

Response of the Ministry of Telecom and Mass Communications of the Russian Federation to CCWG-Accountability Work Stream 2 Issues Jurisdiction Questionnaire

The Ministry of Telecom and Mass Communications of the Russian Federation (The Russian Ministry of Communications) is the governmental agency responsible for developing and implementing national policy and legal regulation in following spheres:

- Information technology (including information technology usage for creation of government information resources and promotion of access to such resources),
- Telecommunications (including the allocation and conversion of the radio frequency spectrum) and postal communications,
- Mass communications and mass media, as well as the electronic media (including development of the Internet, television and radio broadcasting systems (incl. digital broadcasting), and related technological innovation),
- Publishing, printing, and distribution of printed media,
- Personal data processing.

The Russian Ministry of Communications is a founding member of the Coordination Center for TLD RU/PФ — administrator of national top level domains .RU and .PФ (national registry). The Ministry also plays an active role in making important strategic decisions related to development of Russian national domains.

1. Has your business, your privacy or your ability to use or purchase domain name-related services been affected by ICANN’s jurisdiction in any way?

Answer: Yes.

ICANN is a global operational organization and, in fact, it performs supranational functions. However, it is under the jurisdiction of a single state and must comply with all the laws, rules, and regulations of the USA, including the economic and trade sanctions, as indicated in [gTLD Applicant Guidebook](#) version 2012-06-04, section 1.2, item 1.2.1:

“ICANN must comply with all U.S. Laws, rules, and regulations. One such set of regulations is the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury. These sanctions have been imposed on certain countries, as well as individuals and entities that appear on OFAC’s List of Specially Designated Nationals and Blocked Persons (the SDN List). ICANN is prohibited from providing most goods or services to residents of sanctioned countries or their governmental entities or to SDNs without an applicable U.S. Government authorization or exemption.

ICANN generally will not seek a license to provide goods or services to an individual or entity on the SDN List.”

In addition to this requirement in gTLD Applicant Guidebook, similar legal provision, requiring compliance with the U.S. laws, rules, and regulations, including the economic and trade sanctions program administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury, is set out in the document governing new registrar accreditation (“Registrar Accreditation: Application”, section 4. “Application Process”). Hence, not only the new top-level domain applicants (potential registries after application evaluation) must agree to these requirements, but also companies seeking accreditation as ICANN registrar.

According to the [Executive Order 13685](#) of U.S. Administration (December 19th, 2014) prohibiting U.S. companies from supplying services and goods in the Republic of Crimea, doing business with individuals and entities located in the Republic of Crimea since February 1st, 2015, Google Apps users located in Crimea were notified in January 2015 that access to Google services for accounts located in Crimea will be suspended within a week. This was followed by notifications from other U.S. technology companies like Amazon, Apple, Paypal. Soon afterwards, Google Chrome web browser updates were issued. They contained message about blocking and/or removal of web-sites and hosting registered by individual residents of this region.

Domain industry was affected as well. Several U.S. registrar companies (for example, GoDaddy) announced unilaterally that domain names of registrants from the Republic of Crimea will be removed from registries .com, .net, .org, .info, and others. U.S. registrars referred to trade restrictions which do not allow them to do business with individuals and entities located in the Republic of Crimea.

Accordingly, U.S. companies had to follow the Executive Order 13685. This precedent highlights the real threat to Internet stability owing to ICANN’s U.S. jurisdiction, since ICANN, just like any other U.S. company, must comply with all applicable national law.

Russian representative at ICANN 52 and authors of the Joint Statement, supported by leaders of the Russian Internet community (Coordination Center for TLD RU/PФ; Russian Association for Electronic Communications; Regional Public Center of Internet Technologies (ROCIT); Union of Internet Operators; Internet Initiatives Development Fund; Internet Anti-Censorship Organization RuBlackList.NET, etc.) at the Russian Internet Governance Forum (RIGF-2015), stated that community considers these actions as the discrimination against Internet users on the basis of their geographical location.

We are not aware of any OFAC license received by ICANN since 2015 for any of contracted parties (both registrars and registries), so that regulatory risk should be considered.

We also believe that in addition to the review of actual confirmed ICANN failures to fulfill responsibilities due to its jurisdiction, it's necessary to analyze risks of potential future ICANN's failures to fulfill responsibilities due to its jurisdiction.

Cross Community Working Group on Enhancing ICANN Accountability should not replace comprehensive risk analysis with just gathering information about actual incidents. We therefore recommend that Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) carry out comprehensive ICANN's risk analysis and develop solutions to mitigate these risks during Work Stream 2.

2. Has ICANN's jurisdiction* affected any dispute resolution process or litigation related to domain names you have been involved in?

Answer: No information available

3. Do you have copies of and/or links to any verifiable reports of experiences of other parties that would be responsive to the questions above?

Answer: No

4. a. Are you aware of any material, documented instance(s) where ICANN has been unable to pursue its Mission because of its jurisdiction?

Answer: No information available

The mission of ICANN is set out in ICANN's Bylaws (<https://www.icann.org/resources/pages/bylaws-2012-02-25-en#I>)

"The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:

1. Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are

a. Domain names (forming a system referred to as "DNS");

b. Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and

c. Protocol port and parameter numbers.

2. Coordinates the operation and evolution of the DNS root name server system.

3. Coordinates policy development reasonably and appropriately related to these technical functions."

We think that it is impossible to implement item 3 in full, because all ICANN's policies and their implementation are assessed for compliance with the California law (because ICANN is nonprofit public benefit corporation), and that does not allow to fully meet the demands of the modern world, where top-level domain registries enter into agreements with registrars individually, and registrars enter into agreements with the registrants in compliance with law of other countries,

and this inevitably creates intractable conflicts between national law systems. Therefore, the issue of inconsistencies between policies and agreements of ICANN and the requirements of different national law systems is raised regularly at ICANN's official meetings.

The new EU personal data protection act (General Data Protection Regulation – GDPR 2016/679) coming into force on May 25th, 2018, and replacing Directive 95/46/EC, ratified by the Russian Federation, is currently the most widely known example of such inconsistency to ICANN's policies and agreements.

During ICANN meeting in Copenhagen (March 2017) there were sessions with representatives of EU personal data protection regulatory bodies (Council of Europe Data Protection Commissioners), and these sessions revealed that ICANN is by no means ready for this law's entry into force and its very stringent requirements regarding all stages of personal data handling.

(<https://schedule.icann.org/event/9np1/gac-meeting-council-of-europe-data-protection-commissioners> – session with GAC,
<https://schedule.icann.org/event/9nnl/cross-community-discussion-with-data-protection-commissioners> – session with conference participants)

For example, “right to be forgotten” provided for in that law (http://ec.europa.eu/justice/data-protection/reform/files/regulation_oj_en.pdf, (66), page L 119/13) and the possibility of consent withdrawal are not actually implementable currently, because after domain removal from DNS it is still possible to get registrant data via WHOIS during all last stages of the domain lifecycle (<https://www.icann.org/resources/pages/gtld-lifecycle-2012-02-25-en>, Redemption Grace, Pending Delete stages).

That said, the list of such inconsistencies is not yet compiled by ICANN, although this EU law was published almost a year ago (on April 27th, 2016). This allows to draw some conclusions regarding ICANN's mission fulfillment in the context of jurisdictional issue.

The recorded transcript of GAC session with the Council of Europe Data Protection Commissioners at ICANN 58 in Helsinki (http://sched.ws/hosted_files/icann58copenhagen2017/9c/I58CPH_Mon13Mar2017-GAC%20Meeting%20-%20Council%20of%20Europe%20Data%20Protection%20Commissioners-en.pdf) can be used as the documentary evidence.

We stand firm on the position that in addition to the post-factum review of actual confirmed ICANN failures to fulfill mission due to its jurisdiction, it's necessary to review the following relevant substantive questions:

- Why the resources of such a global public infrastructure like Internet are under the jurisdiction of the single state?

- Why all country code top-level domains, ccTLD (for example, “.RU” or domains of any other country) should be under the jurisdiction of the single state?
- Why geographical domains (for example, “.AFRICA”) should be under the jurisdiction of the USA?

Such approach will help to avoid potential risks, in particular, when ICANN will have to implement the requirements of trade sanctions or court judgments of the certain jurisdiction.

b. Are you aware of and able to document the existence of an alternative jurisdiction where ICANN would not be so prevented from pursuing its Mission?

Answer: Yes. Referring to a precedent given in section 1.

In this regard, we consider necessary the detailed assessment of the equitable distribution of Internet governance resources on the basis of international treaties between states under the auspices of the United Nations (see [UN Charter](#)), beyond the limits of national jurisdictions.

We urge to discuss different possible ways to address the issue of ICANN’s jurisdiction. For example, ICANN could be established pursuant to the international law.

Another possible way is to separate main ICANN’s responsibilities (policies development, operational activities, and root zone management) over different jurisdictions.

One more way to arrange ICANN’s activity and to address jurisdictional issue could be U.S. Government decision recognizing ICANN’s jurisdictional immunity in accordance with the United States International Organizations Immunities Act.