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THE DNS.PT ASSOCIATION AND .PT DOMAIN NAME MANAGEMENT

§1. Context

It was with surprise that the Board of Directors of the DNS.PT Association (hereon “DNS.PT”) learnt of ISOC Portugal Chapter Association’s (hereon “ISOC Portugal”) public position entitled “Public position from the Portugal Chapter of the Internet Society Association regarding management of the Top Level Domain for Portugal”.

The document, dated 21 December 2017, was circulated in an “official” capacity a few days later. It essentially expressed ISOC Portugal’s opinions regarding the current .PT domain management model, listing a number of aspects - that are substantiated in a set of generic proposals – and that ISOC Portugal believes should be the guidelines for a restructuring of the model in place.

DNS.PT does not agree with ISOC Portugal’s analysis, and in particular with the conclusions it draws.

First and foremost, the manner in which this position was conveyed was a surprise.

ISOC Portugal has been a permanent member of DNS.PT’s Advisory Board since the beginning, and we are unaware of them ever having expressed concerns regarding the views in their document, either in word, action or any other kind of participation in this forum. Quite the opposite.

As such, most of what can be read in the document is a novelty and has never been presented by ISOC Portugal for discussion (or for vote) in the appropriate forums.

It is also important to clarify – to put this document into context – this is an isolated position taken by ISOC Portugal. It exclusively represents ISOC Portugal’s interpretation, which is contrary to that of the other members of DNS.PT’s Advisory Board, over the past years, and of a broad range of other national and international entities, all of whom have recognized the importance of DNS.PT’s work over the years and results achieved.

Finally, a consideration about the contents of the document. Although this is not the appropriate forum to debate each specific item, DNS.PT cannot remain indifferent to ISOC Portugal’s publicly voiced position. DNS.PT considers the document reflects a very partial and distorted view and a very narrow interpretation of its operational activities. The document contains a number of significant errors (factual and legal), omits important facts and suppresses others following a narrative that falls apart on the first reality check.



In some sections of the text, there is obviously a deep lack of subject knowledge which ends up tainting all of ISOC Portugal's analysis and conclusions.



§2. What DNS.PT is and what it is not

The first point that needs to be addressed is DNS.PT's legal and statutory framework and mission which, once explained, will help clarify the reservations presented by ISOC Portugal.

As a foreword, it is important to remember that .pt is not a monopoly and the DNS.PT Association does not manage a monopoly. When companies and citizens want to put their addresses online, they can resort to a number of different options in the market: .com; .org; net; .eu; .es; .uk. In total, there are currently 1573 options for registering Internet addresses, and .pt is just one among many ccTLDs (312) and gTLDs (approximately 1230). A review of these credible and objective facts provides a simple basis to refute ISOC Portugal's arguments. In addition, only 38% of the national registrations are .PT and over 56% are generic top level domains, namely .com, and around 5.9% are on other ccTLDs. It is precisely because we are not a monopoly that we have been so active to date and still have a lot of work ahead promoting .pt as the national domain of choice.

DNS.PT has long been familiar with the management of the national ccTLD as it was already being run prior to 2013 by the DNS.PT team from within the now extinct FCCN (Portuguese Foundation for Scientific Calculus - a private, not for profit organization) with international delegation of powers from IANA on 30 June 1988.

The Government in 2012 decided to extinguish FCCN (a foundation-like private entity) with immediate effect and all of its mission and responsibilities were integrated into the Foundation for Science and Technology I.P. (Decree Law number 266-G/2012, 31 December) and didn't realize at the time that as it wasn't regulated in the statutes, in addition to the management of the Portuguese RCTS – NREN (National Research and Education Network), it was also responsible for managing ccTLD.pt.

The impact of the regulatory loophole for the management of .PT only became clear after a series of approaches by the FCCN president and ISOC Portugal (trying to transfer this responsibility to the association) and then later by the Management of DNS.PT.

As a result, new legislation for FCT was drawn up and came into effect in 2013 thus regulating that the management, running and maintenance of the Portugal top level domain should be delegated to a private, not for profit association. This was to be created by FCT and other potential associates, embodying the multi-stakeholder model that exists at the most relevant European peers.

This led to the foundation of the DNS.PT Association in May 2013, bringing together the Portuguese State represented by FCT.IP (on account of DNS.PT's undeniable links to science: this technology was originally developed within the academic world and follows international governance models that maintain a close tie to academics, science and innovation. This has been a driving force for the rapid development of DNS worldwide, through non-governmental models, and it is what allows the DNS system to continue to thrive today), the Portuguese arm of IANA/ICANN, DECO (the largest Portuguese consumer association and ACEPI (The Portuguese Digital Economy Association). It is important to note that management of .PT was never led by FCT.

As reflected in its Statutes, DNS.PT represents various stakeholders: the State, the Internet Community, and Consumers and Businesses. As such:

- (i) From the outset, management of .PT has been led by private entities ie: without government intervention. This was always the intention as is clear from the fact that FCCN was initially responsible for its management and then again with the explicit transfer to a private, not for profit association.
- (ii) Following on from the previous point, when referring to the .PT domain, we are not speaking of a typical constitutional responsibility of the State. In fact, ISOC Portugal itself does not refer to the legal basis it is attempting to use as a foundation for its argument. Likewise, we cannot refer to a concession granted by the Portuguese State to a private entity (at least in the technical-legal sense) subject to the same rules and regulations of a public concession (rules to select the counter party, relating to contract resolution or suspension etc) namely because we are not speaking of assets in the legal public sphere, as ICANN has stated.

It is therefore important to clarify that DNS.PT is not a concessionaire of the Portugal ccTLD, as ISOC Portugal erroneously claims. Over its 30 years existence, the Portuguese State has strived to maintain a consistent and transparent approach by promoting independent and decentralized management of .PT, aligned with international best practice as can be reviewed in the Internet Society documentation available on <https://www.internetsociety.org/ianatimeline/>.

DNS.PT is responsible for the management, running and maintenance of the .PT top level domain as a result of the international delegation from IANA to FCCN in 1988 and the transfer of the latter's responsibilities when it was later extinguished.

DNS.PT's performance of these responsibilities has been widely praised as a reference both in Portugal and abroad (associates, clients, registrars, discussion forums and work groups, such as ICANN, CENTR, IGF and EuroDIG) and its experience has been used as a model for inspiration in many other European countries. We highlight the following aspects in particular:

- (i) DNS.PT's very important role in developing the Internet and the digital economy in Portugal, raising awareness and increasing the value of .PT and to achieve its statutory objectives. To this end DNS.PT has hosted numerous initiatives and events, workshops and training sessions to disseminate use of the Internet in Portugal. The increasing value of the ccTLD is intimately linked to (even dependent on) this work;
- (ii) The strategic focus placed on social responsibility (based on innovation and development criteria), namely through initiatives that promote increased digital literacy and that fight info-exclusion and the digital divide. In particular, in 2018, DNS.PT is making a significant effort to support development of digital skills with one of the main initiatives being its support of the government led programme - ICCoDe.
- (iii) Results demonstrate that the management model and business plan have been enormously successful (as voted unanimously by the Associates and Advisory Board's General Meetings) and expectations for future growth are very positive.

To provide a better basis for evaluation, we have taken a longer 7 year historical time scale. Comparing relative performance since DNS.PT was created in 2013 with the earlier period when the institutional management framework had a multitude of different objectives, it is clear that there was an increase in revenues generated by the .PT domain, a big reduction in operating costs of DNS.PT (as a result of efficiency measures introduced by the DNS.PT management team), increased investment in security of the .PT technical infrastructure and increased allocation of resources to .PT promotional initiatives. This is visible in the chart below:

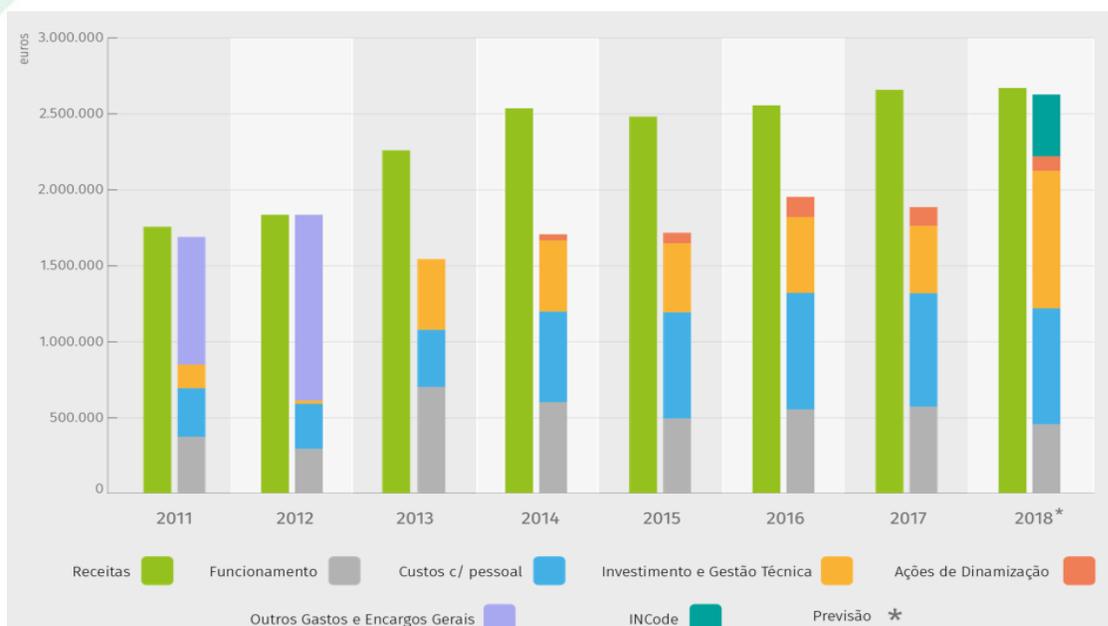


Chart 1 – Relative performance of revenues, OPEX, staff costs, technical investment and Portuguese Internet promotion initiatives.

The highest ever number of registrations was achieved in 2017, more than 100 000, a fact that was widely publicized due to its importance. In .PT’s thirtieth anniversary year, DNS.PT is confident that it will continue to achieve growth for the fifth consecutive year, and forecasts that the 1 million .PT registration milestone will be reached during 2018. The evolution of .PT registrations is very impressive, as can be seen in the chart below:

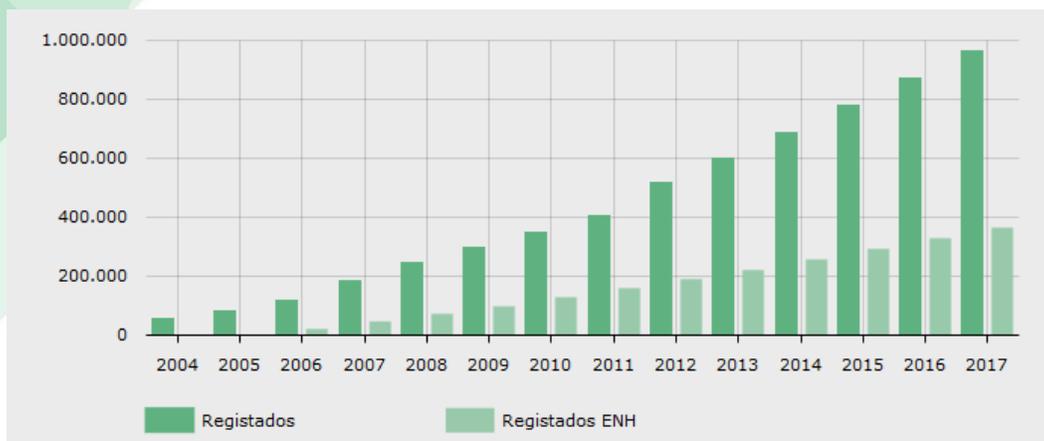


Chart 2 - General domain registration evolution and those registered under the ENH initiative – “Empresa na Hora” (an initiative for fast business set up that provides free registration for a year)

These results are aligned with those disclosed by CENTR in its May 2017 “Domain Wire Global TLD Report” where it refers that the Portuguese ccTLD presented the highest growth in Europe in 1Q 2017.

It is a shame that ISOC Portugal makes no mention of any of this data in its document.

§3. About the DNS.PT Governance Model

ISOC Portugal also raises reservations around the DNS.PT Governance Model in its document, which can be separated into two parts:

- (i) on the one hand the alleged lack of public involvement in the Association’s operations;
- (ii) on the other hand, the alleged existence of potential conflicts of interest in the creation of DNS.PT and its actions;

The first reservation would seem to indicate that ISOC Portugal favours a more centralized, almost governmental (we would say) management of the .PT domain.

In fact, ISOC’s recommendation to “broaden the base of those responsible for management to include more representatives from the government and civil society” would seem to indicate one of two things: transfer of management responsibility exclusively to the Portuguese State or alternatively to ISOC Portugal itself.

DNS.PT believes that neither of these possibilities would be welcomed and we also feel that it would be completely inappropriate to hand over .PT management to private entities that in no way represent the Portuguese ccTLD management ecosystem.

Firstly because international best practice adopts decentralized and not governmental models, which ISOC actually recognizes in its document. The multi-stakeholder model is based on the independence and autonomy of the decision process from public and private powers, ensuring that discussions between all parties are held on an equal footing, thus legitimizing the process and resulting actions: the multi-stakeholder or multi-participated model is therefore one which truly promotes co-responsibility.

Secondly because domain related best practice – based on regions with the most similarities (see chart 3) and which are therefore most commonly compared to us – unequivocally show a majority preference for the model adopted in Portugal, namely as regards delegation of responsibilities in a private, not for profit organization, with relevant and broad representation, and that by definition promotes a multi-stakeholder configuration.

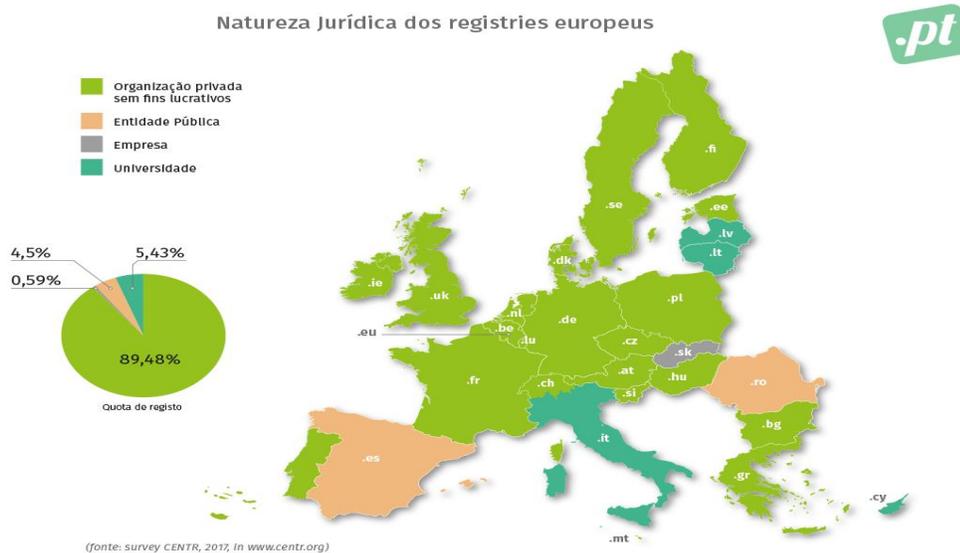


Chart 3 – Legal entity structure adopted by DNS.PT Association's peer group

Contrary to what ISOC Portugal says in its document, the current model has plenty of control mechanisms in place to ensure a deeply collaborative model, namely the presence of FCT on the Board of Directors (with one vote as is the case of all other founding associates), the presence of various public entities on the Advisory Board (IGAC, IRN, ANACOM, INPI, Centro Internet Segura (Safe Internet Centre)), and the

presence on the Governing Bodies of the Association’s General Meeting of FCT and the Government’s representative for GAC/ICANN. It is particularly pleasing for us to report that the Government has had a proactive and inclusive attitude to DNS.PT, involving it in the definition of political and strategic positions that favour all parties as regards issues under DNS management, such as in international forums where the Portuguese position is reinforced and legitimized, in our view.

Finally and due to their core role in the multi-stakeholder and multi-participant model that we have already described, it is worth elaborating on the main actors from the Internet Community. DNS.PT passes this particular test with flying colours. DNS.PT’s governance model has 4 distinct decision levels, which are completely independent of each other:

- Board of Directors (Executive and Non-Executive)
- General Meeting
- Advisory Board
- Fiscal Council

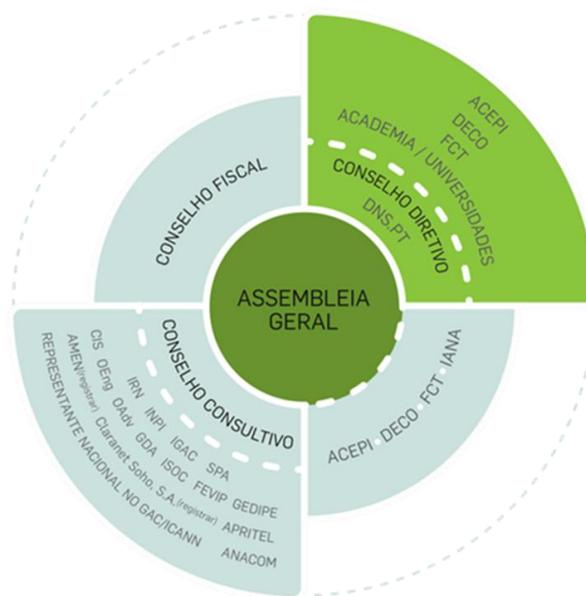


Figure 1 - DNS.PT Association’s Governance Model

Although daily management of DNS.PT is run by the Executive Directors, all structural and strategic decisions have to be validated at the various decision levels that are reflected in the figure above. Even the Advisory Board which is currently composed of 16 entities from various walks of civil society, the economy and public sectors, and whose purpose is to provide an advisory role, is called upon to make suggestions about DNS.PT’s initiatives on a yearly basis. For the most part, these are usually incorporated in the formal management documents that regulate the Association’s operations.

In light of the structure just described, it is hard to imagine that other parties from civil society might not participate and in fact should participate in the management of the Portuguese ccTLD.

Regarding the potential conflicts of interest that ISOC Portugal alludes to, their main issue seems to be the fact that ACEPI, one of the founding Associates of DNS.PT, has itself registrars as associates and that this could be a cover for registrars to benefit by influencing DNS.PT decisions through ACEPI.

The assumptions contains a number of errors.

As we have explained, the DNS.PT governance model is highly collaborative and based on the alignment of many different interests to achieve a common goal, which in this case is to secure best practices as regards the stability, security and resilience of the DNS service, and to safeguard the principles of open, transparent and participated governance of the Internet.

More than recommend, the model demands that the governance or policy making process include the largest number of participants from the ecosystem, measured by their degree of representation, and therefore reinforcing and legitimizing actions that may be taken.

The basic question raised by ISOC Portugal in its document can be broken into two issues:

- (i) Firstly to evaluate whether registrars should be able to participate in ccTLDs management process, in this case of the Portugal .PT.
- (ii) Second, to evaluate if, due to having registrars as associates, ACEPI's presence on DNS.PT's Board of Directors compromises its independence and impartiality and is no more than an interference in its management.

As to the first question, we have no qualms in stating that the collaborative model in place in Portugal is dependent on the participation of registrars as key players in the Portuguese Internet community and the management of .PT.

In practice, their participation has had a really positive impact on the expansion and increased value of .PT. As an example (amongst many others we could mention) the 3 in 1 service launched in 2013, a DNS.PT partnership with 10 registrars to offer all companies created within the "Simplex – Empresa na Hora" initiative a set of services which include a registered .pt domain- a basic tool required to launch a website, technical hosting and an electronic mail box.

However their participation can only be feasible – as referred in DNS.PT's statutes – if levelled with that of other players in the ecosystem in order to prevent registrars becoming a defining force in the .PT domain management system, for their own benefit.

However this risk does not exist at all: only two registrars have seats on the Advisory Council out of a total of 16 members. ACEPI is represented on the Board of Directors with a non-executive director, along with 6 peers.

The presence of registrars on ccTLD governing bodies is not an innovation of the Portuguese model.

On the contrary, looking at the jurisdictions that are generally used for comparison, we find that in the majority of European countries with the most likeness to Portugal, registrars are present. This is clear in the chart below which also shows that in countries where registrars have a role on the governing bodies of ccTLDs, the share of registrations is the highest – more than 75%.

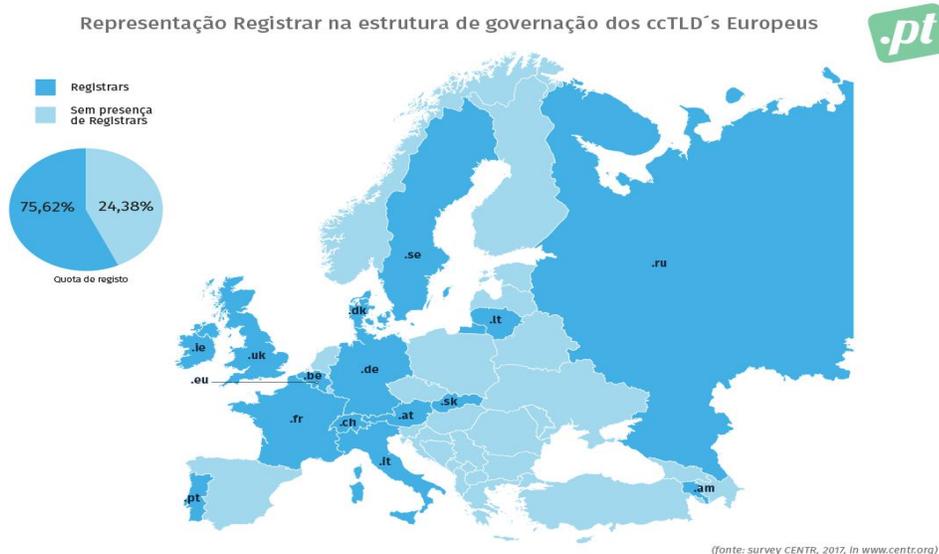


Chart 4 - Geographical representation of European peers of the DNS-PT Association with registrars on their governing bodies

Regarding the second question, as ISOC Portugal is aware, conflicts of interest have always been a matter of great concern in the management of the .PT domain.

To reinforce the ethical and legal rules that must apply in this regard, the Board of Directors approved an internal code of conduct in 2016 which has a specific section pertaining to conflicts of interest.

Potential conflicts of interest may arise in situations where one or more members of the Board of Directors are conflicted in a decision to be voted on, due to the fact they have other interests at stake, outside of DNS.PT, either of a personal, family, or economic nature or related to the entity they represent on the Board. It is up to each Director to disclose specific conflicts of interest by communicating them to fellow Directors in sufficient time to permit a normal course of the Board meeting. Once this formality has been met, the conflicted Director is restricted from participating in the decision at hand.

As such, issues surrounding conflicts of interest are well covered in .PT domain's governance framework.

Specifically on ACEPI, and even though ISOC Portugal did not identify a single situation in its document in which a conflict of interest had arisen, it is important to keep in mind that ACEPI has over 260 associates and only 8 of these are registrars. To claim that this association, perhaps the most important in the digital economy arena in Portugal, is an "association of registrars" is, to say the least, misleading.

§4. Setting service fees

It is important to note in this forum that since its creation, DNS.PT has never changed the fees (not rates which is legally incorrect) or domain registration terms. As such, the prices in place today are the same as when the domain was being managed by FCCN.

However within the context of the preparatory work to change the registration model, prices are being revised, based on a very detailed analysis that justifies the changes and the assumptions behind the new pricing policy.

And it is thanks to the so called preferential discussions held with “service resellers”, that for the first time since the .PT registration process was created, large registrars will no longer have the upper hand over smaller players, putting an end to an unfair discount system for lower revenue generating registrars. This is a good example of how the multi-stakeholder model safeguards strict legal compliance, in particular fair competition and consumer defense regulation, and will introduce a fairer system for registering and managing .PT names. In fact, it was ISOC Portugal itself who proposed an end to the discount system in an email sent to the Advisory Board.

The registration model and pricing structure proposed was the result of an extensive, open and well participated consultation and discussion process of all interested parties that produced guidelines and contributions from Associates, the Advisory Board and the .PT Registrars.

The entire process, criteria and parties involved is described in detail in the aforementioned study, so again, we disagree with the reservations put forth by ISOC Portugal on this matter.

§5. Management of DNS.PT

ISOC Portugal also questioned the way investments had been made by the management of DNS.PT, both disagreeing with the investments themselves and alleging a lack of external control mechanisms.

Although we are not clear what investments ISOC Portugal is referring to, we can clearly state that all DNS.PT investments are submitted to very stringent evaluation and control criteria, at 4 levels:

1. Approval by the Board of Directors;
2. Opinion from the Fiscal Council;
3. Opinion from the Advisory Board;
4. Approval at the General Meeting.

All the details and financial data of the investments made are then disclosed in depth in the management documentation which is available at www.dns.pt. As such, we do not understand the claim that there are apparently no external control mechanisms in place.

ISOC Portugal has never opposed a single investment made by DNS.PT, either at the Advisory Board or at any other forum. This would indicate that their current disagreement is a very recent development given DNS.PT's almost 5 years of activity. In fact, the opposite has been the case to date. Whenever ISOC Portugal has made suggestions that were supported by the Advisory Board, they have been fully incorporated by DNS.PT and even applauded by ISOC Portugal.

To allay any remaining doubts, the main investments made by DNS.PT were in the domain's technical management (as demanded by ISOC Portugal).

The following is a list of the main investments per year:

- 2013: Administrative and Technical Service provision protocol signed with FCT, IP to secure a smooth transition from the services previously provided by FCCN as manager of DNS.PT - €209.372;
- 2014: Call-centre service, incident and external direct communication management to support DNS.PT's activity (Call Centre) awarded to Reditus Consulting S.A.; 5 companies invited to tender; average of €90.000 per year.
- 2015: Purchase of technical infrastructure from ITEN solutions; 3 companies invited to tender; €283.007;
- 2016: Purchase and implementation of an administrative and financial integrated system (Enterprise Resource Planning) awarded to Inovflow Business based on the Primavera solution; 4 companies invited to tender - €43.757;
- 2017: Purchase of Disaster Recovery services for DNS.PT awarded to IP Telecom using a Data Centre in Oporto; 5 companies invited to tender; €59.760
- 2018: Strategic decision to support INCoDE2030 in response to an appeal to collectively embrace the future and promote digital skills and investigation as a matter of social responsibility and priority; over €400.000.

Specifically regarding the decision to buy real estate to transfer DNS.PT's head office, currently run out of rented facilities, it was led by the operational needs of the Association and to prepare for future management requirements of the national ccTLD, whilst protecting the financial sustainability and assets of the Association. All statutory procedures were followed and the decision was voted unanimously by all Associates present at the General meeting after a favourable opinion was obtained from the Fiscal Council and a unanimous position was given by the Advisory Board.

Unfortunately ISOC Portugal was not present at the meeting, as has been the case since April 2016, and therefore missed an ideal opportunity to voice its disagreement with the acquisition, if that was indeed its position at the time.

This is also the case regarding apparently unjustified “advertising costs” incurred by DNS.PT, according to the claim made by ISOC Portugal and respective terminology;

It is not clear which advertising costs ISOC Portugal is referring to.

However if the term “advertising” relates to costs incurred to promote .PT (which include, amongst others, the 20.000 euros sponsorship of the Portugal Digital Summit, the largest yearly Internet and digital event in Portugal, or the €7.500 sponsorship of the “Volta a Portugal em Bicicleta” (Portugal Bike Tour), one of the most popular events in Portugal and a great low cost media opportunity to promote .PT which was also sponsored by the Portuguese Government through MCTES with the “Volta ao Conhecimento” (Knowledge Tour)), then the results achieved in terms of national ccTLD awareness and user satisfaction more than justify the low level of investment in these areas.

§6. Alleged blocking of websites without due legal proceedings

Another issue which should be addressed in this forum is the alleged “usurping” of DNS.PT’s responsibilities within the context of the memorandum of understanding (MoU) reached in 2015 between a large group of entities in matters of copyright and other related rights.

In the document, ISOC Portugal states that as a result of this MoU, DNS is responsible for blocking registration of names of entities that provide free access on their servers to content that other signatories consider to be covered by copyright laws. ISOC believes that it is not up to DNS.PT to reverse the onus of proof when deciding on possible violations.

DNS.PT can only assume that ISOC Portugal did not read the MoU in question. If it had, it would have realized that DNS.PT’s commitments in the MoU are in no way related to the blocking of sites, given that that would not be possible given its legal status and statutory competencies.

On the contrary, DNS.PT’s commitment in this MoU is reflected in Clause 8 and expresses the purpose of the European Observatory for Intellectual Property Violations to implement an aggregate portal under the www.ofertslegais.pt domain.

This is the only commitment made and is referred to in full by the General Inspector for Cultural Activities in his response to this public position and is in Appendix to this document (Appendix I).

§7. The I Trust seal

Finally it is important to clarify that the “I Trust” seal is an accreditation programme designed to increase the credibility and prestige of ecommerce in Portugal. Aligned with best national and international practices in online activity, the programme reinforces consumer trust and safety in online sales of products and services, and in the Internet in general, thus contributing to the dissemination and safer use of the Internet in Portugal.

Award of “I Trust” is visible with a seal in the form of a logo that is awarded to the accredited website after an audit process is conducted. The seal programme results from a partnership between ACEPI – Associação da Economia Digital, DECO – Associação Portuguesa para a Defesa do Consumidor and Associação DNS.PT, and award of the seal is dependent on compliance with a code of conduct and regulation.

Either unknowingly or unwittingly, ISOC Portugal states that “the award of the seal does not involve consumer defense entities”. Not only does this question its role, it also questions the role of DECO – the main consumer association in Portugal with a level of public awareness, independence and such a fundamental role in Portuguese society that it needs no introduction for the public in general.

As if this were not enough, in appendix II of its public position, ISOC Portugal goes on to question DECO’s commitment to this initiative. For the record, DECO has committed a full time lawyer to the Confio.pt

A seal of accreditation for sites is awarded both to companies and to individuals, ONG’s and to the Portuguese State. As ISOC Portugal mentions, the National Health Service was one of the first entities to be awarded the “I Trust” seal, however even here, they find cause to doubt.

The President of the Republic on numerous occasions has publicly referred to the importance of this service for the Portuguese public (on record). The seals are awarded after an independent audit process conducted by an auditor who is part of a team of 10 people with varying academic and professional backgrounds.

Conclusion

In the thirtieth anniversary year of the first domain registered under .PT, DNS.PT continues to pursue its fundamental mission –excellence in management of the Portugal top level domain in accordance with the legal values that frame .PT and best international practice in managing ccTLDs.

Against this backdrop of expansion and growth and increased value recognition of .PT, DNS.PT refutes the considerations circulated by ISOC Portugal in its public position circulated at the end of December.

The document presents a very limited and bias view of DNS.PTs role, based on a narrative that is completely disconnected from reality and omits or distorts the excellent and objective results achieved by this association since it was first created, and led by serious and transparent work ethics.

It also raises suspicions which are completely unjustified in light of the multi-stakeholder model in place and that has been working successfully in Portugal over the last years and has become a reference for many other jurisdictions.

Not only does ISOC Portugal question the model, it also criticizes and raises suspicions on a broad universe of public and private institutions that are well represented on the DNS.PT Association's Governing bodies, by using a very fragile narrative and with complete disregard for the extraordinary work these institutions have done over the past years in defense of the national ccTLD, and ultimately throwing a curtain of doubt on their motivations and reputation.

DNS.PT vehemently rejects this argumentation.

As already mentioned, the position ISOC Portugal expressed in the document is completely isolated and contrary to the opinion of all public and private members of the DNS.PT Advisory Board over the years, who represent the Internet community in Portugal, and of the Associates of the General Meeting. This is the only possible way to read and interpret ISOC Portugal's document.

The Board of Directors of DNS.PT

January 2018

APPENDIX I

Memorandum

Subject: Barring of domains without due legal process

I) Framework

1) On 2 January 2018, Mario de Almeida in his capacity as ISOC's representative on the Advisory Board of DNS.PT (hereon DNS) and member of the Board of the Internet Society Portugal Chapter, sent an email with an attachment informing the members of the Advisory Board of the following document: "Public position from the Portugal Chapter of the Internet Society Association regarding management of the Top Level Domain for Portugal".

2) In Point 7 of this document, entitled "Barring of domains without due legal process", it can be read that "DNS.PT committed to barring practical use of registration names of entities that give free access through their servers to content that other signatories believe are protected by copyright".

3) The same point dwells on whether the model is valid from a legal standpoint and raises questions as to why DNS signed the memorandum of understanding (MoU) on 30 July 2015. It seems that ISOC believes its content is in violation of the law and that DNS has entered into an illegal agreement.

4) ISOC goes on to conclude that "from our research of international practice in these situations, content without any kind of legal conflict has been incorrectly barred whilst on the other hand, a lot of content that is clearly in violation of the law has not been impacted".

5) Considering that the entity responsible for inspecting and supervising the matters discussed in the memorandum is the General Inspectorate for Cultural Activities (hereon IGAC) and is the only entity empowered to order telecom operators to block websites that illegally provide access to content protected by copyright and similar public rights, we feel obliged to express our opinion on the matter at hand.

6) Reading of the content suggests significant confusion between institutional issues and legal and procedural issues. It also fails to clarify DNS' effective role in the Agreement and that we will present below.

7) Whatever the context, the perfunctory manner in which the document was written gives an imperfect and imprecise view of reality. It also casts a shadow of doubt on all the entities that subscribed to the memorandum and to the serious and responsible nature of their contribution in a matter so serious that violation can lead to criminal punishment.

8) It is important therefore to clarify that the evaluation of whether content is copyright protected is not just down to anyone. Even more so the decision to block access to a website, however well-meaning and collectively aligned. It is indeed a very serious offense with perverse impacts on the cultural economy and on social, economic and cultural development as can be verified in the abundant research available on the subject.

9) We will address the issue in more detail ahead and seek to better explain the legal framework. However, although opinions are free and legitimate, in the words of Fernando Pessoa's heteronym Alberto Caeiro "Of the many opinions that exist about Nature, not one has ever made a plant grow or a flower blossom".

10) The entities that signed the agreement are the General Inspectorate for Cultural Activities - the sector regulator, the Consumer Agency (Direção Geral do Consumidor) - the leading representative for Consumer rights in Portugal and, on behalf of their associates, the Portuguese Electronic Telecommunication Operator's Association (APRITEL), the Civilian Internet Anti-Piracy Movement (MAPINET), Associação Fonográfica Portuguesa (The Portuguese Phonograph Association); Associação Portuguesa de Editores e Livreiros (The Portuguese Editor and Bookshop Association); Associação Portuguesa de Imprensa (The Portuguese Press Association); Associação para a Gestão e Distribuição de Direitos (Rights Management and Distribution Association); Associação Portuguesa de Software (Portuguese Software Association); Associação Portuguesa de Defesa de Obras Audiovisuais (Portuguese Association for Audiovisual Rights); Cooperativa de Gestão dos Direitos dos Artistas, Intérpretes ou Executantes (Artist, Actor and Producer Cooperative), Associação para a Gestão de Direitos de Autor (Copy Right Management Association), Produtores e Editores e VISAPRESS – Gestão de Conteúdos dos Media, CRL. (Producers, Editors and Visapress – Media Content Management CRL);

11) This agreement was signed by a number of important players in the publicity, media and advertisers market, amongst which the Portuguese Advertisers Association (APAN) whose mission is to defend, safeguard and promote its' members interests in all aspects of commercial communication. This is the only entity in Portugal exclusively defending advertiser's rights.

12) And The Portuguese Advertising, Communication and Marketing Agencies (APAP) whose mission, on behalf of its associates, is to promote and dignify their work and as such, contribute to a more harmonious business environment for publicity and communication.

13) And the Portuguese Media Agencies' Association (APAME) that defends the interests of its various associates and represents them in various forums.

14) And DNS.PT, the entity responsible for managing, registering and maintaining domains under the TLD (top level domain) and other consumer defense organizations.

II. The Memorandum of Understanding

15) Having provided this brief overview, it is important to clarify the issue at hand in more detail, and the terms and scope of the Agreement.

16) The ability to block access to illegal content and works is regulated by the Electronic Commerce Code (hereon LCE) approved by Law nr. 7/2004 dated 7 January, and its subsequent alterations and by copyright protection law. This procedure already existed and was (and remains) completely independent of any Agreement.

- 17) The LCE foresees the regulators will encourage the creation of associations and codes of conduct by interested parties and the participation of the respective associations and consumer defense organizations in initiatives that draw up and apply the codes of conduct, whenever their interests are at stake. This is reflected in the Agreement.
- 18) According to line b) nr.2 of article 2 of the LCE, decree law nr. 43/2012 dated 25 May, the legal mechanisms at IGAC's disposal in its capacity as sector regulator are the ability to pursue a provisional legal action designed to remove or prevent access to activities or information that are in clear violation of the law.
- 19) As sector regulator for copy and other related rights, IGAC is obligated to safeguard the collective interest and relies on best efforts from all related parties to protect the liquidity and reliability of the system.
- 20) This led to the signing of the Agreement, established as a means of further reinforcing protection of copy and other connected rights in a digital world and to encourage more and better communication procedures between its signatories in the event of unauthorized dissemination of copyright protected content – a crime punishable by law under the copyright and other connected rights legislation.
- 21) The signatories agreed on the mutual benefits of clarifying and establishing single procedures across the board as a means of improving implementation of the legal mechanisms available under LCE and of promoting a more responsible attitude from users.
- 22) Coordination and cooperation amongst all parties is key to reducing and dissuading unlawful abuse of copy and other connected rights which in addition to LCE are also protected by the specific code regulating copy and other connected rights (Código do Direito de Autor e dos Direitos Conexos).
- 23) The Agreement establishes that before a complaint is registered with IGAC, the suspect will be informed of the illegal appropriation and provision of protected works and only then will IGAC start an investigation to confirm the existence of the violation, reviewing all the evidence provided (location of the content, link or hyperlinks, the website where the content is being shown and proof of the website owner's refusal to withdraw the content upon request).
- 24) Once the accusation of failure to obtain authorization from the owners of the content rights has been proven (note this is an exclusive right) IGAC is in a position to notify telecom operators to block access to the sites that are disseminating the unauthorized and protected content.

- 25) IGAC will then lodge a legal complaint against the blocked sites that disseminated the content with the public prosecutor, who will then direct criminal proceedings in close cooperation with IGAC.
- 26) The Agreement has been in place since 2015 and, to the best of our knowledge, application of its terms has never been cause for complaint or administrative or legal proceeding.
- 27) Besides the aspects already mentioned, and not wanting to influence DNS' possible response on this matter, it is absolutely clear that DNS' role in this Agreement does not in any way lead to the barring of website access. This would not even be possible given DNS' statutory framework and delegated responsibilities.
- 28) Although likely in support of all the solutions set out in the memorandum, ultimately DNS' role is limited to the terms of clause 8 which reflects the objective of the European Observatory on Infringements of Intellectual Property Rights, to develop a single aggregation portal under www.ofertaslegais.pt. This already exists and has proven very successful.
- 29) This project is the result of a selection by the Observatory operating within the Internet Market Harmonization Institute to defend Intellectual property rights in 4 pioneer countries, two of which that didn't initially have legal offer aggregation portals to (Portugal and Lithuania) and two that did (France and United Kingdom).
- 30) The Observatory subsequently provided a toolkit with the necessary software to create, develop and install the portal for Portugal, all of which free of charge.
- 31) DNS' participation in this process shows Portugal in a very good light and should be praised for the efficiency and effectiveness with which it embraced its' commitment in this regard.

Conclusion

- a) This Agreement brings together a number of public and private entities and has become recognized as a success in many international forums. Its scope is to introduce a disciplined framework for interactions between entities that value intellectual property and has irrefutable legal grounds.
- b) Blocking access to websites is decided when copyright protected content is disseminated and financially exploited under illegal circumstances and against the will of the owner of the intellectual property rights.
- c) The decision to block access to websites results from a joint review of all complaints submitted to IGAC by intellectual property right owners or their representatives, including those submitted within the scope of the Agreement.

- d) If the violation is confirmed, IGAC will proceed according to the law as defined by the Electronic Commerce Code (in its capacity as sector regulator) and by the code regulating copyright and other connected rights - Código do Direito de Autor e dos Direitos Conexos (criminal proceedings are supervised by the Public Prosecutor).
- e) The lodging of a complaint with the Public Prosecutor results from its role as legal regulator in accordance with the Código do Direito de Autor e dos Direitos Conexos. A complaint should be lodged whenever the violation is considered to be an usurpation with criminal motivation or an attempt to benefit from works that have been usurped.
- f) This Agreement is the first of its kind internationally and brings together the efforts of a number of public and private entities from all sectors with a responsible attitude to raise awareness amongst the general public and users for the importance of protecting intellectual property rights. It combines the efforts of various entities with responsibilities and involvement in the digital space, thus reinforcing the ability to fight illegal dissemination of protected works and reducing the very negative costs of this behavior on society in terms of cultural development and social and economic impacts.
- g) Most importantly, the Agreement provides the context to create a site that aggregates all legal offers providing citizens access to music, audiovisual, scientific, literary and artistic works as well videogames and sporting events that are available in their respective Member States.
- h) The General Inspectorate for Cultural Activities (IGAC) is the sector regulator and fiscal body responsible for coordinating all the interactions described in the memorandum. It is exclusively IGAC's responsibility to determine whether access to a website should be blocked by telecom operators due to illegal dissemination of content protected by copyright and other connected rights.
- i) Such a violation constitutes a crime and must be referred to the Public Prosecutor by IGAC who is responsible for following up on the legal proceedings. We are unaware of any notification by legal authorities regarding this procedure or of any other administrative or legal complaint submitted by interested parties or potential victims since it was first established.

Lisbon, 5 January 2018

Inspector General

Luis Silveira Botelho