

8-Dec-2017

Göran Marby  
Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers

Cc: Cherine Chalaby, Chair, ICANN Board of Directors

Re: 2 November 2017 [Statement from Contractual Compliance](#)

Dear Göran:

During the ICANN60 meetings you read a statement that ICANN Contractual Compliance would be deferring action against any registry or registrar for noncompliance with contractual obligations related to the handling of registration data. ICANN Org subsequently posted the [Statement from Contractual Compliance](#) (the “Statement”)

We are concerned that this unilateral action makes no reference to ICANN’s published [Revised ICANN Procedure For Handling WHOIS Conflicts with Privacy Law](#) (the “Procedure”) that implements the applicable consensus policy (Policy) in this situation. While some overtones of the Procedure are present in the Statement, the lack of transparency, community involvement, and process for comment and discussion, among many other procedural safeguards of the Procedure, are missing. Missing too are the basic principles of transparency applicable to ICANN operations that, under the Procedure, would require at least

- (i) a “public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it,”
- (ii) “a public comment period on [the General Counsel's] report,” and if data elements in the registry’s and registrar's WHOIS output will be removed or made less accessible, and
- (iii) “an appropriate notice to the public of the resolution and of the reasons for ICANN's forbearance from enforcement of full compliance with the contractual provision in question.”

We note further the communication from the Dutch Personal Data Authority (AP) dated 26 October 2017, affirming the existence of a conflict with regard to .frl and .amsterdam, and the response from the General Counsel, John Jeffrey of ICANN, referencing the invocation of the Procedure. It therefore is imperative that ICANN proceed on the basis of the fully vetted Policy and Procedure, rather than plot a new path that has not been subject to the same degree of community input.

Our concerns regarding the Statement are not limited to the abandonment of critical community input mechanisms merely for principled reasons. There also is legitimate concern within many facets of the community that the Statement issued by ICANN will lead to the non-transparent adoption of one-off policies and provisions, which could be implemented differently, at the extreme, for every single, different registry and registrar. Users of WHOIS require a reasonable level of certainty regarding continued access to WHOIS. That certainty, in part, comes from the application of a consistent standard, which should be developed in accordance with existing consensus policy.

Moreover, we note that the Statement says “detailed guidance regarding the process and eligibility requirements will be provided *shortly*.” Frustratingly, a year and seven months has passed since [GDPR](#) was adopted, and nearly a month has elapsed since the Statement was initially read at ICANN60 and subsequently posted on 2 November 2017. Without splitting hairs

about an appropriate definition of *shortly*, the important thing to note here is the looming deadline for enforcement of GDPR - May 25, 2018. There is less than six months for contracted parties to implement changes to their internal tools and systems. Each day that passes without a clear path forward increases the risk of a substantially fragmented and altered WHOIS system.

Separately from our concerns stated above, we note that the Procedure abounds with detailed guidance regarding the process and eligibility for how registries and registrars are to handle WHOIS conflicts with privacy law. There are multiple paths for accommodating existing contractual obligations within the GDPR, including, but not limited to, these key elements:

- (1) a public WHOIS database is necessary for the performance of a contract and therefore falls within Art. 6(1)(b);
- (2) a public WHOIS database is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, and therefore falls within Art. (6)(1)(e);
- (3) a public WHOIS database is necessary for the purposes of the legitimate interests of registries and registrars, and users of the registration data directory service, and therefore falls within Art. 6((1)f); and
- (4) an informed, freely given and properly written consent under the conditions described in Article 7.

Under these key bases, registries and registrars can reconcile their contractual obligations and the GDPR. This approach is supported by the European Council's recently adopted Nov. 7<sup>th</sup> conclusions on cybersecurity (Paragraphs 43 & 44) that recognizes the importance of ensuring a coordinated EU position to ensure swiftly accessible and accurate WHOIS databases of IP-addresses and domain names, so that law enforcement capabilities and public interests are safeguarded.

In sum, each model submitted to ICANN should (i) be dealt with in a way that tracks the Procedure, to the greatest extent possible, and (ii) should take the above noted three key bases into consideration or, where not utilized, include within the required accompanying analysis an explanation as to why not.

We request that you issue an updated Statement and related processes and requirements that complies with this.

Sincerely,

Andrew Mack

Chair, ICANN Business Constituency