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Governmental Advisory Committee

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GAC response to the ICANN request for comments on the Procedure for Handling WHOIS Conflicts with Privacy Law

Background

On 3 May, ICANN opened a [public comment period](#) to review the effectiveness of the recently revised [Procedure for Handling WHOIS Conflicts with Privacy Law](#), with a deadline of **7 July 2017** for responses.¹ The revised procedure provides for an "Alternative Trigger" mechanism that allows contracted parties to request an exception from contractual WHOIS obligations if they could provide a written statement from a governmental agency testifying to a violation of privacy laws. To date the procedure has not been invoked. A [staff paper](#) forms the basis of the consultation and lists a number of specific questions, with a focus on the alternative trigger mechanism.

On 12 May, the ICANN GDD President sent a [letter to the GAC Chair](#), inviting GAC comments and asking GAC members to encourage participation of their National Data Protection Agencies (DPAs) in the public comment period.

The present document sets out a draft response for the GAC that would (1) set out a high-level GAC position and (2) forward the DPAs' various positions without endorsement of a particular position.

¹ This review was occasioned by a recent [GNSO Council resolution](#).

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The GAC welcomes the opportunity to comment on the effectiveness of the recently revised [Procedure for Handling WHOIS Conflicts with Privacy Law](#) and thanks ICANN for inviting GAC members to comment and to encourage their data protection agencies to review the staff paper and provide their comments.

The attribution and use of domain names is a matter that goes beyond a purely private contract between parties. It serves broader public interests in creating a safe, secure, and reliable environment, including preventing and fighting crimes on the internet, securing the protection of personal data of Internet users, or ensuring respect for and enforcement of consumer rights, according to relevant legal frameworks.

Per ICANN's [bylaws](#), the issues, procedures and principles related to *"maintenance of and access to accurate and up-to-date information concerning domain name registrations"* is part of ICANN's Mission in connection with gTLD registries and registrars. Additionally, *"in performing its Mission"* ICANN is bound to *"carrying out its activities in conformity with relevant relevant principles of international law and international conventions and applicable local law"*. Finally, ICANN has also recognized the importance of maintaining *"timely, unrestricted and public access to accurate and complete WHOIS information."* (ICANN [Affirmation of Commitments](#)).

Therefore, contractual obligations for registrars and registries that pertain to the WHOIS databases must be drafted and construed in a way that ensures consumer protection, data privacy, the effectiveness of criminal investigations, and the disclosure of personal data, in accordance with applicable law.

Given existing concerns about the compatibility of WHOIS contractual obligations with some local laws, the Procedure for Handling WHOIS Conflicts with Privacy Law is important. The GAC welcomes the efforts undertaken to review this procedure in order to better address the needs of affected stakeholders. In support of these efforts, GAC members and observers have reached out to data protection experts and have received the enclosed positions, which are forwarded for your information and will be submitted by the experts in the public consultation:

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- Position prepared by the Council of Europe Data Protection Unit and coordinated with the United Nations' Special Rapporteur on the right to privacy, the European Data Protection Supervisor, the Article 29 Working Party, the Chair of the Committee of Convention 108, the Data Protection Officer of Interpol.
- Position prepared by the Data Protection Units of the European Commission's DG JUSTICE.
- Position prepared by Europol's Data Protection Officer.

The GAC has not endorsed these positions but rather this information reflects expert input that the GAC has requested.

Importantly, what emerges across the different positions is that the proposed involvement of data protection authorities (DPAs) as an "alternative trigger" mechanism is **not viewed** as appropriate or feasible by data protection experts. Hence, it appears that the proposed procedure likely requires further consideration. In light of these challenges, a WHOIS policy that respects the requirements of data protection legislation while fulfilling ICANN's Mission related to the "*maintenance of and access to accurate and up-to-date information concerning domain name registrations*" would seem all the more relevant. The GAC welcomes the efforts of the RDS PDP WG in this respect. The GAC supports efforts by the ICANN Board, Organisation and Community, to: (1) define the purpose of collection and use of RDS Data Elements, with input from relevant experts, including from the GAC; (2) explore solutions, including guidance and technical implementation, to address Data Protection requirements; and (3) to align deliveries of the Next Generation RDS PDP with the timing of changing regulations across the world.

Reply to [Public comment period](#) to review the effectiveness of the recently revised Procedure for Handling WHOIS Conflicts with Privacy Law

I. General Comments¹:

The introduction of the new “Alternative Trigger” to “Whois Conflicts with Privacy Law” procedure does not solve the underlying problem. As the text refers to governmental agencies it also brings an additional confusion, as Data Protection Authorities (DPAs) which would be called to issue the proposed opinion are not governmental agencies but independent supervisory authorities in the majority of the jurisdictions they are operating in.

What the “Alternative Trigger” is suggesting is practically impossible as it would imply that the DPAs have to deal with each and every request they might get from contracted parties who feel ICANN contracts are in conflict with the applicable law.

In addition, it has to be emphasised that, regarding the rights to privacy and data protection continuing with an approach based on an exception regime does not seem the most appropriate, when such human rights are to be respected as a rule. Privacy and data protection agencies/experts have made clear repeatedly that WHOIS contractual obligations as they stand are generally not in compliance with privacy legislation applicable in the majority of (if not all) jurisdictions where contracted parties operate (lack of adequate prior information to data subjects on the data processing , failure to comply with proportionality principle, etc.).

ICANN should put in place its own well-structured Privacy Policy to be in compliance with international standards. An attentive and preventive assessment should be carried out of the impact of processing of personal data on the rights of the data subjects (rather than only referring to ex post remedies) and accountability should be ensured. Furthermore it should set up a Privacy Office or designate a Privacy Officer, or at least set up a Working Group on Privacy which can assist it in dealing with individual cases and to help to implement the international privacy standards into ICANN policies.

Furthermore it has to be recalled that opinions and official communications agreed on at the highest level on behalf of the European Union’s Article 29 Working Party² and of the International Working Group on Telecommunications³ have already been sent to ICANN raising concerns on issues relating to purpose limitation, data minimisation, access to data, proportionality and data accuracy. The European Data Protection Supervisor also raised

¹ This document was prepared by the Data Protection Unit of the Council of Europe and was coordinated with the United Nations’ Special Rapporteur on the right to privacy, the European Data Protection Supervisor, the Article 29 Working Party, the Chair of the Committee of Convention 108, the Data Protection Officer of Interpol.

² http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2003/wp76_en.pdf , letters to ICANN

³ In 2000 the IWGDPT issued a common position on WHOIS data. In 2000 the IWGPT issued ten commandments for protecting privacy on the Internet. In 2003 the IWGPT wrote to ICANN with concerns about the Interim Report of the Names Council's WHOIS Task Force of October 14, 2002. In 2005 the IWGDPT wrote to the International Working Group on Internet Governance (IWGIG) to let them know that the two groups exist and are interested in Internet privacy issues and further cooperation.

concerns⁴ regarding ICANN's data retention requirements in light of the European Charter of Fundamental Rights, as interpreted in the decisions⁵ of the Court of Justice of the European Union. The Chair of the Consultative Committee of the Council of Europe's Convention 108 also expressed concerns in a letter to NCUC and calling for consideration of the European and international privacy standards in an ICANN context⁶. As summary of these high level communications it can be concluded that, according to international and European data protection bodies some of the contractually imposed data retention rules appear to be unlawful and excessive, and that the purposes of the collection and processing of WHOIS data are unclear to meet the requirements of purpose limitation, as defined in various international and European legal instruments. ICANN should thus be advised not to continue on the path of individual opt-outs for registrars.

II. Q&A

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?

It seems practically unfeasible. It is an unreasonable expectation towards DPAs that they should deal potentially with all the contracts that registries and registrars might conclude with ICANN and deliver an opinion whether they comply with the applicable privacy and data protection legislation. In some jurisdictions DPAs operate with 3 staff members and others with 120 resulting in an inequality of chances in getting a waiver.

Furthermore for a registrar operating in country A (where no data protection legislation and DPA exist) but offering its services in country B (where data protection legislation is to be applied in such a case) which entity would issue the written statement?

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

This question seems to take as a base the assistive function that DPAs cannot ensure in practice. Furthermore according to privacy legislations the focus should be on the accountability of the controller. Should the DPA nevertheless be in charge of this assessment, a party should provide all the legally binding documents to the DPA as well as all documents containing the details of the data processing activity it foresees to undertake.

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https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2014/14-04-17_EDPS_letter_to_ICANN_EN.pdf

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<http://curia.europa.eu/juris/document/document.jsf?text=&docid=150642&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=647293> ,

<http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d53138f210f1c8419d858494ba1ca40bc5.e34KaxiLc3qMb40Rch0SaxyKbx10?text=&docid=186492&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=842473>

⁶ <http://www.statewatch.org/news/2013/dec/coe-whois-privacy.pdf>

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?

In individual cases there should be no challenges for DPAs to assess the compliance of contractual obligations with the applicable law. However as stated in point 1 it would be unrealistic to expect that a DPA is in the capacity to assess all the cases under its jurisdiction.

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?

Yes, but again it does not seem feasible to establish direct and workable contact with all DPAs operating in jurisdictions where ICANN contracted parties operate. During ICANN58 the Council of Europe Committee of Convention 108 volunteered to provide a global platform for exchange and facilitate the dialogue between ICANN and the data protection community, including DPAs who might wish to take part in such cooperation.

It might be envisaged also to set up a working group within ICANN on privacy issues.

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

At international level, the International Conference of Data Protection and Privacy Commissioners can be a forum for businesses to engage with the international privacy and data protection community every year. ICANN will, this year jointly organise a side event with the Council of Europe to discuss the most urging issues concerning privacy and data protection. Furthermore the Council of Europe is to set up a platform to engage with global internet players on areas of mutual interests and concerns, where privacy will certainly be one of the most prominent elements.

Besides those there are similar initiatives at European Union's and at national level.

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

Experience demonstrates a piece meal approach: whereas all EU countries are bound by a similar data protection legal framework, only few DPAs have been consulted. Furthermore, it seems that disclaimers were obtained after quite some time while DPAs had provided their assessment in the specific cases.

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)?

There is no reason why this shouldn't be the case if it is about a general contractual obligation imposed by ICANN which conflicts with the applicable law at EU level for instance (which every data controller operating in the same jurisdiction has to abide by).

It is even so as most data protection commissioners have independently endorsed the request made by the European Union's Article 29 Working Party, the International

Working Group on Telecommunications and the Consultative Committee of the Council of Europe's Convention 108 that ICANN accepts those communications as appropriate written assessment which can accompany a Registrar's Data Retention Waiver Request in general.

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?

Judiciary bodies, governmental agencies.

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?

If the question aims at assessing if another trigger mechanism, in complement to the proposed "Alternative" trigger, inspired from the "Legal Opinion Trigger" and the "Contracted Party Request" trigger should be considered, the "Legal Opinion Trigger" does not seem to be an adequate solution as contracted parties should have the ability to explain themselves directly to ICANN in matters which are directly impacting them and not be required to seek legal firm's opinion.

As for another trigger based on the "Contracted Party Request", it could be of help in general, but the procedure has to be defined in a sufficiently detailed manner and it should be open to everyone.

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

It has to be reiterated that a regime based on exception is not the recommended one. However should the current regime stay a mix of the "Contracted Party Request" trigger and an upgraded version of the "Alternative" trigger together with a new trigger elaborated under point 11 could make the procedure easier and more effective.

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?

There should be procedure(s) and triggers put in place for the assessment of the compliance of ICANN contractual obligations with the applicable law raised by a contracted party based on its own assessment (without governmental, DPAs' supporting documents.)

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

Yes. If it is set up, ICANN's working group on privacy and/or the data protection office/officer should be included.

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?

Normally such an action should be taken by the contracted party as it is that entity which is legally bound by both the applicable legislation and the ICANN contract. Self-assessment in this process should be key.

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

Further to a clear definition of the purpose of this processing, the WHOIS registry and procedures have to undergo a Privacy Impact Assessment.

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?

Key partners in deciding on those issues are ICANN staff, contracted parties, governmental representatives, DPAs or ICANN data protection office/ officer or working group on privacy (if set up) and law enforcement agencies.

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?

As per ICANN bylaws and policies.

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

ICANN staff should present a proposal subject to communities' approval/endorsement.

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

Comments have to guide the decision-making process and should be taken into account to the extent possible (which means if not taken into account a plausible reason has to be demonstrated). However comments not falling into ICANN mission-statement or stretching it too widely according to the communities, should be left apart.

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

It depends on the complexity of the issue. Usually 3 weeks to 1 month public consultation period should be enough.

20. How should comments be analysed?

On a case-by-case basis and taking into account criteria put forward in Point 18.

Process and Next Steps:

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

In light of the previous comments, absolutely.

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

According to criteria explained in Point 18.

European Commission, DG JUSTICE, Data Protection units' reply to [Public comment period](#) to review the effectiveness of the recently revised [Procedure for Handling WHOIS Conflicts with Privacy Law](#)

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?

To the extent that a controller is subject to EU legislation, it is for the controller to ensure that its processing operations are compliant with EU data protection legislation (current Directive 95/46/EC).

It would therefore not be appropriate to task DPAs to certify the existence of conflicts with national or EU data protection law. In any event, while DPAs can always be approached to seek (written) advice, they will always be obliged to apply the law to the circumstances of each individual case.

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

Please see reply to question 1

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?

Please see reply to question 1

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?

The instruments for cooperation among EU DPAs and between EU DPAs and third countries data protection authorities and international organisations, included as part of the new EU data protection framework, might foster a more in-depth discussion on issues affecting the relationship between ICANN and EU registrars and registries.

BACKGROUND

According to the current EU legislation on the protection of personal data (Directive 95/46/EC), national data protection authorities have (i) investigative powers to perform their supervisory duties, (ii) effective powers of intervention, such as for example that of delivering opinions before processing operations are being carried out and (iii) the power to engage in legal proceedings.

National data protection authorities in the EU cooperate within the Article 29 Working Party (WP) which has an advisory status.

Article 29 WP has already expressed different opinions and statements its position on the on general issues about WHOIS data processing without assessing the compliance of any specific processing operation carried out by concrete Registrars and Registries.

Article 29 WP has assessed in particular some specific issues in relation to WHOIS database, notably those related with the purpose limitation principle, the differentiation between personal and non-personal data and the data retention periods. The European Data Protection Supervisor, as body responsible for advising and supervising European Union institutions and bodies, shares the line of the Article 29 WP on WHOIS issues.

As of May 2018, the upcoming Regulation 2016/679 (General Data Protection Regulation – GDPR) will be applicable replacing the current framework. This legislation establishes a new European Data Protection Board (EDPB) which replaces the current Article 29 Working Party. The new data protection legislation foresees different mechanisms, like the adoption of guidelines, recommendations and best practices by the new EDPB which will be helpful for instance in cases of new issues arising from the application of data protection legislation.

Europol reply to [Public comment period](#) to review the effectiveness of the recently revised [Procedure for Handling WHOIS Conflicts with Privacy Law](#)

Overall assessment

The legal basis and related internet governance model is of a significant value for the law enforcement sector. The deliberations on ICANN's legal status and amended procedures should be done in close collaboration between all the potential stakeholders, with the obligatory involvement of the law enforcement community and the data protection experts. Setting up a forum which seeks 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 also serves the basis of ensuring the ICANN's principles of accountability and transparency and 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 procedure which permits Registrars to apply for a waiver from their WHOIS obligations in order to comply with applicable law now includes the alternative trigger to be implemented which basically provides broader opportunities than the ones in the past which asked to be either under a judicial or administrative proceeding to benefit from it. Therefore it is considered to be a positive step towards the 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 charged with enforcing its data privacy laws. This can be done by indicating that a particular Whois obligation conflicts with national law which is the basis of the submissions of the statement to ICANN. The contracting party could then be entitled to seek an exemption from a conflicting Whois obligation.

However, it should be noted that the amount of information requested by ICANN in the notification of Whois proceedings represents a huge amount of information to be collected. 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 creates the possibility that a sensitive information referred to national law enforcement procedures is revealed. This obligation should not impose a necessary requirement for such a waiver as it is not a prerequisite for the success of the process.

Government agency

By setting the requirements for the government agency involved in the Alternative trigger procedure, the revised procedure in fact establishes the figure of the government agency as the mediator of the process who enforces the national law.

However, It should be noted that due to the variety of national approaches towards governmental bodies, there is a huge difference between the tasks and duties of the government agencies at international level.

Stakeholders management

In some countries the tasks related to the enforcement of national laws are divided amongst different stakeholders. Therefore, there is a risk of possible collision of the mandate of various stakeholders concerning the possibility to enforce national laws. Such

a collision should be avoided and a consistent approach should be seek in managing such type of requests.

Public consultation

The inclusion of a public consultation in 2.5 of the additional trigger procedure represents an additional requirement which unnecessarily slows down the process unless strict time periods apply. It is necessary to consider a time period for the closure of such a public consultation in order to avoid unnecessary prolongation of the process.

Law enforcement agencies involvement

It should be obligatory to ensure that the observations of the law enforcement authorities are taken on board during the step two of the procedure.

Therefore it is necessary that the law enforcement agencies' participation in the step two of the process is obligatory rather than ensured only "where appropriate".

Consultation phase

It should be obligatory for ICANN to consult at all times the registrar/registry in the consultation phase. The current requirement to consult only ' unless impractical under the circumstances' does not implement the necessary safeguards for the involvement of all potential stakeholders.