

EUROPOL Position

Procedure for Handling WHOIS Conflict with Privacy Law¹

Introduction

Europol is the law enforcement agency of the European Union. The present position paper was prepared in collaboration with the Data Protection Function (DPF) of Europol. It represents the views of the agency alone and not that of the European Commission.

Background

The WHOIS protocol provides information on domain name owners. WHOIS is a useful tool for LE investigators as the querying of domain name registration information is the first step in many cybercrime investigations (website spreading malwares, hosting illegal content etc.)

The procedure details how ICANN will respond to a situation where a registrar/registry indicates that it is legally prevented by local/national privacy laws or regulations from complying with the provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS

The existing trigger in the WHOIS Procedure allows a registry operator or ICANN-accredited registrar to invoke the procedure if they are in receipt of a notification of an action that its compliance with WHOIS obligations are prevented by local laws.

With the additional trigger, a registry operator or ICANN-accredited registrar may now also invoke the procedure by providing ICANN with a written statement from the applicable government agency responsible for enforcing its data privacy laws indicating that a WHOIS obligation in an ICANN contract conflicts with applicable national law. As the "alternative trigger" proposal shifts the burden of complying with privacy laws to registrars and government agencies, concerns related to the procedure were identified by the law enforcement community.

Overall assessment

The legal basis and related internet governance model is of a significant value for the law enforcement sector. Deliberations on ICANN's policies, status and procedures should be carried out in close collaboration with interested stakeholders, and with the involvement of the law enforcement community and data protection experts.

Setting up a forum to provide clear and accurate information on the needs of the key players in the process seeking to achieve common grounds on the way forward ensures that the ICANN principles of accountability and transparency are upheld and this should be encouraged and promoted.

Although the revision of the ICANN procedure for handling WHOIS conflicts with privacy laws should be in principal welcomed, there are still some issues which deserve further elaboration with due consideration of their practical implementation and feasibility.

Positive steps

The new procedure which allows Registrars to apply for a waiver from their WHOIS obligations in order to comply with applicable law includes an "alternative trigger" which provides more opportunities than the existing ones which request to be either under a

¹ <https://www.icann.org/en/system/files/files/whois-privacy-conflicts-procedure-03may17-en.pdf>

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judicial or administrative proceeding to benefit from the waiver. Therefore, it is considered to be a positive step towards a more practical implementation of the procedure.

With the inclusion of the "Alternative Trigger" the contracted party has the possibility of seeking a written statement from the government agency entrusted with the enforcement of data privacy laws. This can be done by indicating that a particular WHOIS obligation conflicts with national law which is the basis for the submissions of the statement to ICANN. The contracting party could then be entitled to seek an exemption for a conflicting WHOIS obligation.

Risk of revealing sensitive information related to ongoing investigations

However, it should be noted that the amount of information requested by ICANN to be collected to submit the notification of WHOIS proceedings is substantial. Apart from the fact that the process of gathering all this information is time-consuming, it enshrines multiples risks. The necessity to provide the text of the applicable laws with references to particular actions or investigations being launched by the law enforcement authorities and the demand to provide a description of the efforts undertaken to meet the requirements of both local law and obligations to ICANN, includes the risk that sensitive information - referred to in national law enforcement procedures - might be revealed. This obligation should therefore not impose a necessary requirement for such a waiver as it is not a prerequisite for the success of the process.

Government agency as a mediator in the process

By setting a requirement for a government agency to be involved in the alternative trigger procedure, the revised procedure establishes the government agency as the mediator of the process who enforces the national law. Due to the variety of national approaches towards governmental bodies, there is a vast difference between the tasks and duties of the government agencies at international level.

In some countries the tasks related to the enforcement of national laws are divided amongst different stakeholders. Therefore, there is a risk of possible duplication in the mandate of various stakeholders concerning the possibility to enforce national laws. Such duplication should be avoided and a consistent approach should be sought in managing this type of requests.

Public consultation and strict timeframe

The inclusion of a public consultation in paragraph 2.5 of the additional trigger procedure represents an additional requirement which would unnecessarily slow down the process unless strict time periods apply. It is necessary to consider a strict timeframe for such public consultation in order to avoid any unnecessary delays in the process.

Law enforcement agencies involvement

It is essential to ensure that the observations of the law enforcement authorities are taken into consideration during the second step of the procedure. Therefore, it is necessary that the law enforcement agencies' participation in the step two of the process is mandatory rather than only "where appropriate".

Consultation phase

It should be mandatory for ICANN to consult at all times registrars and registries in the consultation phase. The current requirement to consult only if "impractical under the circumstances" does not seem to be sufficient to implement the necessary safeguards for the involvement of all potential stakeholders.