

## Processing Activities & Responsible Parties – 24 October 2018

General Comments on the Responsible parties:

### **1. No substantive consideration as to the responsibilities of the parties has occurred, or is recorded**

Generally speaking, the presentation of the roles and responsibilities as captured do not yet adequately represent the myriad of data processing activities, and the responsibilities of the parties. We do not believe that it is appropriate to, at this point, present this as a finding in a perceived substantive manner. When read as a whole, to any observer, there continues to be a lack of data flows for individual processes, and it is not clear, nor is it capable of discerning a full data map of the processing activities within the industry. This should be of grave concern to the ePDP.

The core of the issue is that the ePDP, regardless of a number of recorded requests from the CPH, the NCSG and the ICPCP, we have as of yet, not undergone a basic and simple assessment of the actual responsibilities of the parties. This document purports to allocate processing responsibility, but such allocations remain based on mere assumption or simple assertion of the parties. The ePDP team has not engaged in any substantive consideration of the actual roles, and the allocations now found in this document cannot be objectively concluded to be based on any deliberation or consideration, but instead on such bare assertion.

As this stage the ePDP team cannot categorically assign any role or responsibility to the parties. It is submitted that we must, without any further delay, engage in the basic task of assessing the actual reality of the processing activities and the associated control that is exercised over such processing activities, for each identified 'purpose'; only then can the ePDP substantively recommend the allocation of responsibility.

Any document that purports to allocate 'Responsible Parties', at a minimum should include substantive answers to a swath of grounding questions, including but not limited to:

- What data is being processed?
- For which party is the purpose envisaged?
- Which party determined the purpose for such data?
- What party determined the means of the processing for the data?
- Where are such determinations recorded?
- Where multiple parties are involved, how has the influence of the various parties measured?
- What degree of independence is exercised by each party in determining how and in what manner the data is processed as well as the degree of control over the content of personal data?

- Has such influence given rise to a determination of joint controllership, and where is the reference to such a determination, or evidence to suggest such a conclusion?
- Where has the ‘transparent determination’ of joint controllership, as referred to in ‘Joint Controller’ section (numbered paragraph number 1) of ‘Processing Activities & Responsible Parties’ document?
- What contractual relationship currently exists between the parties regarding data processing, and does that support the allocated responsibility.
- If the contractual relationship is insufficient, what contractual obligations must be put in place to properly identify and define the parties?

**2. Only the controller (or joint controller) may determine the purpose for data. All Purposes are currently considered to be exclusively ICANN’s purposes.**

We would caution that this document highlights a flaw in the progress of the ePDP, and again noting our early calls for clarity, we must remind that the purpose is inextricably linked to the identification of the Controller; therefore where an identified ‘purpose’ is determined to apply to a single party alone, then it must follow that that party must be the sole controller.

Noting that **all** the identified purposes have now been classified as ‘ICANN’ purposes, the likely effect of such odd insistence, results in ICANN being unavoidably considered as Sole Controller in all such instances. Noting this, the Contracted Parties can **only** be considered as processors for all identified purposes. This fact is not reflected in the allocation of responsibilities in this document.

**Conclusion:**

The CPH cautions as to the unintended consequences of the statements that have been included in this document

- 1) The allocations of responsibilities have no basis in actual substantive and transparent deliberation of the ePDP
- 2) The insistence that all purposes are ICANN purposes, is at odds to any allocation of responsibilities of the parties, other than ICANN being considered as sole controller for all processing activities flowing from such purposes, and the Contracted Parties, as processors.