

# **SWIPO Common Governance – Complaints and Appeals Proposed Final Draft**

## **Annex I: Complaints Mechanism**

### **1. Complaints Body**

#### **1.1. General**

- (1) The Executive Board shall create a Complaints Body composed of a Secretariat and a pool of independent and neutral persons that will be available to decide upon complaints related to infringements of SWIPO CoCs in a fair, unbiased, and competent manner that respects confidentiality.
- (2) Each Sector Board shall nominate at least 3 individuals to become members of the Complaints Body. Such appointments are subject to a decision of the Executive Board.
- (3) Only individuals can be members of the Complaints Body that meet the following requirements:
  - Sufficient expertise to handle complaints about any potential non-compliance of services adherent to one or more SWIPO CoCs or a sufficient understanding of the related legal issues (such as contract interpretation);
  - No conflict of interest exists that could prevent or endanger a fair and unbiased decision about infringements of SWIPO CoCs;
  - Not employed by a SWIPO Member or by SWIPO itself;
  - Not employed by an EU regulatory body or other government agency.
- (4) Members of the Complaints Body are appointed on a 3-years term and each member may revoke their membership at any time.
- (5) The Complaints Body shall develop, publish in a clear manner, and implement appropriate procedures and structures according to its functions and powers subject to the decision of the Executive Board. The Complaints Body will continuously evaluate their processing of complaints with a view to improving processes.
- (6) The Complaints Body is restricted to handling complaints on compliance as articulated under applicable Codes.

## **1.2. Independence of the Complaints Body**

- (1) The Executive Board shall equip the Complaints Body with reasonable financial and organizational support to perform its functions.
- (2) If the Executive Board observes indications endangering the fair, unbiased and competent procedures by a member of the Complaints Body, the Executive Board shall perform an investigation on the subject matter. In such an investigation, the respective member of the Complaints Body is obliged to cooperate and has a right to be heard. Once all relevant facts are available and assessed, the Executive Board will decide whether to revoke the appointment of the respective member of the Complaints Body.
- (3) If the Executive Board decides to expel a member of the Complaints Body, it must inform the General Assembly of its reasoned decision, respecting confidentiality and the terms of any related non-disclosure agreements. If requested by at least 10% of the SWIPO Members, the General Assembly has the right to initiate a review and revisit this decision of the Executive Board within 10 business days after electronic distribution of the decision. The decision about the revocation shall not be effective until the end of the review-period of the General Assembly or until the outcome of the vote of the General Assembly. While deciding on expelling the member of the Complaints Body, the powers of the concerned member are suspended, and any ongoing complaints being adjudicated by that related to that member shall be postponed.
- (4) At any time, the General Assembly can decide to expel a member of the Complaints Body. This decision shall require a qualified majority of 75% of all eligible votes of the Members of the General Assembly.
- (5) Members of SWIPO who have a conflict of interest (e.g. because that Member has been the subject of an adverse opinion from the Complaints Body or a certain member of the Complaints Body) shall recuse themselves from all matters related to a decision about the revocation of a member of the Complaints Body and shall not vote on such matters.

## **2. Procedures**

### **2.1. General**

- (1) Before deciding whether to initiate the Complaints process, the Provider and Customer shall take reasonable efforts to resolve any dispute between themselves or provide evidence as to why this is not appropriate. Regardless the Customer retains the right to initiate the complaints process.
- (2) Previous, potential and existing Customers of a Service, which is declared adherent under a Sector CoC, shall have the possibility to file a complaint. Complaints must relate to an alleged or potential non-compliance by a Member with the requirements of a Sector CoC. For the purposes of this Complaints mechanism, a potential Customer is one who

is eligible to receive transparency documentation from a Provider related to the relevant Sector CoC.

- (3) Prior to the release of any confidential information to the Complaints Body, the Secretariat will establish an appropriate panel of at least three members with the necessary combination of skills and knowledge to expertly adjudicate the specific complaint (the “Complaints Panel”) to the relevant Customer and Provider. The Customer or the Provider can provide a reasoned request to remove one or more of these members. The Secretariat will consider such requests and if accepted those members shall be replaced.
- (4) The Complaints Body shall establish procedures, subject to the approval of the Executive Board, that ensures that confidentiality of provided information is protected, taking into consideration the credibility of the complaints process.
- (5) The Complaints Panel shall be appropriately empowered to process any complaints, and to impose appropriate remedies and actions as provided by this SWIPO Common Governance. The objective of the Complaint process shall be to determine compliance to the relevant CoC as articulated in the complaint.
- (6) The Complaints Body shall establish a process for reviewing objections fairly and impartially regarding the outcome of a Complaints Panel. Appeals in connection with any other decision, action or inaction of the Complaints Body, Secretariat or Panel can be made according the Appeals Process in Annex II.
- (7) In principle, Complaints can be submitted free of costs for the complainant. However, the Complaints Board in consultation with Executive Board and any relevant Sector Board may define costs for complainants, where appropriate, to minimize potential abuse due to manifestly unfounded or excessive complaints, in particular if they are recurring.

## **2.2. Processing and Concluding a Complaint**

- (1) The Complaints Secretariat shall ensure records of complaints, including the outcome, are kept in accordance with SWIPO’s record retention policy. The Complaints Secretariat shall publish an annual report to the General Assembly which may include recommendations for improvements to SWIPO CoCs. At least yearly pseudonomised statistical and analytical reports shall be presented to the General Assembly to ensure the appropriate performance of the complaints handling and the credibility of SWIPO. The Complaints Secretariat may publish to SWIPO Members additional information on a complaint if agreed by the parties involved.
- (2) The Complaints Secretariat may reject any complaints that are not consistent with the requirements specified herein, are incomplete, or have not been submitted using published procedures.

- (3) For incomplete complaints and where the complainant provided contact details, the Complaints Secretariat shall – prior to rejection – request missing information but has no obligation to do this more than once.
- (4) The Complaints Secretariat shall promptly reject any complaints that are obviously not related to any Sector CoC or may reject any complaints where the Secretariat has fair reason to believe the complainant is not a genuine potential customer.
- (5) The Provider shall cooperate with the Complaints Panel and provide all relevant information. In the frame of the complaint procedure, the Provider shall be given the opportunity to investigate the complaint and also be given the opportunity to promptly remedy any underlying, alleged non-compliance.
- (6) The Complaints Panel shall make reasonable attempts to engage with the Provider over a reasonable time period.
- (7) Unreasonable non-cooperation of any party may influence the decision by the Complaints Panel.
- (8) The Complaints Secretariat shall provide appropriate (for example, statistical and analytical) reports for publication under the transparency and communication policy of SWIPO.

### **2.3. Remedies and Actions**

- (1) If the Complaints Panel concludes that non-compliance took place, the Complaints Panel shall decide on appropriate actions which could include actions and remedies against the Provider whose service was subject to the complaint.
- (2) The Complaints Panel shall determine the appropriate and proportionate action based on the following principles:
  - severity of non-compliance with regards to the potential impact on the free flow of non-personal data principles;
  - degree of fault of the Provider - whether the Provider intentionally or recklessly disrespected or ignored the requirements of the Code or negligently misinterpreted them;
  - frequency of non-compliance on similar incidents based on information as provided by the Secretariat under confidentiality;
  - whether the Provider has taken prompt measures to resolve the non-compliance.
- (3) The Complaints Panel may appropriately determine one or more of the following actions:
  - issue a non-public but formal reprimand: both the Provider and the Customer are informed;
  - include in the SWIPO public record the finding of non-compliance;
  - require that remedial actions are taken and within which time frame;

- temporary or permanent revocation of declaration of adherence for all services related to the non-compliance, which affects the listing of services in the public register;
  - revocation of membership in SWIPO, which may have a minimum period before re-application.
- (4) Before the determined remedy is enacted, a Provider shall have sufficient time to exercise its rights to appeal.
  - (5) The Provider shall implement the required actions within the expected timeframes and shall report back to the Complaints Secretariat when done. The Complaints Body shall have appropriate mechanisms to verify the actions of the Provider and to update the public record.
  - (6) If the Provider has not implemented their actions within the agreed timescales, the Complaints Body shall have a mechanism to adjust the remedies and action or impose additional actions against the Provider.

## **Annex II: Appeals**

### **1 General**

- (1) The Executive Board shall establish an SWIPO Appeals Committee to address any concerns in connection with a decision, action or inaction of a SWIPO body and render fair, neutral and competent resolutions.
- (2) Objections regarding the outcome ruling of a Complaints Panel shall use the process defined by the Complaints Body. However, Appeals through this process can be made in connection with the procedural operations of the Complaints Body.
- (3) The Appeals Committee consists of four participants. Participants of the Appeals Committee are appointed on a 3-years term and each participant may revoke their membership at any time.
- (4) The Appeals Committee shall decide by consensus.
- (5) Where the Appeals Committee does not reach a consensus decision, at least one member of the Appeals Committee may refer the matter to the General Assembly for it to decide.
- (6) Participants of the Appeals Committee shall not also serve on the Executive Board or a Sector Board at the same time, nor can they be from the same member organization as participants on these bodies.
  - The Executive Board shall broadly solicit applications from interested SWIPO members when appointing or re-appointing participants to the Appeals Committee, ensuring a balance between Providers, Customers and Sector Groups. Applicants will be asked to provide information regarding their experience and areas of relevant

expertise, together with their reasons for seeking the position. As both the Executive Board and Appeals Committee are governance bodies with fiduciary responsibilities to SWIPO, the Executive Board shall make every effort to select Appeals Committee participants who are willing and able to act in the best interests of SWIPO and avoid any possible conflict of interest.

- An Appeals Committee participant shall fully recuse themselves from any participation in connection with an appeal where there is a perceived conflict-of-interest.

## **2 Neutrality**

If the Executive Board believes that there is sufficient reason to question whether the Appeals Committee may not be acting in an independent, objective and unbiased way, the Executive Board will solicit further information and views from the General Assembly, for which the General Assembly must then decide how to remedy the situation.

## **3 Appeals Procedures**

(1) SWIPO members who have directly and materially affected interests in SWIPO's activities and who believe that they have been or will be adversely affected by any action or inaction of a SWIPO body shall have the right to submit a written Appeal regarding such action or inaction and have such an Appeal adjudicated.

- Any such Appellant is encouraged to first approach the SWIPO Executive Board with an informal complaint before pursuing the official complaint/appeals process detailed in this section without prejudice to their right to later submit a formal Appeal. The deadline for submitting a formal, written appeal (as described below) shall be notified by the Executive Board at the end of the informal process.
- A written Appeal must be submitted to the Appeals Committee (with a copy to the Chairman of the Executive Board) within 30 calendar days after the action being appealed has taken place or by the date communicated by the Executive Board if an informal approach had previously been made to them. An Appeal based on an alleged inaction may be submitted at any time.
- As part of the Appeals process, an appellant may raise concerns about the impartiality or possible conflict-of-interest of an Appeals Committee member. The Appeals Committee, in possible consultation with the Executive Board, shall make every effort to sufficiently address such concerns (including the possible recusal of such Appeals Committee member), and otherwise seek to ensure a fair and objective outcome.
- The Appeal submission shall identify (a) the action or inaction, (b) the basis for the objections, (c) relevant procedures, policies, or legal principles, and (d)

suggested remedial action(s) that the appellant believes would resolve the issues raised in the Appeal. In their discretion, the Appeals Committee may ask for written comments on one or more related issues from other relevant or impacted members or bodies. Such request for comments and any comments provided shall promptly be shared with the Appellant who may provide the Appeals Committee with a written response before any hearing.

- The Appeals Committee shall hold a hearing (with the appellants invited) within 45 days of receipt of the appeal – this may be a physical meeting or may be held electronically. The Appeals Committee shall render its reasoned decision, including any remedial action, within 30 days of the hearing. The decision of the Appeals Committee shall be final, subject to section 3 of this Annex.
- The Appeals Committee shall act with due regard to requested confidentiality.
- Written records of appeals shall be kept and made available to SWIPO Members upon request, with redactions permitted only if there is sufficient legal justification.