

BT – I think we are mixing apples and oranges here – the cost will be whatever the cost is. The question EL brings up is who pays which is not being addressed in this section – in this context would suggest leaving this as is for now and dealing with this in the Plaintiff section.

- member). Usual conflict of interest rules would apply. (the Administrator will have a roster of pre-approved panelists, a plaintiff may choose another SME but this one will have to be certified by the Administrator prior to being eligible).
- Will not accept supplementary material from non-IFO participants but can hold individual teleconference hearings with all the involved parties.
 - Can request a presentation by the IFO on the matter under review. The Panel, at its discretion, can also request answers to its questions from the IFO which must respond promptly to these (2 business days California time following the day of the request – this should be included in the IFO SLE process statistics).
 - The Independent Advice should explain in detail its decision which must be supported by at least two of the panelists.
 - Final Independent Advice from the panel cannot be appealed.
 - If the Advice is against the IFO the IFO/ICANN the panel can recommend that the IFO/ICANN re-imburse all review costs to the plaintiff.
- The IFO:
 - Must amend its procedures to allow concerned parties sufficient time to file for Independent Advice prior to the IFO making a recommendation to the ICANN Board regarding the decision which is being challenged. As such the IFO will advise all concerned parties of any appealable decisions. Such decisions will be labelled Preliminary Decisions and will advise the concerned parties of their options for appealing such decisions.
 - IFO cannot make a recommendation to the ICANN Board on the matter being reviewed prior to the panel providing Advice.
 - Will make all relevant internal materials available to the panelist who will be under a formal confidentiality agreement. These will include all internal emails on the matter and all communications from all the relevant parties but does not include formal legal advice to the IFO.
 - If the IFO does not accept the Panel's Advice, it must include it in its recommendation to the ICANN Board and explain why it was not accepted.
 - The plaintiff:
 - Must be a ccTLD which is a member of the CCNSO Manager except in the case of the delegation of a new ccTLD where any applicant for that new ccTLD is eligible. All reviews of the same decision (by different parties) must be heard as one "case" (The new ccTLD scenario could involve 2 or more applicants for the same ccTLD – in such a case if more than one applicant wishes to pursue Independent Advice then the Administrator could require that these cases be consolidated – corner case).
 - May only apply for an Independent Advice Review within 30 days of the IFO publishing its Initial Decision.

Commented [BT5]: Eberhard Lisse - i've got issues with with will not accept supplementary material we I think we are agreed on a de Novo reviewed, it means day we applicants must be able to bring everything they want.

- Nick Wenbman-Smith – support clause but - On the people who are making the original decision because they were doing it without the benefit of all this additional stuff and then the question is well why wasn't this material presented earlier so normally, that is a good rule to have, but sometimes it's because.
- 00:31:26 You know, sometimes it is in the interests of fair administration of justice for new material to be introduced for example it's something that wasn't known to the plaintiffs at the time that they made their complaint.
- 00:31:38 Or it was something like a question of fraud or sort of serious misconduct.
- 00:31:45 As a result of which now they found out about this now that actually does make a material difference than it's in the best interest of justice for the panel to admit that additional material so they're kind of.
- 00:32:00 Narrow narrow there's more detail there's kind of a general rule, and then they're sort of standard exceptions normally into this sort of this, so the question, so I just wanted to double check that.

Commented [BT6]: EL email 20211014 - Any review (application) must be as "wide" as reasonably possible, and all supporting documents that are reasonably available or could have been reasonably available must be submitted with the application or as soon as reasonable after they become available.

BT – see previous comment.

Commented [BT7]: Eberhard Lisse – We are making policy for all ccTLD Managers. EL email 20211014 - The mechanism will be available to the "affected" ccTLD Manager, and in cases of (new) delegations also to the unsuccessful applicants.

BT – proposed change should be compatible with this.

Commented [BT8]: EL email 20211014 - All reviews of the same decision (by different parties) must be heard as one "case"

BT – That works for me at this point.

Commented [BT9]: Eberhard Lisse – have to clearly define what that is.

BT – Agree but the text provided is a start. Also including a new clause in the IFO section.

- 30 days to be calculated as follows – The IFO publishing its Initial Decision will be deemed Day 0. Day 1 will begin 1 minute after 23:59 UTC of Day 0. The opportunity to submit an application for an Independent Advice Review will expire on Day 30 at one minute past 23:59 UTC.
- To launch an Independent Advice Review, the plaintiff must provide the Administrator with a statement (in English) detailing which IFO decision should be reviewed, identify the plaintiff contact, payment for the review, and clearly indicating why the plaintiff believes it is inconsistent with RFC 1591, the CCNSO FOI for RFC1591 as approved by the ICANN Board or any other policies which apply to CCNSO members and is approved by the ICANN Board.
- The plaintiff will have to agree to the rules for the Independent Advice Review which will include a clause preventing the applicant from taking the Administrator, panelists, the CCNSO or ICANN to court with respect to the Independent Advice Review. This is no way prevents the plaintiff from taking the IFO or ICANN to a relevant court regarding the original decision by the IFO and any approval of such recommendation by the ICANN Board.
- The Administrator may interact with the plaintiff's contact person to obtain clarifications on the request (and may allow the applicant to resubmit).
- If the Administrator rejects the application for an Independent Advice Review the plaintiff's payment will be refunded minus initial administrative costs (objective 1,000 to 5,000\$US maximum - TBD). There is no mechanism to appeal the Administrator's decision to reject an application however the Administrator will be required to publish its reasons for rejecting the application.

Commented [BT10]: Eberhard Lisse – need to include a clause that clearly says that the plaintiff can sue ICANN for the decision it takes vs the ccTLD – but agree not to sue the IAR

BT – Proposing new text to make this clearer..

Commented [BT11]: Eberhard Lisse - Applications I have no problems with that, but we must be not trying to put in technicalities in at a very early stage but leave it for the arbitrary for the board of the panel or whatever we call it to decide it's in the end, whether they accept it or not.

BT - Unclear as this is not the intention as what is required is specified three points earlier.