

Registries Stakeholder Group and Registrar Stakeholder Group Response to the Revised ICANN Procedure for Handling WHOIS Conflicts with National Law (Public Comment)

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Background

- Effective 18 April 2017 ICANN updated the procedure for handling WHOIS conflicts with Privacy Law to include an “Alternative Trigger” to invoke the procedure.
 - Original trigger: a **notification** of an action that its compliance with WHOIS obligations are prevented by local law.
 - Alternative trigger: a **written statement from the applicable government agency** indicating that a WHOIS obligation in an ICANN contract conflicts with applicable national law.
- Purpose of the Public Comment: assess the practicality and feasibility of the alternative trigger.
- No registry or registrar has yet invoked the Alternative Trigger.

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Since the Implementation Advisory Group (IAG) commenced and completed its work there have been significant changes on the global privacy environment. Most significantly the advent of Privacy Shield in the US and the passage of the General Data Protection Regulation (GDPR) in the EU, have the potential to significantly impact the operations of all Registries and Registrars with regards to their ability to comply with the provisions of ICANN contracts regarding personal data and WHOIS in the same manner as they do today.

The Registries Stakeholder Group (RySG) and Registrar Stakeholder Group (RrSG) appreciate the opportunity to comment on the proposed revisions to the ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws (“Procedure”) and acknowledges the many years of work that have been dedicated to developing and evolving those requirements and procedures. In addition, we appreciate the continued evaluation and evolution of the Procedure to respond to the ever-changing privacy landscape.

While the “Alternative Trigger,” wherein the Procedure may be triggered by a written statement from the applicable government agency responsible for enforcing a registry or registrar’s data privacy laws indicating that a WHOIS obligation in an ICANN contract

conflicts with applicable national law, adds some flexibility the overall Procedure remains inadequate and unreasonable for contracted parties facing potential conflicts between their contractual requirements with ICANN and applicable law, the Alternative Trigger as it stands will not serve as a cure all solution for registries and registrars with regards to global data protection issues.

We will review some general concerns related to the procedure, as well as respond to the questions posed by ICANN about the viability of the Alternative Trigger.

Triggers remain problematic and potentially unfeasible, even with the addition of the “Alternative Trigger.”

As contemplated in the analysis of the Alternative Trigger, we believe that it is highly unlikely that a government agency would be willing to dedicate the time and resources necessary to provide such an in depth legal analysis or would be in a position to provide such a legal interpretation to a private entity on an existing law. Further, there are very few government agencies that, if they were to provide such a legal analysis, would be willing to release that analysis and the suggested remedies to comment and/or amendment by a private organization or its stakeholders who are unaffiliated with the proceeding. As there are extensive texts of existing law, government agencies are known to advise public and private entities to seek their own legal counsel and amend their operations accordingly but will not tailor solutions or offer legal analysis of an entity’s operations. Further, even if the proposed analysis was available the proposed “Alternative Trigger” may create a catch-22 for contracted parties. Given that the Procedure must be completed before an exemption or waiver of enforcement may be granted, a party may have concerns with bringing the conflict to the attention of the relevant DPA, which could invite enforcement action.

The Procedure improperly places ICANN in the middle of legal compliance matters.

Where a conflict exists between the provisions of the contract, and legislative requirements applicable to the parties, it is the legislative enactment, which takes precedence, regardless of the existence of a procedural remedy. As the data controller, ICANN should not require processors to undertake tasks that are in conflict with data protection laws and regulations. In fact, including such requirements for processors can itself be deemed in conflict with data protection laws and regulations, including but not limited to the enhanced provisions of the GDPR.

Under the proposed procedure, a contracted party that identifies a conflict can only be granted an exemption from the conflict or a temporary waiver of enforcement until after the initial ICANN review is complete (though a waiver may be granted following ICANN’s internal review but pending the completion of a public comment period, if deemed necessary). This suggests a problematic assumption that, for the duration of the review, the contracted party should continue to adhere to ICANN requirements, risking non-compliance with applicable law and not cease the conflicting behavior until ICANN has signed off on the position of the DPA.

The Procedure is inflexible and inapplicable to a number of closely related conflict situations.

The Procedure evidences a general pattern wherein in ICANN policies and procedures are brittle and over-engineered. While the procedure purports to address conflicts between

WHOIS conflicts and privacy regulations generally, one can easily envisage closely related conflicts that would not qualify for the Procedure. For example, while the analysis engages in a discussion around whether the Procedure should refer to all applicable law, whether set by a national or regional-level regulatory authority, the procedure ultimately applies only to conflicts with national law, without clearly justifying why other applicable law should not qualify for the Procedure. GDPR provides a prime example of how regulations may be developed or implemented at a regional level, and such conflicts should warrant similar treatment. Similarly, aspects of the proposal assume that conflicts will be based on the jurisdiction in which the registry or registrar is based; the statement underpinning the Alternative Trigger must come from “the government agency charged with enforcing its data privacy laws.” This fails to account for the fact that privacy regulations may impact parties outside the jurisdiction of a particular government agency, as seen through the impact of the GDPR on any party processing European customer data, regardless of where it is domiciled. Lastly, the revised Alternative Trigger requires that a statement comes from the “government agency responsible for enforcing its data privacy laws”; as noted in the comments previously submitted by the Council of Europe, in many jurisdictions privacy laws are enforced by Data Protection Authorities (DPAs) that are not government agencies. This could equally render the Alternative Trigger inapplicable to a majority of real world WHOIS conflicts.

More generally, it is difficult to grasp why it is necessary to have two different processes, with different standards, for legal conflicts related to data retention and conflicts related to WHOIS. The ICANN staff and community alike would benefit from developing processes to address situations of conflict between contracts and laws in general, versus having to develop and maintain a distinct process for each category of conflict that might emerge.

The proposal does not establish expectations for the timeline of a review.

The apparent expectation that contracted parties continue to comply with WHOIS requirements while the review is ongoing is doubly problematic when paired with the fact that the Procedure does not provide a timeline by which such review will occur. ICANN’s handling of the Registry Service Evaluation Request Process (RSEP) has been notoriously slow despite a clear timeline set in the consensus policy establishing a reasonable timeline for review to occur. The Procedure should include a similarly expedited timeline for granting an initial waiver of enforcement, given legal compliance risks to contracted parties if conflicts are drawn out.

The proposal creates undue burden for similarly situated contracted parties, as well as ICANN staff and DPAs or government agencies.

The proposal does not provide a mechanism for addressing WHOIS conflicts that affect large numbers of contracted parties. The requirement, even with the Alternative Trigger that each contracted party individually receive a statement related to the conflict from its DPA and that ICANN carry out a de novo review of each purported conflict, even where the same regulation impacts multiple parties, creates undue work for contracted parties, ICANN staff, and government agencies alike. The Procedure should also account for circumstances where overall changes to privacy regimes, like the GDPR and Privacy Shield, could simultaneously create conflicts for large numbers of contracted parties. Otherwise, the process could be rendered cumbersome and ineffective, as a small number of staff endeavor to process numerous parallel requests from similarly situated parties.

The Procedure should not replace proactive efforts by ICANN to identify and account for conflict.

Finally, as the data controller, ICANN should already be engaged in dialogue with their primary data protection authority (DPA) and/or expert legal counsel with regards to the various data protection laws globally and how ICANN can be compliant with laws and regulations that may have implications for WHOIS.

Questions Concerning the Effectiveness of the Revised WHOIS Procedure

- Trigger -

1. How feasible is it for data protection agencies to provide a party with a written statement indicating that a Whois obligation in an ICANN contract conflicts with national law?

Without an official notice, fine, or proceeding it's unlikely that a government agency would offer a definitive statement or ruling. It is more likely that public guidance or an advisory would be developed with respect to certain types of data (WHOIS, etc.) and its collection, use, and/or processing to guide enforcement.

It is submitted that neither DPAs, nor any other equivalent body in their stead, where such authorities do not exist, would be in a position to provide any such 'statement' of conflicts with national law. Although the 'Alternative Trigger' mechanism suggests that the response from a DPA or equivalent would be considered definitive by ICANN, it is submitted that no such opinion or evidence is capable of supplanting the interpretation of an applicable Court of Law. This reinforces the need for ICANN, as the controller, to directly engage with DPAs to seek sectoral guidance, and to engage their own expert privacy counsel as necessary.

2. What type of evidence or documentation should a requesting party provide to the data protection agencies?

If seeking guidance, such a party would likely need to identify the contractual clauses, related personal data, the data flows required to comply with that contractual clause, the justification for such processing, the portions of the law or regulation the requirement violates, and the proposed remedy. In addition, the submitting party would identify their role and actions as a processor and include contact information regarding the associated controller.

In many cases ICANN as the data controller will be better equipped to solicit this information from the relevant agency rather than requiring each registry and/or registrar to do so individually.

3. What challenges, if any, will data protection agencies face in terms of providing a party with a written statement indicating that a Whois obligation in an ICANN contract conflicts with national law?

As stated, as the controller, ICANN should engage in consultation with government agencies to understand what may impede them from providing such a statement. Notwithstanding the fact that fundamentally a relevant Data Protection Authority is not likely in a position to provide such an interpretation (see question #1), it is submitted that DPAs and SAs would likely be unwilling to accept comments or changes to any statement based upon input from parties not affiliated with the contract in question. In this way the traditional ICANN public comment process would present challenges. Legal conflicts related to WHOIS or other contractual matters should be treated as compliance issues between ICANN and the relevant contracted parties, and not as matters of policy development.

4. What improvements or changes could be made to better engage data protection agencies in this process, i.e. would direct contact with ICANN make the process more efficient?

ICANN, with due regard to nature of the relationship between them and the Contracted Parties, and the requirements of data protection laws and regulations (e.g. GDPR), should seek direct engagement with government agencies and/or expert privacy counsel as part of its responsibilities and liabilities as Data Controller.

5. Is there a forum for businesses to engage with data protection agencies on best practices in your jurisdiction?

Whereas generally it is expected that relevant government agencies would be willing to engage with individual entities to provide non-binding guidance. It is also submitted that such practical engagement and advice is unlikely to extend to legal advice (as already noted in the introductory paragraph and the submissions in Q1 & Q3).

A preferred course of action to establish or understand best practices would be to engage such agencies at an industry level with representative associations seeking practical advice on wider endeavors such as industry codes of practice (also called codes of conduct). Given the likely demands on DPAs in the coming years, such industry based endeavors are likely to be better received, and attract more timely attention. In addition, industry codes of practice require DPA evaluation and acceptance by the DPAs, lending added credibility to the industry's approach, when agreed.

Further, official advice and/or public guidance is issued by the Article 29 Working Party (known under GDPR as: European Data Protection Board (EDPD)) to clarify certain portions of laws with regard to specific types of data and to guide DPA enforcement.

6. What experience, if any, have community members had with requesting similar written statements from data protection agencies?

Data on such instances is extremely limited. Reviewing publicly available sources, it is clear that government agencies are open to providing written responses to queries, and whereas such responses may be considered ‘advice’, they fall short of ‘legal advice’. This was also evidenced during the public session in Copenhagen, where it appeared clear that the DPAs in attendance may offer input, and practical general advice on how the controller or processor could go about developing purposes or remedies but will generally not offer specific input on individual inquiries.

It is not the role of the DPAs to provide legal advice, but to enforce the proper application of Data Protection Law as it applies in their relevant jurisdiction.

7. In cases where an exemption has been granted for a particular conflict with local privacy laws, should it automatically apply to all contracting parties that fall within the jurisdiction of the local law (e.g. all contracted parties incorporated in the European Union Member States)?

Where such an exemption is ‘granted’ by ICANN, it is an acceptance that elements of that contract are incompatible with the legislative requirements of a particular jurisdiction. As ICANN will be on notice of this incompatibility, it must therefore follow, that any other entity facing the same legal conflict and subject to the same contract (or at least the same provisions within that contract), should be also granted an exemption, without the need for a specific application to ICANN.

In this case, any associated costs incurred by the original requestor of the exemption should be considered. This situation reinforces the need for ICANN, as the controller, to be the entity that engages with DPAs to seek guidance, and engage expert privacy counsel.

8. Regarding countries that may not have an official data protection authority, which bodies would be considered authoritative enough to provide credible evidence of a conflict with national law and Whois obligations?

In a case where a country may not have a robust legislative system, a smaller number of registries and registrars are impacted, or in the case where a local law requires an entity to gain such a statement from a Government Agency, this is where the “Alternate Trigger” may be useful. Again, the proposed trigger would find utility in smaller scale requests and would likely not be suitable to those entities operating under the purview of larger scale requirements (e.g. GDPR).

9. Should a third trigger, such as the Contracted Party Request or the Legal Opinion trigger, be incorporated into the modified Whois Procedure to mitigate issues related to obtaining statements from a governmental agency? Would these triggers be considered to be not consistent with the underlying policy recommendations? If so, why not?

While other triggers may be appropriate and helpful in discrete situations, ICANN should be engaged in a more comprehensive approach to evaluating its contracts with contracted parties with regards to data protection laws and regulations globally.

As stated previously, the practicality of the proposed “Alternate Trigger” is questionable. ICANN could consider advice and/or guidance issued by the Article 29 Working Party (Known under GDPR as: European Data Protection Board (EDPD)) as sufficient to demonstrate contractual conflicts.

It is submitted that registries and registrars, acting as Data Processors, may only process data within the stated instructions of ICANN, as Data Controllers (relating only to the registration of domain names). ICANN should be certainly open to the requests and legal opinions received from registries and registrars which tend to demonstrate that the instructions of the Data Controller are causing or are likely to cause a conflict with the requirements of relevant Data Protection legislation. However, as Data Controller, the onus to ensure that instructions given do not conflict with legislation lies with ICANN, and such requests and legal opinions should be the exception, not the norm.

10. What triggers to the Whois Procedure would be considered consistent with the underlying policy recommendations?

We believe that the trigger relied upon for the existing process for conflicts within data retention requirements, wherein review may be initiated based upon a written opinion from a nationally-recognized law firm detailing the legal requirement and how it conflicts with the contractual requirement, is consistent with the underlying policy requirements and more practical for contracted parties. This would have the added benefit of streamlining processes for resolving legal conflicts.

11. What other trigger(s) would amount to a credible demonstration that a party is legally prevented from fully complying with applicable provisions of its ICANN contract regarding its Whois obligations?

The requirement for demonstrating a data processor’s party’s inability to comply with applicable provisions of the Registry Agreement, Registrar Accreditation Agreement, or another ICANN consensus policy should be the provision of a formal legal opinion. The consideration process following receipt of such a legal opinion from a Contracted Party remains a matter for ICANN.

In addition, without indicating preference for or against such a process, ICANN could consider official advice and/or guidance issued by the Article 29 Working Party (known under GDPR as: European Data Protection Board (EDPD)) as sufficient to demonstrate contractual

conflicts that would add flexibility to the proposal. Viewing official advice or guidance issued by a DPA as credible would increase the proposal's utility by lowering the administrative burden of lengthy (and likely unproductive) engagement with DPAs. This would especially benefit smaller registries and registrars.

12. Should the procedure be revised to allow for invocation prior to contracting with ICANN as a registry or registrar? If so, how would that alter the contracting process and what parties would be most appropriate to include?

Yes, the Procedure should allow for invocation prior to contracting in the event that a conflict precedes accreditation as a registry or registrar to minimize compliance risk associated with the conflict. For example, the invocation of the procedure, at the earliest possible juncture, may not only be prudent, but potentially expected under the GDPR.

Similarly, the process should be able to be invoked for forthcoming legal conflicts that may not have yet come into effect. For example, if a new regulation is announced that would create a conflict with WHOIS requirements, contracted parties should be able to initiate the process as soon as the regulation is published, and be eligible for a waiver prior to when the conflict would come into effect.

13. Absent an enforceable order, what steps can be taken to inform a contracted party that their contractual obligations regarding Whois data is not in compliance with national laws?

It is submitted that ICANN, as Data Controller, should consider its responsibilities when considering how to inform contracted parties as to their contractual obligations not being in compliance with national law. Identification of a conflict by ICANN as a contracting body should also be an option, whether as a means to inform parties acting under contract of the potential conflict, or to trigger the process directly.

14. What other factors could be considered to make the Whois Procedure more effective?

As noted in our general comments above the Procedure should include a clear, expedited timeline for review to increase predictability for contracted parties facing potential compliance risk. Similarly, efforts to minimize redundancy in the process by providing blanket exemptions would make the process more effective and timely for ICANN and contracted parties alike. Lastly, the review process should allow for ICANN to grant a temporary waiver of enforcement sooner in the process, while the full review remains ongoing, if notice of conflict is provided that includes all of the required elements.

- Public Consultation -

15. Are there other relevant parties who should be included in the Consultation Step? What should their roles be in the consultation process?

As this issue deals with ICANN's contractual requirements with contracted parties and not a policy development process, any potential public comment phase should be scoped appropriately. Any changes to contracts, be they bilateral or universal amendments, are noticed in public comment but negotiated and agreed between ICANN and the contracted party.

16. How would ICANN ensure that parties identified in the consultation phase and/or trigger step are able to provide the opinion or input requested as part of their respective role?

17. How should public comments be incorporated into the procedure?

As noted above, government agencies would likely be unwilling to make changes to any statement based upon input from parties not affiliated with the contact in question. In this way the traditional ICANN public comment process would present challenges. (see response to question 15)

18. What role should comments have in ICANN's decision-making process?

This process is about assessing a legal obligation and the mutual efforts required to ensure that the execution of the legal agreements between contracted parties does not give rise to breaches of Data Protection laws. Public comments, although perhaps capable of highlighting or illustrating legal issues, cannot replace or supplement that of a legal consultation process. It is submitted that this process should be part of a full legal review and implementation of privacy considerations. (see also response to question 15)

19. What length of public comment period is appropriate to ensure that the procedure is completed in a timely fashion?

See response to question 15.

20. How should comments be analyzed?

See response to question 18

- Process and Next Steps -

21. Should the underlying policy recommendations on Whois Conflicts with privacy law be revisited?

Yes. The current review of GDPR and Whois requirements provides a clear example for why existing procedures are inadequate to address changes in the overall privacy landscape.

22. How should the issues and suggestions raised during the public comment forum be addressed in this review?

See response to Question 18
