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## AT-LARGE ADVISORY COMMITTEE

### ALAC Statement on the Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law: Process and Next Steps

#### Introduction

Christopher Wilkinson, member of the European Regional At-Large Organization (EURALO), developed an initial draft of the Statement on behalf of the ALAC. A number of EURALO members also assisted in the development of the Statement, including Olivier Crépin-Leblond, Bastian Goslings, Werner Hülsmann, Andrei Kolesnikov, Yrjö Lämsipuro, Annette Mühlberg, Valentina Pavel, Rainer Rodewald, and Erich Schweighofer.

On 02 June 2017, the first draft of the Statement was posted on its [At-Large Workspace](#).

On that same date, ICANN Policy Staff in support of the At-Large Community sent a Call for Comments on the Statement to the At-Large Community via the [ALAC-Announce mailing list](#).

On 7 July 2017, a version incorporating the comments received was posted on the aforementioned workspace and the ALAC Chair requested that Staff open an ALAC ratification vote.

In the interest of time, the ALAC Chair requested that the Statement be transmitted to the ICANN public comment process, copying the ICANN Staff member responsible for this topic, with a note that the Statement is pending ALAC ratification.

Once ratified, this Statement will be resubmitted incorporating updated ratification information in the introduction section.

## ALAC Statement on the Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law: Process and Next Steps

The At-Large Advisory Committee wishes to respond to the public consultation. Although At-Large members participated in the WHOIS-IAG during 2016, we do not believe that the comments of our members as well of others looking for a truly implementable solution were adequately taken into consideration by the IAG and the ICANN staff in the final draft now under public consultation.

I. The procedure, as eventually revised on the basis of the IAG report, would include significant shortcomings which ALAC does not accept:

1. **The Procedure does not create a level playing field** among Registrars. On the contrary, Registrars (and some Registries) subject to privacy laws would have to undertake an onerous case-by-case procedure to obtain the right from ICANN to respect their domestic privacy laws. Whereas Registrars operating out of other jurisdictions would be free to ignore privacy laws which pertain elsewhere. That outcome is inconsistent with ICANN's responsibility for maintaining the conditions of fair competition among Registries and Registrars.
2. **The Procedure is manifestly inefficient:** We have been informed that the pre-existing procedure has hardly ever been used! Which means in practice, that Registrars subject to privacy laws have effectively functioned outside applicable local law and their Registrants' personal data have been potentially exposed to bulk downloads and other abuses, without their authorisation and possibly without their knowledge.

We see no elements in the revised procedure to suggest that in future the procedure would be more regularly used and implemented.

3. The Procedure still requires that the local **agency responsible for compliance shall be empowered to enforce the law** (Paragraphs 1a), ii), (f) and (g) of the Procedure). On the contrary there are many regulatory agencies responsible for the implementation of public policy that do not have, in and of themselves, the power of enforcement. ICANN's position presupposes that applicable law can be ignored until it is "enforced". ALAC cannot support such an anti-social attitude to applicable laws.
4. **The International Legal environment for privacy protection is rapidly evolving:**  
We understand that, at least in the European Union and associated countries, the General Data Protection Regulation (GDPR) will shortly introduce a more stringent, uniform and enforceable data protection law throughout that jurisdiction. This would render the proposed ICANN Procedure obsolete.

Independently of the EU GDPR, the ALAC rejects the proposed Procedure for the reasons outlined in Points 1-3, above.

**Although this is not the place to address the GDPR in detail, and if our recommendations below are not retained, we suggest that the proposed Procedure should be put on hold, until the implications of GDPR for ICANN have been thoroughly reviewed.**

### II. Alternative approaches

The ALAC recommends that ICANN adopt an entirely different approach to the protection of privacy in all DNS related applications, notably WHOIS and its successor implementations. It proposes two alternative approaches, one long term and one short term:

II.A The preferred long-term policy would be for ICANN to **study globally, international best practice in privacy protection**, which might arrive in the form of GDPR or indeed any other local privacy law.

It is not unusual for ICANN to implement best practice that goes beyond current applicable local laws:

- Trademark protection in the DNS clearly goes beyond anything that can be ensured on the basis of national laws alone;
- we are not aware of any network security policies elsewhere which go beyond SSAC's advice and implementation in ICANN's operations;
- we expect that the global protection of geographical terms and geographical indications throughout the DNS will in due course in practice extend beyond those provided for by national laws alone.

**Accordingly, we have no hesitation to formally request that ICANN study global best practices in the matter of the protection of personal data with the aim to find a satisfactory solution for all parties.**

II.B In the short term, we note that the WHOIS IAG was offered an alternative "easier" solution to the issue in the form of a "**block exemption**" for EU-based and other Registries and Registrars subject to local privacy laws incompatible with ICANN contracts and procedures. That option was rejected by the IAG and ICANN staff.

The ALAC prefers this option at the present time, as a short-term solution until another more elaborate long term solution is found. II.B is the only solution that would be immediately workable.

The ALAC is on record for supporting accurate WHOIS records and whilst understanding the complexity of this topic, it is sensitive of the need to balance the Privacy of individuals with the identification of companies trading on the Internet and the needs of those dealing with cyber abuses such as phishing, malware and spam. The ALAC understands that ICANN will be attempting to satisfy GDPR issues as a matter of priority, but as an **interim short-term position** we would support a block exemption.