

7 July 2021

RE: Whois Inaccuracy

Dean Marks
Executive Director and Legal Counsel
Coalition for Online Accountability ("COA")

Dear Dean,

Thank you for your email dated 21 June 2021 regarding Whois inaccuracy. We also take note of your comments during the discussion between the CSG and the ICANN Board on the same day.

The topic of GDPR and how it relates to the provisions in ICANN agreements with contracted parties about the accuracy of registration data remain the subject of discussion among various parts of the ICANN community. As well, there have been some questions about whether, and if so, how the concept of joint data controllers under Article 26 of the GDPR relates to this discussion. These topics are complicated, and there are many moving pieces, but we don't understand the basis for the claims in your email about "ICANN Org backing away from its role as a joint controller of WHOIS data" and how this "will continue to undermine [ICANN org's] ability to enforce rigorously accuracy requirements". We want to provide some additional clarity and context for consideration in light of your comments.

ICANN org is not backing away from discussions about data controllers; instead it is seeking legal advice and guidance from European authorities to inform ongoing community discussions.

The basis for the concern expressed in your email about "ICANN Org backing away from its role as a joint controller of WHOIS data" is not clear. This statement assumes that (1) ICANN is a joint controller, and (2) ICANN is backing away from this joint controller role.

First, the topic of controllers and joint controllers has been subject to ongoing debate, leading up to and since the effective date of the GDPR, and ICANN org has been out front to seek legal advice and guidance from data protection authorities on this topic. Based on this advice and guidance, there remains uncertainty about whether ICANN is a joint controller together with

registries and registrars for every processing activity associated with the lifecycle of a domain name (e.g. collection, transfer, publication, etc.).

Second, ICANN org is not backing away from its role as some type of controller. We've made many public statements on the topic to outline our understanding of ICANN's role and responsibilities and even published legal advice explaining this position, which is further described below.¹ Ultimately, it's not about what label (controller/joint controller) we or the community may *prefer* to "assign" to ICANN; it is a question of law about whether Article 26 of the GDPR applies. And the law, as applied to the processing of data in the domain name ecosystem, is not clear and remains the subject of ongoing debate in the ICANN community.

ICANN's work to understand controllership under the GDPR

When ICANN org began focused work with the community in May 2017 to begin to document the flow of gTLD registration data, it acknowledged that ICANN may well be regarded as a data controller under the GDPR and the desire to understand any obligations ICANN may have in such case.

Further, as part of the work to develop the interim compliance model outlined in the "Cookbook," which led to the creation of the Temporary Specification for gTLD Registration Data, ICANN org articulated its position about the roles and responsibilities of controllers and processors for various processing activities associated with the lifecycle of a domain name, based on our best thinking at the time, and concluded that ICANN and each contracted party is acting as an independent controller in connection with the processing of WHOIS/registration data.² These roles were further detailed in the Temporary Specification (Appendix C), where ICANN, Registry Operators, and Registrars are identified as controllers and/or processors for various processing activities concerning registration data, such as publishing registration data in RDDS/WHOIS.³ After discussion and compromise with the contracted parties, ICANN was

¹ See e.g. <https://www.icann.org/en/system/files/files/gdpr-memorandum-part1-16oct17-en.pdf>; <https://community.icann.org/download/attachments/117604842/ICANN-EPDP%20-%20Qs%201%20%26%20%20-%209th%20September%202019%5B2%5D.pdf?version=2&modificationDate=1568143518000&api=v2>

² See Section 7.2.11.3 of the Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation <https://www.icann.org/en/system/files/files/gdpr-compliance-interim-model-08mar18-en.pdf>

³ <https://www.icann.org/resources/pages/gtld-registration-data-specs-en/#appendixC>

identified in that document as “controller” (without reference to joint or independent) for all of the registration data processing activities documented in the Temporary Specification.

Following the implementation of this compromise approach in the Temporary Specification, ICANN org has continued to solicit advice from the European authorities on the matter of controllership given the uncertainties under the GDPR. As you are no doubt aware, ICANN org has not received any definitive clarification in response. As a result, our understanding of the concept of controllership has continued to evolve over time, as informed by court decisions, enforcement actions, and guidance from the supervisory authorities.

The GDPR states, “Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers.”⁴ As we understand it, control must generally be assessed for a distinct processing operation (or set of operations), as confirmed in the Fashion ID decision of the European Court of Justice (ECJ), which is the most recent decision on the concept of joint controllership.⁵ ICANN org, together with the community, continues to do this work of assessing each processing operation, including as part of implementation of the EPDP Phase 1 policy recommendations.

At each step, we continue to report back to the community and bring this information to bear so that it can be considered in ongoing community discussions and policy development processes where processing registration data is at issue.⁶

Open questions about controllership do not impact ICANN org’s ability to enforce requirements in the Registrar Accreditation Agreement about accuracy of registration data.

In your email, you make a connection between accuracy obligations in the RAA and the topic of controllership, and assert that backing away from being a joint controller “will continue to undermine [ICANN org’s] ability to enforce rigorously accuracy requirements.” We would like to

⁴ Art. 23 (1) GDPR.

⁵ See Judgment of 29 July 2019, Fashion ID GmbH & Co. KG v Verbraucherzentrale NRW eV (C-40/17)

⁶ See, e.g. <https://www.icann.org/en/blogs/details/an-update-on-icanns-gdpr-related-efforts-23-12-2020-en>; <https://www.icann.org/en/blogs/details/icann-meets-with-belgian-data-protection-authority-19-2-2020-en>; <https://www.icann.org/en/announcements/details/belgian-data-protection-authority-response-to-proposed-unified-access-model-17-12-2019-en>; <https://www.icann.org/en/blogs/details/data-protectionprivacy-update-key-gdpr-whois-updates-and-next-steps-27-7-2018-en>

understand your analysis and assumptions better. Based on our analysis to date, it is true that the unavailability of some public contact information in RDDS has hampered ICANN org's ability to continue with the original framework for the WHOIS Accuracy Reporting System (ARS) program, which was *one* of several tools to help improve the accuracy of RDDS data. However, all of the existing accuracy obligations in the Registrar Accreditation Agreement remain in place and subject to ongoing enforcement by ICANN Contractual Compliance. Failure to comply with these affirmative obligations,⁷ such as verifying certain contact details of the registrant, could lead to a registrant having its domain name suspended. Additionally, a registrar failing to investigate and correct reported inaccuracies could also lead to a breach of the Registrar Accreditation Agreement. It's not clear whether ICANN is deemed a controller or joint controller under the law impacts its ability to enforce its existing contractual obligations that are not in conflict with the law.

We hope this additional context is helpful and look forward to ongoing discussions in the community on these important issues.

Sincerely,



Jamie Hedlund

Senior Vice President, Contractual Compliance and Consumer Safeguards

⁷ <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#whois-accuracy>