



26 March 2018

RE: Request for Guidance: General Data Protection Regulation (GDPR) Impact on the Domain Name System and WHOIS

Elizabeth Denham
Information Commissioner

Via electronic mail

Dear Ms. Elizabeth Denham,

This letter is in follow up to our letter dated 12 September 2017 to provide you with an update on the ongoing work of ICANN and the global Internet community in seeking to comply with the General Data Protection Regulation (GDPR) as it may apply to the global Domain Name System, and in particular, the WHOIS, a global, publicly available distributed directory service containing information about the registration records of more than 187 million domain names. ICANN helps to coordinate a decentralized WHOIS through private contractual arrangements, with more than 2,500 domain name registries and registrars, each of which, along with ICANN, are data controllers impacted by the GDPR.

Accordingly, ICANN and more than a thousand of the domain names registries and registrars are at a critical juncture. We need specific guidance from European data protection authorities in order to meet the needs of the global internet stakeholder community, including governments, privacy authorities, law enforcement agencies, intellectual property holders, cybersecurity experts, domain name registries, registrars, registrants and ordinary internet users.

Following extensive public debates and information exchanges about the impact of the GDPR on WHOIS, there remain critical questions regarding how to maintain the global system of WHOIS in a manner that is consistent with the GDPR. Without guidance from you on these critical questions detailed below, the integrity of the global WHOIS system and our ability to enforce WHOIS requirements after the GDPR becomes effective will be threatened. Continued ambiguity on the applicability of the GDPR to the global WHOIS may result in many of the domain name registries and registrars choosing not to comply with their contractual requirements on WHOIS out of fear that they will be subject to significant fines following actions brought against them by your respective offices. Many of ICANN's contracted parties, specifically domain name registries and registrars, need clear guidance on these critical questions and assurance that they will not have enforcement actions brought against them while they implement changes to comply with the GDPR.

At the same time, governments, law enforcement authorities and others are deeply concerned that blocked access to the global WHOIS may significantly harm the public interest, by blocking access to critical information which allow them to enforce other laws and protect consumers, critical infrastructure and intellectual property rights.

We request you to help ICANN and the domain name registries and registrars to maintain the global WHOIS in its current form, through either clarification of the GDPR, a moratorium on enforcement or other relevant actions, until a revised WHOIS policy that balances these critical public interest perspectives may be developed and implemented.

Background

To provide additional context for our request, the following is a brief overview of the ICANN community's efforts to identify changes to the WHOIS system that are needed to come into compliance with the GDPR, and how we see the process unfolding over the coming weeks leading up to 25 May 2018.

As you may know, the Internet is administered by a decentralized collection of organizations and people who set rules, standards, and policies so that the world can be connected on one global, secure and stable Internet. ICANN is a nonprofit globally mandated non-governmental organization. ICANN's role is to coordinate, at a global level, the Internet's system of unique identifiers. Our core mission is the responsibility of ensuring the security and stability of the top-level of the unique identifiers used on the Internet, specifically, domain names, Internet Protocol addresses, and other technical parameters used to make the Internet work and that help facilitate a global Internet.

As part of our responsibilities, and through contracts with thousands of registries and registrars, ICANN coordinates WHOIS, which is a publicly available, globally distributed repository of information, known as registration data, that provides contact, and other information necessary for the secure, stable, and resilient operation of the Internet. Maintaining public access to accurate, complete, and up-to-date registration data on resources used on the Internet facilitates efforts to identify and mitigate issues that can impact the proper operation of the network and reduce the chance of abuse. The WHOIS also helps build consumer trust online as it allows Internet users to "look up" who is responsible for a particular domain name.

To help identify any contractual compliance implications arising from the new law, ICANN is engaged in extensive legal review and analysis of the GDPR as it may apply to the domain name industry. In its coordination role, ICANN is working with the community to develop interim changes to WHOIS. The changes are intended to uniformly address the obligations of ICANN and each of the thousands of contracting parties in their roles as controllers, and to impose reasonable cooperation obligations to enable the exercise by data subjects of their data protection rights as set forth in the GDPR. These proposed interim changes, which would be enforced through our private agreements with registries and registrars, would be in place while a longer-term policy is developed and implemented.

We began our work by engaging the global Internet community to develop use cases about the personal data that gTLD registries and registrars collect, transmit or publish pursuant to ICANN agreements or policies.¹ The use cases were used to help establish the purposes for processing

¹ <https://www.icann.org/resources/pages/gtld-registration-dataflow-matrix-2017-07-24-en>

personal data. We also engaged Hamilton Advokatbyrå, a European law firm, to assist in our analysis of the GDPR's impact on gTLD registration directory services.²

With these building blocks, ICANN organization published potential “interim compliance models” for how ICANN, along with the industry of gTLD registries and registrars could continue to comply with existing ICANN contractual requirements and community-developed policies in light of the GDPR. We received input from the Internet community on these proposals, including feedback from ICANN's Governmental Advisory Committee (GAC), which is made up of more than 170 representatives of national governments, multinational governmental organizations and treaty organizations, or public authorities from around the world, including EU member states and the European Commission. Also, the European Commission provided feedback and advised that, “... given the importance of determining the best approach in light of the important interests at stake and the many stakeholders concerned, we consider that it would be better to delay ICANN's final decision on the interim model while keeping the current momentum, so that it is possible to arrive at a good solution for all parties involved.”³ The Commission suggested that ICANN defer making a decision on a final compliance model until after ICANN's public meeting in Puerto Rico, held 10 - 15 March 2018, to allow for discussions with all stakeholders involved including data protection authorities.

Attachment 1 to this letter includes a listing of the community discussion documents, letters, and comments on this work, all of which are posted on our website,⁴ along with regular updates and related blogs.

Where we are today

On 8 March 2018, ICANN org published a unified plan and approach for how ICANN and the industry of gTLD registries and registrars could continue to provide WHOIS in light of the GDPR.⁵ This plan, published as the “Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation (The “Cookbook”, 8 March 2018),” took into account public comment received on the proposed compliance models. The plan attempts to balance compliance with the GDPR while maintaining the existing WHOIS system to the greatest extent possible. We submitted a copy of the Cookbook on 8 March 2018 and it is also included in Attachment 2 to this letter.

ICANN conducted extensive discussions with the community about the Cookbook during its recently concluded public meeting in Puerto Rico. These discussions demonstrated that there is

² The legal memoranda from the Hamilton law firm published on 16 October 2017, 15 December 2017, and 21 December 2017 are available here: <https://www.icann.org/en/system/files/files/gdpr-memorandum-part1-16oct17-en.pdf>; <https://www.icann.org/en/system/files/files/gdpr-memorandum-part2-18dec17-en.pdf>; and <https://www.icann.org/en/system/files/files/gdpr-memorandum-part3-21dec17-en.pdf>.

³ 7 February 2018 letter from Roberto Viola, European Commission, European Union re: ICANN-Proposed Compliance Models available at: <https://www.icann.org/en/system/files/correspondence/viola-to-marby-07feb18-en.pdf>.

⁴ <https://www.icann.org/dataprotectionprivacy>

⁵ Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation (The “Cookbook”, 8 March 2018) <https://www.icann.org/en/system/files/files/gdpr-compliance-interim-model-08mar18-en.pdf>

convergence on key elements of the Cookbook, including: layered/tiered access for WHOIS; developing an accreditation program for access to full WHOIS data in consultation with the Governmental Advisory Committee, data protection authorities and contracted parties with full transparency to the ICANN community; and identification of the WHOIS data elements that should be accessible only by accredited users.

Many parts of the community have expressed that ICANN's proposed changes to WHOIS in the Cookbook go far beyond what is necessary for compliance with the GDPR. These parties have provided extensive analysis and legal support for their positions, and have advised that extensive changes to WHOIS are not needed given that there is a legitimate and valuable public purpose for continued access to WHOIS data by consumers, law enforcement, governments, cybersecurity, anti-abuse, and intellectual property holders. The Governmental Advisory Committee issued consensus advice at the ICANN61 Puerto Rico meeting which lends some support to this position, including for example that ICANN's proposal to substitute the registrant's email address with an anonymized email addresses or webform "may not be proportionate in view of the significant negative impact on law enforcement, cybersecurity and rights protection."⁶ The advice highlights a larger concern that ICANN's proposed changes to WHOIS "risk[s] hindering the efforts of law enforcement, intellectual property and other actors in combating illicit activities and mitigating DNS abuse."

On the other hand, many parts of the community have expressed the ICANN's proposed changes to WHOIS do not go far enough to comply with the GDPR. These parties also have provided extensive analysis and legal support for their positions, including, for example, analyses that call into question whether existing practices for collecting full contact details for the administrative and technical contacts associated with a domain name registration can be sustained under the GDPR. On 9 March 2018, ICANN received input from the International Working Group on Data Protection in Telecommunications (IWGDPT, a.k.a. "Berlin Group") about privacy and data protection issues with regard to registrant data and the WHOIS Directory.⁷ The Berlin Group provided recommendations on changes needed to the WHOIS system, and questioned ICANN's role in mandating access to data in the WHOIS system. The Berlin Group noted that, "The rise of cybercrime, phishing attacks, and the use of the Internet as a communications medium for a wide variety of crime is of concern to everybody. However, it is questionable whether it is the role of ICANN, as a private corporation, to require its contracted parties to assemble data and provide it, without regard to human rights concerning fair legal procedure, to the global law enforcement community, and to private sector security companies."

In addition, some members of the Internet community have warned that, absent additional guidance from DPAs and relevant European government authorities, ICANN's approach "...will have significant adverse implications for the rule of law in the online environment, including with regard to enforcement against online criminal activity, cybersecurity, intellectual property theft and the continued ability to use the internet to safely communicate and transact."⁸ EUROPOL's Statement by the EC3 Advisory Group on Internet Security highlights that, "Removing the

⁶ https://gac.icann.org/advice/communiqués/public/20180315_icann61%20gac%20communiqué_final.pdf

⁷ <https://www.datenschutz-berlin.de/working-paper.html>

⁸ <https://www.icann.org/en/system/files/files/gdpr-comments-sheckler-et-al-article-29-wp-whois-05mar18-en.pdf>

cybersecurity community's access to Whois data will thwart existing cybersecurity mitigation techniques and further empower the ability of cyber attackers to scale their infrastructure with more persistent campaigns. Given the centrality of DNS abuse to an enormous volume of malicious cyber activity, and the current role of cybersecurity companies and independent researchers in defending would-be victims via Whois data, such access remains necessary and is vital to a multi-stakeholder approach to cybersecurity.”⁹

Request for guidance from DPAs

Guidance from DPAs on ICANN's plan of action as presented in the Cookbook, and in particular, the areas where there are competing views, is critical as soon as possible, but particularly during the next few weeks. We understand from comments from some DPAs that there is an opportunity for DPAs to continue to provide support to companies along the path to compliance beyond the GDPR effective date if the company has an established plan of action.¹⁰ In addition to the information in the Cookbook, we stand ready to provide any additional information about our plan of action (e.g. timelines, milestones, etc.) that you may need to facilitate your consideration of our requests.

We appreciate your guidance on this matter to prevent any of the risks outlined above, and remain committed to engaging with you on these important matters as we work to finalize our interim compliance model.

Best regards,



Göran Marby
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers (ICANN)

⁹ <https://www.icann.org/en/system/files/files/gdpr-letter-ec3-europol-icann-proposed-compliance-models-26jan18-en.pdf> and <https://www.icann.org/en/system/files/files/gdpr-statement-ec3-europol-icann-proposed-compliance-models-25jan18-en.pdf>

¹⁰ <https://www.lesechos.fr/tech-medias/hightech/0301307949319-isabelle-falque-pierrotin-donnees-personnelles-la-cnif-fera-preuve-de-souplesse-et-de-pragmatisme-2154549.php#yXOmTB9J44GvkPjh.99>

Attachment 1

Reference Documents Concerning Community Comments on Interim GDPR Compliance Models

(from <https://www.icann.org/resources/pages/gdpr-legal-analysis-2017-11-17-en>)

Attachment 2

Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation (The “Cookbook”, 8 March 2018)

<https://www.icann.org/en/system/files/files/gdpr-draft-compliance-models-10mar18-en.pdf>

<https://www.icann.org/en/system/files/files/gdpr-compliance-interim-model-08mar18-en.pdf>