

**From:** Christian Dawson

**Subject:** Dawson and Rickert to ICANN Board

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**Cc:** Thomas Rickert

ICANN Board:

We are writing you today in anticipation of your vote on the Temporary Specification. Our message is short and simple. We ask that you remember the goal of the task in front of you. It is to approve a strategy to mitigate a conflict between EU law and ICANN's contracts with registries and registrars that currently exists, and will soon include new penalties under GDPR.

This contractual compliance process has become convoluted by special interests that are not parties to those directly facing the business risks associated with WHOIS-related GDPR noncompliance. We echo the sentiments of the Article 29 group in their April 12th letter to ICANN, which encouraged ICANN to stop acting as though third party interests are ICANN's interests.

We urge the ICANN Board not to adopt a Temporary Specification that is not fully compliant. ICANN's contracted parties have gone on the record multiple times that they will not follow any instructions that are in breach with the GDPR. It would undermine ICANN's authority if requests for reconsideration and compliance action would be the result of the Temporary Specification.

The updated draft Temporary Specification:

- Contains contradictions and duplications;
- Does not explain why the collection of the various data elements is compliant with the principle of data minimization;
- Shows a lack of nuance when it comes to purposes for processing and legal basis (only Art. 6 (1)(f) GDPR is mentioned, processing based on Art. 6 (1)(b) or (c) is missing entirely.
- Does not explain whose legitimate interests are concerned (Are the claimed legitimate interests ICANN's interests or third party interests?) Also, a rationale how these interests outweigh the rights of the data subjects is missing.
- Only contains broad brush ideas, such "as supporting a framework to address issues involving domain name registrations, including but not limited to: consumer protection, investigation, investigation of cybercrime, DNS abuse, and intellectual property protection". This one bullet point only shows that interests are conflated, all of which need diligent analysis and warrant different legal analysis, as a consequence of which such requirements can neither be supported by contracted parties, nor be implemented, let alone be enforced;
- Contains a lot of information that is more or less copied from the GDPR, but which does not contain all relevant information required to be compliant. Thus, the information is misleading. Additionally, restating the GDPR in a Temporary Specification is neither required nor appropriate;
- Does not offer language on the roles and responsibilities of the registries, registrars, ICANN, escrow agents and the EBERO, while appropriate data processing agreements

and a joint controller agreement unambiguously stating who has what role is required and needs to be contractually laid down.

- Does not offer any information on how to legitimize ICANN's far reaching rights to request data, instruct escrow agents and the EBERO.
- Does not mention the CZDA programme and why, if at all, it can be offered in a compliant manner.

The above points serve only to illustrate the shortcomings of the document and the list is not exhaustive.

We trust the Temporary Specification was drafted to avoid fragmentation in the marketplace and offer guidance to the contracted parties. Given that May 25th, 2018 is next week, fragmentation is already a fact as contracted parties developed their own GDPR compliance strategies. As it stands, the draft Temporary Specification raises more questions than it answers.

ICANN, the names and numbers organization, needs to narrowly focus on the mitigation of business risks facing both ICANN the organization, and its registries and registrars based on this contractual conflict. This is best done if a Temporary Specification is revised and limited to those factors that are compliant and implementable.

Third party interests can and should be heard - through the development of an expedited Working Group on a next-generation WHOIS replacement that can exist within GDPR. We encourage a focus on this as well.

However, do not conflate a need to quickly find a solution to this contractual issue with a need to build a next-generation WHOIS. The former is a matter that can and should be dealt with between affected parties seeking to mitigate their business risk. The latter should be a multistakeholder endeavor we look forward to engaging in.

It is time to demand that the ICANN staff focus on a path forward that solely focuses on providing business clarity to its contracted parties. This needs to be the only goal. The time for attempting a split focus that tries to address other third party issues needs to be put aside for now.

Sincerely,

Christian Dawson, i2Coalition  
Thomas Rickert, eco - Association of the Internet Industry