

Göran Marby  
Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers  
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Los Angeles, CA 90094

Dear Göran:

This letter follows our recent communications about the Temporary Specification for gTLD Registration Data, passed by the ICANN Board of Directors on 17 May 2018, with a stated effective date of 25 May 2018 (hereafter “Temporary Specification” or “TS”), and is sent on behalf of the Tucows family of registrars, including Tucows Domains Inc. (IANA ID 69) (operating as “OpenSRS”), Enom LLC (IANA ID 48), and EPAG Domainservices GmbH (IANA ID 85), and their accredited affiliates (collectively “Tucows”).

As you know, we have undertaken an extensive redesign of our registration processes, with revisions to what data we collect, what data we share, and how we collect and maintain user consents (where required). We have done so with a view to both the GDPR and to ICANN requirements. Links to the material we have developed over the course of the last year is available from our GDPR website (<https://opensrs.com/the-gdpr/>) with information in German also for our EPAG customers (<https://www.epag.de/einfuehrung-in-die-dsgvo/>).

While we are open to reconciling our solution with the Temporary Specification, we cannot do so where we believe the Temporary Specification is insufficient. In those areas, we have designed our implementation in order to comply with the GDPR’s requirements. This approach has been live since 25 May 2018.

While we are grateful that the Court in Germany has addressed one of the issues we had with the Temporary Specification, ICANN did not raise our full list of issues with the Court. Accordingly, we address them more fully below.

### **Data Collection**

As a general matter, we note that the Temporary Specification attempts to preserve as much of the legacy system of data gathering, sharing, and display as possible, rather than designing with “data protection by design and by default” in accordance with Article 25 of the European Union’s Regulation 2016/679 (“General Data Protection Regulation” or “GDPR”). Article 25 specifically provides that a controller

should process “only personal data which are necessary for each specific purpose,” an obligation that also extends to “the amount of personal data collected.” Indeed, “data minimisation” is a core tenet of GDPR and woven into many of its articles and recitals.

Here, ICANN is asking registrars to collect data elements that are not necessary for the provisioning of the service purchased, namely Admin and Tech contacts. As one of the early registrars, Tucows has been in the registration business for almost twenty years. So while we appreciate the historical context for gathering the Admin and Tech contacts, we now observe that the significant majority of domain name registrants provide identical information for all fields. The Registered Name Holder is primarily the same as the Admin contact, which is the same as the Tech contact. The very fact that substantially all domain name registrants provide the same contact information for each contact implies that the Admin and Tech contacts are not required for the purchase, operation and maintenance of a domain name.

In the cases in which the Admin and Tech contacts are not the same as the Registered Name Holder, we also have concerns about how to collect meaningful consent, where required, given that these persons are not initiating the domain name registration, transfer in, or contact update transaction. Moreover, even if a modest incremental public benefit exists in collecting this usually redundant data, any benefit is outweighed by the the practical difficulties of collecting consent from persons outside of the domain name registration contract and the resulting limited data that would be published in the absence of consent.

For these reasons, we believe that continued collection of contacts beyond the Registered Name Holder is not permitted by the GDPR.

### **Data Transfer from Registry to Registrar**

The Temporary Specification appears to require registrars to transfer the full set of registration data to registries for all contacts, yet it provides no rationale for why that transfer must take place, why it must encompass all data elements for all contacts, or the legal justification for such a transfer. The Temporary Specification only mentions legitimate interests, but does not establish what interests those are and why they outweigh the rights of the data subjects. A registry can perform its core function of maintaining the uniqueness of domain name registrations and publishing zone files with a much smaller data set.

Furthermore, the Temporary Specification requires data transfers to take place regardless of whether the registry or registrar in question adheres to the GDPR. No contracted party should be forced to transfer to or accept data from another contracted party without the necessary legal safeguards.

To date, we have not received data processing agreements or similar contractual assurances from the vast majority of our registry partners, our data escrow provider, or ICANN itself. While the Temporary Specification states that registries

must include data processing provisions (6.3.1) and may adopt model clauses for international transfers (6.3.2), as of the date of this letter, we have not received such contractual assurances from many gTLD registries. Accordingly, since 25 May 2018, we have reduced the data we share with registries.

While we appreciate that ICANN included a table with the roles of the respective parties as controllers or processors for various processing activities, we do need agreements for these various scenarios, as Article 28 of the GDPR requires data processing agreements to be in writing. As far as the role of registries, registrars and ICANN being described as controllers, the Temporary Specification does not specify that these three parties are joint controllers and there is no draft joint controller agreement. While Article 26 of the GDPR is silent on specific formal requirements, we would hope that ICANN will present a standardized agreement detailing the sharing of responsibilities to the contracted parties, for discussion and agreement, as soon as possible. We look forward to reviewing this when available.

For these reasons, we believe that the continued sharing of full data sets with gTLD registries that have not provided us a satisfactory data processing agreement is not permitted under the GDPR, and so we will be sharing a minimum data set, including placeholder data, with most gTLD registries until we have a better understanding of both (a) the registry's need for full contact data beyond the minimum data necessary to register and publish a domain name registration; and (b) the data processing assurances provided by a data processing agreement.

### **Public Display of Personal Data in Whois**

The Temporary Specification requires that the registrar continue to publish the registrant organization, state/province, and country fields in the public whois. In the vast majority of domain registrations, the organization field matches the first and last name fields, and thus is highly likely to contain personal data which should not be included in a public whois output. Requiring registrars to display this field often forces the disclosure of personal information. If the organization field is supposed to be used strictly for non-personal data, it will take a transition period of at least a year to educate registrants on the proper use of this field, and allow for correction of existing data in this field.

Also, there is an internal conflict between two requirements within the Temporary Specification; Section 1 4.4.7 requires that the Tech and Admin contacts be published in the whois record at the request of the Registered Name Holder, while Appendix A 2.4 requires that the full Admin and Tech contacts are published in the whois if the Admin or Tech contact gives their consent.

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We have other concerns around the ICANN implementation, especially around generality of the justifications and repetition of language from the GDPR in lieu of

application of the GDPR to the nature of the relationships of ICANN contracted parties.

We wanted to raise these specific areas of concern with you immediately, however, as we do not believe that we can be compliant with both ICANN's Temporary Specification and our obligations under the GDPR. We look forward to working with both ICANN staff and the community as we all tackle these unique challenges together.

Very truly yours,

/s/

Elliot Noss  
CEO

Cc: Cherine Chalaby, Chair, ICANN Board of Directors,