



### children's charities' coalition on internet safety

## Response to Nominet's Registration Policy Review

### Recommendations

1. Being mindful of the unique position of .uk as the UK's flagship domain, Nominet should accept there is a normative or standards-setting aspect to its core business and this sets .uk and Nominet apart from the generality of TLDs and Registries.
2. Nominet should adopt an ethical naming policy.
3. The ethical naming policy should expressly proscribe the creation or renewal of domain names which are themselves illegal advertisements or names which appear to advertise or promote behaviour which is illegal in the UK.
4. The ethical naming policy should also expressly proscribe the creation or renewal of domain names which appear to advertise or promote behaviour which is repugnant to public policy. Nominet should not feel it is obliged to provide a shelter for anyone and everyone.
5. The ethical naming policy should apply across the whole of the .uk namespace.
6. It would be well within the reach of current filtering technology and algorithms to establish parameters to allow a range of words or expressions to be identified. However, it is recognised that Nominet may also need to develop specialist tools to allow it to be proactive in enforcing and maintaining an ethical naming policy.
7. In the first instance these tools should be introduced for a trial period and their efficacy closely monitored. Linked to that Nominet should continue to receive reports or complaints about domain names from third-parties but cease to rely so heavily on them.
8. The ethical naming policy should be published. There should be an independent appeals mechanism against any decision made pursuant to the policy.

## Background

1. Nominet is a not-for-profit organization charged with administering the rules governing the .uk namespace, otherwise known as the UK's Country Code Top Level Domain (ccTLD). In deciding its policies Nominet is meant to act in the public interest.
2. Nominet has clear rules about the number and type of characters which may be used when registering a domain name within .uk. These are actively enforced at a technical level by the registration systems used by Registrars but otherwise it seems pretty much any name can be registered and nothing will happen in relation to it unless someone complains. This may be characterised as *"do nothing then wait and see"*.
3. Who would be likely to complain or raise an issue with Nominet about a particular domain name, implying a request for it to be withdrawn? Who would be likely to trigger an investigation which might lead to the suspension or cancellation of a domain? Presumably *not* someone deliberately searching for the sort of content found at that domain if it matches their tastes or interests. A policy of *"wait and see"* is another way of saying *"come to us and find out how long you can get away with it"*.
4. The present policy in reality therefore relies on referrals to Nominet following an accidental discovery by a member of the public, or a discovery by a vigilante or a competitor, on references from law enforcement or a network administrator who took an interest for one reason or another. This is highly haphazard and not a satisfactory basis for policy.
5. Thus *"wait and see"* means extremely undesirable, potentially illegal conduct can be established, advertised, promoted and carried on uninterrupted for an extended period of time. This cannot be in the public interest.
6. Nominet's approach reflects the historic practice of many bodies associated with managing or providing a wide range of services on the internet. It is a policy that has passed its sell-by date. More could and should be done by Nominet to frame and enforce an ethical naming policy.

## Legal background

7. The [eCommerce Directive](#), provides some legal underpinning for Nominet's *"wait and see"* approach. Adopted in 2000 it inaugurated or at any rate formalised *"notice and take down"*.
8. The eCommerce Directive provides legal immunity to electronic service providers as long as they do not have actual knowledge of any unlawful content on their servers or, on notice, they acted expeditiously to remove or correct it. This immunity matters where, as in the present case, third-parties in effect interact with automated systems. The prevailing view is, whatever the reason, any attempt to police one's site or service risks attracting liability as the provider may be deemed to become the knowing publisher of anything and everything not removed. Perversely, the rule therefore provides a substantial incentive to be passive.
9. However, many commercial companies and other organizations have *chosen* to be proactive. Some of these operate on a far larger scale than Nominet. They constantly or periodically scan their site or service seeking out material that is in breach of their Terms and Conditions. They have shown they are willing to risk losing the legal immunity they would otherwise enjoy. This is generally because of the importance they attach to preserving their brand values. Nominet should adopt a similar position.
10. Incidentally CHIS is *not* suggesting that the current legal position should change in any fundamental way. In such matters it would be wrong to create a liability for something the entity could not have known about, although in other areas of public policy strict liability can arise. However, the Directive was never intended to provide an alibi for indifference or inaction. What would be welcomed, therefore, is a statement from the

appropriate authorities making it clear that simply *looking* on one's site or service for illegal or other matter that breaches a provider's Terms and Conditions cannot put the general immunity in jeopardy. Actual knowledge or failure to act expeditiously following notice should remain as the cornerstones of liability.

## Reasoning behind the eCommerce Directive

11. The thinking which informed the passage of the relevant parts of the eCommerce Directive might be summarised as follows:

- a. A belief that the scale on which things can happen in cyberspace, linked to the complexities of some of the jurisdictional or other issues which might arise, meant that, in practice, whether one wanted to or not it is anyway impossible to intervene proactively in an effective way to enforce what are seen as values based rules.

*In the early days of the internet this may well have been true i.e. tools were not readily available to allow for such interventions at scale. Things have changed. Moreover the volume of domain names Nominet trades in, while not trivial, neither are they overwhelming.*

*It would be well within the reach of current filtering technology and algorithms to establish parameters to allow a range of words or expressions to be identified. However, it is recognised that Nominet may also need to develop specialist tools.*

*When flagged, post purchase but prior to deployment, questionable names could be pulled from a line to be put in front of human eyes preparatory to a decision being made about whether or not the proposed new name or renewal fell within or outside Nominet's policy. What seems to be missing at the moment is any **desire** to do anything like this on the part of Nominet. However, accepting that this approach is untried CHIS suggests it should be introduced for a trial period and its efficacy closely monitored. How or if Nominet might want to share the responsibility and the cost of carrying out this enforcement role with Registrars is a matter for further discussion.*

- b. A worry that *any* rules potentially will stifle innovation thus choking off or restricting economic growth, jobs and corporate profits.

*Nobody is in favour of bad rules but the notion that one eschews any against the possibility of unknowable or unquantifiable potential harms or benefits is plainly absurd. It amounts to a cowboy's charter. However, rules without an effective enforcement mechanism can amount to no more than pious words. They can also be deceptive i.e. they imply something that actually isn't there.*

12. Around the time the eCommerce Directive was being drafted there was also an ideological component to thinking about the internet.

13. The internet had its origins in various scientific and research communities. These were located in a relatively small number of institutions and countries. There was a high level of trust among users, based on shared values. The leadership of many key bodies associated with the internet's development saw themselves principally as being in the business of establishing technical standards that would allow the new technology to flourish. They specifically denied they had any direct responsibility for how it was then used. That became a "*content question*" and put it outside the scope of their concerns. The notion that the name, *per se*, can be entirely divorced from what actually happens on a site is more than a little suspect but in the then prevailing climate there seemed little to worry about anyway.

14. The early optimism which surrounded the emergence of the internet has been confounded by the realities of a global network which, in effect, is now a mass consumer product far removed from the Ivory Tower. Bad guys have rushed in where the founders never imagined they would even think about treading.

## Web addresses can be equivalent to a business address

15. For a wide range of web sites a domain name is very often, in practice, the equivalent of or might actually be a business name. Is there a case for saying, therefore, that the standard applied across the .uk namespace ought to be the same as or similar to the established rules applying to business names within the UK?

## Britain's virtual flagship

16. What is being discussed here are the rules which should apply *solely* to the UK's flagship domain, not every domain. Nominet is not a commercial Registry. Nominet should acknowledge there is a normative or standards setting aspect to the policies and practices which relate to its core business. This sets it apart. Within limits Nominet should not feel it needs to *compete* with other TLDs. Acting in the wider public interest, Nominet's primary task is to tend to the reputation and functioning of .uk in a way no one else can.
17. The fact that a particular practice is legal or is not forbidden does not mean it is necessarily ethically sound or that it provides an entire justification for a given course of action. In other words just because Nominet cannot be sued or prosecuted for failing to prevent an illegal or undesirable name from appearing or being used, it does not mean they *ought* to hide behind such loopholes or get-out clauses and refuse to try.
18. The promotion or protection of free speech is an important public policy objective. It is one of several and there can be tensions between them. For example under R v Perrin it is established law that hard core pornography sites should have a link to an age verification process. Nominet should feel entitled to say that if a pornography site wishes to register within .uk it must demonstrate that it complies with R v Perrin as a condition of initial and continuing registration. Where there are other laws which are known to impact directly on the legality of an online operation Nominet should take a similar view.
19. To argue the only acceptable limit on names is no limit, or that first come first served is all that counts, is not consistent with the unique characteristics of a ccTLD. That would make .uk no more than a catch all for anything and everything that comes along. It undermines the idea of any lines of demarcation between domain names. Lots of UK based projects do not use the .uk domain. By the same token a refusal to accept a particular proposal on policy grounds is simply another way of saying *this one is not for us, try somewhere else*. Thus Nominet should not feel they are under an obligation to provide a shelter for anyone and everyone. There may be many other TLDs that are better suited for certain types of undertakings.
20. A refusal to accept certain types of proposals within .uk therefore cannot in any meaningful way be equated with a denial of free speech. This is obvious when it comes to names which themselves constitute illegal advertisements but the same concept can reasonably be extended to other names which are repugnant to UK public policy. The parameters of such a policy would need to be clearly stated and there must be an appeals mechanism.
21. It would be distressingly ironic if some of the standards applied to several of the commercial TLDs were noticeably stricter, more ethically-based or more vigorously enforced than those being applied to .uk.
22. Nominet has no absolute right to exist. There is no international law or accepted jurisprudential standard which says ccTLDs should only ever and forever be administered by a not-for-profit public interest body or the incumbent. However, in order to continue to enjoy its current monopoly Nominet needs to ensure that its policies and practices always pass a public interest test. At the moment with regard to names they do not.

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