

13 March 2014

**Summary and Analysis of comments for:
Notice of Preliminary Determination To Grant Registrar OVH SAS Data Retention Waiver**

The comment period ran from 27 January 2014 to 27 February 2014. One (1) public comment submission was received, which may be viewed in its entirety at:

<http://forum.icann.org/lists/comments-ovh-sas-27jan14>

Disclaimer: The summary is not a full and complete recitation of the comment received. It is an attempt to capture in broad terms the nature and scope of the comment. The summary has been prepared in an effort to highlight key elements of the submission in an abbreviated format, not to replace the comment. Every effort has been made to avoid mischaracterizations and to present fairly the views provided. Any failure to do so is unintentional.

SUMMARY & ANALYSIS

Only a single set of comments was received, from the GNSO Intellectual Property Constituency (the “IPC”). Those comments from the IPC said in part:

“While IPC would not object in principle to the specific waiver requested, so long as it is adequately demonstrated that without a waiver OVH will face an irreconcilable conflict between its contractual obligations under the RAA and its legal duties under applicable law, we question whether the materials submitted thus far constitute the adequate demonstration needed.”

The IPC’s basis for questioning whether the materials submitted provide adequate demonstration of this conflict include that although OVH submitted a letter from the French national data protection authority, CNIL, expressing the view that “it does not seem to be the case” that the two year retention policy is no longer than is necessary for the purposes for which they are obtained and processed pursuant to Article 6-5 de la loi du 6 janvier 1978 ainsi que la Directive 95/46/CE, IPC believes that it is not clear that this amounts to a “conclusive demonstration that OVH will be in legal jeopardy under French law if it were to respect the contractual obligation it has taken on. IPC suggests that “Before it grants this waiver, ICANN should take whatever steps it reasonably believes to be sufficient (including seeking input from relevant law enforcement or related bodies) to establish and document the authoritative and actionable character of the CNIL statement upon which the submission relies.”

In addition the IPC comments that the one-year retention period is derived from a different provision of national law, Decree No. 2011-219, which it understands to have been issued under the authority of a different statute than the one which is relied upon as the basis for the asserted conflict, and questions whether OVH is asserting that this decree is applicable to it in its role as domain name registrar, or whether it is arguing by analogy from its obligations under the decree in other roles that it may play in a particular instance, such as ISP or web hosting company.

The IPC also proposes that if a waiver is granted, it be limited to other registrars located in and subject to legal jurisdiction in France, because French law is the basis for the claimed conflict and support for the claimed remedy, and that ICANN make clear that the waiver applies only to the post-sponsorship period of retention and not to any of the obligations of the Data Retention Specification that apply during the term of the sponsorship or during the reduced one-year post-sponsorship period of retention that would be required if the waiver is granted.

ICANN is committed to working with registrars and the ICANN community to balance and reconcile the data retention requirements of the 2013 RAA with local, regional and national laws and regulations.

Commentators:

Name:

On Behalf of:

Steve Metalitz

GNSO Intellectual Property Constituency