

13 October 2017

Dear Mr. Marby,

We write to you today on behalf of contracted parties with respect to the European Union's General Data Protection Regulation (GDPR). As we approach the end of the two year implementation period, ending on 25 May 2018, GDPR is already presenting significant and immediate challenges to registries, registrars, and the ICANN organization.

The simple fact is that the requirements under GDPR and the requirements in our contracts with ICANN to collect, retain, display, and transfer personal data stand in conflict with each other. This is a message we have been communicating to ICANN organization in plain terms since before we convened for the GDD Summit in Madrid this May. Following that Summit, we were encouraged by the stated willingness of ICANN organization members to work collaboratively with contracted parties and other members of the ICANN community, resulting in the formation of the small task force. In good faith, we as contracted parties worked to contribute to the user stories matrix designed to serve as the basis for legal analysis.

However, following that initial burst of activity, we have been consistently disappointed with the way the last five months have proceeded. In particular, we are dismayed by the lack of communication and transparency from members of the ICANN organization regarding their activities around GDPR. We had hoped to collaborate with ICANN organization to develop a concrete solution (or solutions) to address the conflicts between data privacy regulations and certain contractual requirements that contracted parties could implement prior to 25 May 2018. The lack of progress in identifying any tangible remedies has been frustrating and has created anxiety over the viability of developing a shared solution to GDPR compliance in time for that looming deadline.

We recognize the impact that the GDPR regulation is likely to have on ICANN's longstanding policies related to WHOIS, and that the ramifications of that impact will also affect other members of the ICANN community. As such, we appreciated the updates ICANN organization shared during ICANN's Data Protection/Privacy Activities webinar on 4 October 2017 and applaud the efforts made to engage with Data Protection Authorities (DPAs) and obtain a legal assessment. But those efforts should not have been undertaken at the exclusion of working directly with contracted parties to develop concrete solutions. GDPR presents a clear and present contractual compliance problem that must be resolved, regardless of whether new policy should be developed or existing policy adjusted. We simply cannot afford to wait any longer to start tackling this problem head-on.

To that end, we as contracted parties make the following requests of ICANN organization. We are seeking your assistance, as the President and CEO of ICANN organization, in directing your staff members to fulfill these requests.

1. Commit to regular and meaningful engagement with the identified small group of contracted party representatives, with the objective of developing a concrete and implementable solution (or solutions) to address the conflicts between data privacy regulations and contractual requirements. This commitment must include identifying the appropriate ICANN organization members to be involved in this effort, and ensuring their ongoing availability to participate in this process, including during the face-to-face meeting scheduled during ICANN 60.
2. Where developing the aforementioned concrete solution(s) requires additional information or input from DPAs, members of the European Commission, or other relevant stakeholders, consult with contracted party representatives prior to any engagement or outreach. Wherever possible, include representatives of contracted parties in engagements or consultations.
3. Once such a solution (or solutions) is identified, support the contracted parties in communicating and socializing that solution to members of the ICANN community, especially the ICANN Board of Directors, in order to ensure its successful adoption and implementation.

If we are unable to work together to identify a shared solution, contracted parties must necessarily develop their own approaches to dealing with the conflicts between GDPR and their contractual requirements, which may or may not align with each other. We as contracted parties would prefer a unified approach, but ICANN and contracted parties need to work together immediately to have a plan in place in the next sixty (60) days, so we can begin implementation.

Sincerely,

Paul Diaz
Chair, Registries Stakeholder Group

Graeme Bunton
Chair, Registrars Stakeholder Group