

Consultation Paper: Proposals to amend Nominet's Terms and Conditions for the Registration of Domain Names

1 Executive Summary

Nominet is seeking your comments with regard to proposed changes to its standard terms and conditions for the registration of domain names. The proposed terms can be found in full at

<http://www.nominet.org.uk/Pab/PabConsultationPapers/TAndCsConsultation/ProposedTAndCs.html>

In brief, the objectives of the changes are as follows:

1. To make the terms and conditions flexible, in order to allow Nominet to continue to make improvements in its operational services;
2. To clarify the position if the registrant ceases to exist
3. To clarify the requirements for registrants to give accurate contact information
4. To make a number of minor changes which are summarised at section 3.

We ask you to respond to the following questions:

Question 1: Do you agree with the general approach of keeping the terms and conditions operationally flexible, whilst maintaining full dialogue and consultation on any policy issues, and publishing full details of operational practices on our web site? If you do not agree, what approach do you think we should take?

Question 2: Do you agree that it should be possible for Nominet to terminate the contract of registration if the registrant (for whatever reason) ceases to exist, so long as sufficient safeguards are in place to protect individuals and small businesses? If you do not agree, what should happen when a registrant ceases to exist?

Question 3: Do you think that the combination of draft clauses 14.4 and 15 provide sufficient safeguards for individuals and small businesses? Are there any additional safeguards that you would like to suggest?

Question 4: Do you think that the safeguards set out in draft clauses 14.4 and 15 are necessary? If 'no', what alternative would you suggest?

Question 5: In your view, what should Nominet require the registrant to provide in terms of contact details? Is it sufficient for the name to be good for contact and not deceptive, or should a stricter rule apply? If so, please specify what you think this should be.

Question 6: Do you think that a respondent's address details should continue to be published on all DRS decisions? Please explain the reasons for your views.

Question 7: Does the draft clause 4.3 provide a simple, effective and fair system for dealing with security information? If 'no' please suggest improvements.

Question 8: To what degree, and how, should the Terms and Conditions deal with the issue of revocation of identifying codes in cases where (a) Nominet is aware of the revocation (because, e.g. we reissue a code for the Registrants Online system) and (b) Nominet is not aware of the revocation (e.g. because the registrant's encryption key has changed)?

Question 9: Do you have any comments on the other proposed changes in section 3 of this paper?

2 Background

The current terms and conditions were introduced in September 2001 (subject to minor changes in February 2003).

Since September 2001, Nominet has made considerable changes in its operations, for example by the introduction of positive renewals, online reply forms, and replacing paper certificates with downloadable certificates. Whilst we have implemented these operational changes in accordance with the Terms and Conditions, our experience has highlighted the potential difficulties which arise when the standard contract goes into operational detail.

This is particularly the case when, as with Nominet, a lengthy and inclusive consultation process is necessary before any changes can be made to the Terms and Conditions.

A draft of the proposed Terms and Conditions is set out at Appendix A. Our purpose is to encapsulate within the Terms and Conditions the policy issues, but not to drill down the operational detail of every process.

We have not presented the draft with changes tracked. The reason for this is that we have also completely rewritten the terms in plain English so that they can be more easily understood, and therefore tracking the changes would show a mass of redline.

You are requested to consider the issues and to give your reaction to the proposals, and to highlight and give your views on any other issues relating to the Terms and Conditions which are not covered in this paper.

3 Policy issues relevant to the proposed changes

Apart from a conversion to plain English, and re-ordering the clauses by topic, the following are the key policy changes on which your views are sought:

3.1 Operational Flexibility

Nominet has a number of structures in place to ensure that it consults on policy matters. Principal amongst these is the Policy Advisory Board (PAB), which is made up of representatives both of Nominet's membership but of the wider stakeholder community, including the Department of Trade and Industry, the Confederation of British Industry, the Information Commissioner, and the Institute of Trade Mark Attorneys. In addition, Nominet frequently involves the wider community in consultations on policy changes.

Although Nominet welcomes and respects these processes, as the .uk domain name registry, it also has an obligation to be efficient and dynamic with respect to operational matters.

As stated above, Nominet is going through a process of profound operational change, and anticipates that over the coming years, further operational changes will be made. It has increasingly found its operational changes to be constrained by the detail in the current terms and conditions. We have therefore redrafted the terms to be less focussed on the operational detail of our practices. For example see draft clauses 2.5, 4.6 and 16. In this way, it is hoped to make the terms more flexible in allowing operational changes to be made. The 'generalist' approach to operational matters has been requested by Nominet's management team.

It is intended that Nominet publish on its web site up to date information and assistance for those using its operational systems.

Question 1: Do you agree with the general approach of keeping the terms and conditions operationally flexible, whilst maintaining full dialogue and consultation on any policy issues, and publishing full details of operational practices on our web site? If you do not agree, what approach do you think we should take?

3.2 Registrant ceases to exist

If a registrant dies, is struck off the register of companies, is a dissolved partnership or otherwise ceases to exist, the contract is currently silent on what should happen. At present, if we find out that a registrant has ceased to exist (for example, it is a company that is struck off at Companies House), we act as though the contract of registration continues. If the domain name registration has not been dealt with as part of the dissolution of the company, or distribution of the estate, we refer enquiries about such domain name registrations to the Treasury Solicitor, as having passed to the Crown.

In practice, such cases are rarely straightforward, and demand considerable staff time to resolve, especially if the registrant name is recorded ambiguously, or if a transfer is claimed to have taken place prior to the dissolution of the registrant. Frequently, the domain names are renewed either by ex-directors who may be using the names, or by others who have control of the domain name (such as an Internet service provider). Disputes about alleged transfers prior to the dissolution of the registrant are also common, and are difficult and costly for Nominet's staff to resolve. It is also difficult to resolve issues such as incorrect contact details. It is hard to maintain a consistency of approach, as in many cases the resolution comes down to a judgement call by the case officer. All these circumstances lead to delays and frustration from would-be registrants of such names.

As a result, Nominet initially proposed that in the majority of cases, the contract should terminate if the registrant ceases to exist. However, the PAB expressed the view that it is right for the contract continue, at least until the point of renewal. This would allow registrants such as individuals or small traders to deal with domain names as part of the distribution of their estate. It would also allow for companies which had become insolvent, or had reorganised their corporate structure, to manage domain names which had not been dealt with on distribution of the assets or reorganisation.

In the light of the PAB's concerns, Nominet proposes, as a default position, that we may cancel a registration if the registrant dies, is struck off or otherwise ceases to exist (clause 14.4). However, Nominet would not exercise such a right if we are provided, on request, with proof that the person wishing to take on the name has validly acquired it (either through an assignment or by operation of law), and that they wish to take on responsibility for the name in accordance with our terms and conditions (see draft clause 15).

Question 2: Do you agree that it should be possible for Nominet to terminate the contract of registration if the registrant (for whatever reason) ceases to exist, so long as sufficient safeguards are in place to protect individuals and small businesses? If you do not agree, what should happen when a registrant ceases to exist?

Question 3: Do you think that the combination of draft clauses 14.4 and 15 provide sufficient safeguards for individuals and small businesses? Are there any additional safeguards that you would like to suggest?

Question 4: Do you think that the safeguards set out in draft clauses 14.4 and 15 are necessary? If 'no', what alternatives would you suggest?

3.3 Contact details and aliases

Accuracy of the information on the register is of importance to Nominet for several reasons, paramount of which are Nominet's duty to provide accurate information about registrants of .uk domain names, and to be certain as to the identity of a domain name's registrant.

With regard to registered companies, the position is relatively straightforward, since there exists at Companies House and its regional equivalents an accurate record of the company's name and number. This is not the case with individuals, sole traders and partnerships. In English law, there is no requirement to register business trading names with any registry (as distinct from company names). In addition to this, an individual may use any name they

chose, provided that the purpose of using the name is not deceptive or otherwise illegal. Although individuals can use 'Deed Polls' (Change of name deeds) or Statutory Declarations to change their name, these are not compulsory and do not have to be registered with any authority.

With regard to individuals, sole traders and partnerships, there is little or no guidance as to the "correct" way to record the registrant's name. In consultation with the PAB, it is recommended that the only criterion to make a name 'correct' under Nominet's terms and conditions should be that it is both good for contact, and that it is not deceptive.

However, we are aware that it may be possible for a domain name's registrant to be recorded in a way that is not deceptive, but is actually meaningless for contact purposes, or contractual certainty. An example would be where a URL instead of a name is given as the registrant of a domain name.

The current draft at clauses 3.1 and 6.2 deals with this issue in terms of the necessity for Nominet to be able to determine who the underlying contracting party is.

In addition, the PAB has expressed concern about privacy issues arising from the publication in DRS decisions of the registrant's name and address, in circumstances where the registrant is a non-trading individual. On the one hand, a non-trading individual has a right to opt out of having his/her address published as part of the WHOIS and there is a logic in extending the opt out also to DRS decisions. However, Nominet's independent experts have expressed the view that the registrant's address is often relevant in reaching a decision under the DRS – for example if there is an allegation of a pattern of abusive registrations – and that there is a qualitative difference between publication as part of the WHOIS, and for use as identification, and potential reference in future decisions, of a respondent under the DRS.

Question 5: In your view, what should Nominet require the registrant to provide in terms of contact details? Is it sufficient for the name to be good for contact and not deceptive, or should a stricter rule apply? If so, please specify what you think this should be.

Question 6: Do you think that a respondent's address details should continue to be published on all DRS decisions? Please explain the reasons for your views.

3.4 Security and passwords

Nominet has always performed reasonable checks to ensure that any request it receives is authorised by the registrant. As Nominet moves more of its services online, and makes use of security codes and passwords, the manual nature of such checks is likely to diminish. While this will provide speed and convenience for both registrants and tag-holders, there is a risk that a change will be automatically processed on the basis of an authorisation code which is later denied by the registrant. The current Terms and Conditions do not address this sufficiently, so the draft sets out guidelines which clarify that Nominet is reasonable to believe that anyone who has a password or security code is, or is authorised by, the registrant.

At the time of writing, Nominet is issuing security codes to all new and renewing registrants, which it is intended to use as part of security checks. However, such checks may in the future rely on other information, such as personal information provided by the registrant, or identification issued by third parties (e.g. via encryption systems).

The PAB recommended that the first version of the draft be amended to better reflect the fact that such identifiers may come from sources other than Nominet, and may be revoked by the registrant.

Question 7: Does the draft clause 4.3 provide a simple, effective and fair system for dealing with security information? If 'no' please suggest improvements.

Question 8: To what degree, and how, should the Terms and Conditions deal with the issue of revocation of identifying codes in cases where (a) Nominet is aware of the revocation (because, e.g. we reissue a code for the Registrants Online system) and (b) Nominet is not aware of the revocation (e.g. because the registrant's encryption key has changed)?

4 The proposed changes: Summary of other changes

In addition to the proposals detailed above, the draft terms include the following proposed changes:

1. Plain English throughout. Concurrently with consultation, the draft will be put to the Plain English Campaign for their comments.
2. Reordering of clauses by topic.
3. Harmonisation of the provisions relating to renewal and transfers. See draft clauses 2.1, 5.2, 14.1 and 16.
4. Clearer provisions to deal with restoring registrations which were cancelled in error. See draft clause 14.3.
5. Recognition of other representatives, in addition to tag-holders generally, for the purposes of some transactions (at present, tag changes). See draft clause 4.5.
6. Clearer statements that registrants should deal with Nominet via their agents (tag-holders) rather than directly with us unless we request it. See clauses 4.4 and 4..
7. A more transparent policy on refunds. See draft clause 5.
8. Clarification of the legal status of domain names. See draft clause 7.
9. With regard to requests for registrant data which is not published on the WHOIS, we propose to move to a system where in responding to requests for personal data, Nominet closely follows the exemptions set out in the Data Protection Act 1998, rather than specifying its own categories. The key difference here is that the identity of the enquirer is less important than the purpose for which the information is sought. Since these exemptions have been considered by Parliament, they seem to us to be a more objective basis on which to base the exemptions than is currently the case. Please see draft clause 8.3.
10. Clarifying that mediation under the DRS is a confidential process. See draft clause 12.2.
11. Clearer rules about cancellation, suspension and "special status". See draft clauses 13, 14, and 15.
12. Reverting to English law and jurisdiction in most cases (as opposed to the uncertain 'UK law' in the current terms) except where consumers are based in Scotland, Wales or Northern Ireland. See draft clause 32.

Overall, the draft terms are the same length as the current terms. The numbering has been rearranged so that it does not go to four levels (1.1.1.1) and rarely goes to three (1.1.1) as this becomes hard to read, but this does mean that there appear to be more clauses.

Question 9: Do you have any comments on the other proposed changes in section 3?

5 How to give feedback

This consultation will run from 4 May to 4 August 2004.

In order to give input, please send an email to pab-feedback@nominet.org.uk with the subject line 'T & C consultation'. All consultation responses will be published on Nominet's web site at

at <http://www.nominet.org.uk/Pab/PabConsultationPapers/TAndCsConsultation/T&CResponses.html>

We reserve the right to remove any materials which in our reasonable opinion are defamatory, offensive or unintelligible.