

Statement of the Non-Commercial Stakeholders Group on the Draft Recommendations of the Independent Review Process Implementation Oversight Team¹

The Non-Commercial Stakeholders Group (NCSG) greatly appreciates the opportunity to comment on the draft recommendations that the Independent Review Process Implementation Oversight Team has delivered.

The NCSG strongly supports the change in the updated supplementary procedure rule #4 ('Timing for Filing Rule'). The first Implementation Oversight Team recommendation draft had given the claimants only 45 days to file a claim against ICANN. As we said in our previous public comment dated 24 January 2017:

“from a practical standpoint 45 days (the initial duration that was given in the first IoT report) is simply too short a time period for claimants. This is particularly true if the potential claimant is a collective body (like the NCSG) where significant public actions need to be coordinated with numerous members and other stakeholders.”

We support the modified language and warmly welcome the prolongation of the duration from 75 days to 120 days. We specifically support:

“The modified language which provides for 120-day period for filing after the claimant becomes aware of the material effect (75 days more than was suggested previously).”

Please note that “effect” should be spelled “affect”.

In addition, the NCSG strongly supports basing the time limit for filing an IRP case on a period beginning with the date when the prospective claimant was first entitled to bring their claim:

“The proposed supplementary rules time-limit IRP challenges to a maximum of one year after ICANN’s action, thereby immunizing it from any subsequent challenges. This is an extraordinary loophole. It could easily take 2-3 years after a policy is adopted for it to be actually implemented by ICANN and cause harm. Under these proposed supplementary rules, no one could challenge the rule if the harms were caused a year after it was passed.”²

¹ This statement was delivered in response to this opportunity for public comment, published on the ICANN website on 22 June 2018: <https://www.icann.org/public-comments/irp-iot-recs-2018-06-22-en>

² <https://www.ncsc.org/wp-content/uploads/2017/05/IndependentReviewProcess-NCSGPublicComment-1.pdf>

Hence we support the following change:

“Under the prior text, a claimant would have had to have filed their IRP within one year of the action/inaction that is being challenged. Under the new text, the only timing requirement that the claimant has to meet is the 120-day requirement above, whether the challenged action/inaction happened 3 months, 3 years or 5 years prior (or more).”

The NCSG under no circumstances accepts the return to the previous text, as the IRP is a critical tool to keep ICANN accountable and as transparent as possible. However, we reiterate our previous comment that while the time limit might be appropriate for commercial actors, it is not for consensus policy:

“Clearly, we don’t want commercial actors to be able to hold ICANN in a state of perpetual uncertainty regarding decisions or actions in the narrow domain that it regulates. But the time limits make no sense at all when applied to disputes over consensus policies that are alleged to transgress mission limitations. The mission limitations are meant to protect fundamental individual rights, and to permanently constrain ICANN’s mission. They are not matters of expediency and are not time-dependent. If a policy allows ICANN to expand its mission beyond its intended remit, the actions it takes under that policy should be subject to challenge at any time.”

Finally, the NCSG supports both modifications that took place as a result of the community’s objections and we thank the Implementation Oversight Team team for making the changes happen.