

October 5, 2018

Göran Marby
President and CEO
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Dear Göran,

MarkMonitor commends ICANN on publishing a second draft framework for a unified access model (“UAM”). As we noted in our response to ICANN’s first UAM, the Temporary Specification’s overly broad¹ redaction mandate and the risk of GDPR fines have resulted in a troubling overredaction of WHOIS data, resulting in unreliable-at-best access to the WHOIS data needed for law enforcement, cybersecurity, consumer protection, and intellectual property rights enforcement purposes. Accordingly, MarkMonitor appreciates the opportunity to provide feedback on this second UAM.

MarkMonitor continues to urge ICANN to support the inclusion, in any final model, of the work already undertaken by members of multiple and various stakeholder groups, constituencies, and advisory committees in the Accreditation & Access Model (“AAM”)² currently on version 1.7. We call for ICANN to move forward with implementing such a model immediately, echoing the sentiment expressed by the Intellectual Property Constituency and Business Constituency in their recent letter,³ which implementation MarkMonitor suggests that ICANN establish on the cross-community, bottom-up nature of the model, and not as top-down policymaking.

MarkMonitor also urges ICANN to seek explicit confirmation from the EU Data Protection Board, Data Protection Authorities, and the European Commission that it is subject to a “legal obligation”⁴ to process personal data by virtue of its responsibility to coordinate the global DNS, that this responsibility constitutes “official authority”⁵ or “public authority,”⁶ or that

¹ GDPR does not affect processing legal persons’ data, and such redaction is inconsistent with ICANN’s commitment to preserve as much of existing WHOIS as possible.

² <https://www.icann.org/en/system/files/files/draft-whois-accreditation-access-model-v1.7-23jul18-en.pdf>

³ <https://www.icann.org/en/system/files/correspondence/bc-ipc-to-marby-07sep18-en.pdf>

⁴ GDPR Art 6 Sec 1(c) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=en>

⁵ GDPR Art 6 Sec 1(e) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=en>

⁶ GDPR Art 6 Sec 1(f) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=en>

coordinating the DNS is “a task carried out in the public interest.”⁷ Such certainty would serve as the cornerstone supporting further processing on the appropriate legal basis, and obviate the problematic balancing test under GDPR 6.1(f). Regardless of whether such explicit confirmation is provided, ICANN should assert unambiguously that it requires registrants of domain names in the DNS provide certain limited personal data determined to be necessary for the purpose of ensuring the security and stability of the DNS. This assertion should include that although this data will not be published, it will be processed as needed for documented requests subject to terms of use, for a limited, enumerated (not open-ended) list of purposes.

Regardless of whether European authorities provide such explicit confirmation, MarkMonitor urges ICANN to consider the possibility of centralizing to itself, or a singular third-party contractor, the sole access gateway and/or sole RDAP hosting of all global WHOIS data (“Trachtenberg Model”), and also consider indemnifying contracted parties for their role in processing the data. While registrars may legally be controllers of customer data processed according to our individual business practices, ICANN should acknowledge that registrars are merely processors of WHOIS data, which data is processed neither by means determined by registrars, nor for registrars’ purposes, but rather by means determined by ICANN through the multistakeholder model, and for a litany of non-registrar purposes.⁸ As sole controller, ICANN should implement standard contractual clauses for data protection with registrars, giving registrars the legal assurances required to provide the data directly to ICANN and/or otherwise pass it into a centralized RDAP server. However this scenario is achieved, the desirable result is consistent, lawful access to data, as opposed to the current environment where thousands of registrars face each take a different approach to access in the face of GDPR fines when making access decisions.

To reduce any remaining uncertainty about the legality of data processing, ICANN should consider whether it would be prudent or necessary to pass through data processing terms to registrants, either via the registration agreement with the registrar or by some other means. ICANN should also consider whether registrants should be required to enter into a limited data processing agreement directly with ICANN to justify its own processing and its controller role in facilitating access for third parties.

More specific comments on the UAM follow:

Question 11: Would there be a central repository of WHOIS data from which access would be granted to authenticated users?

⁷ GDPR Art 6 Sec 1(e) <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=en>

⁸ https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controller-processor/what-data-controller-or-data-processor_en

Yes, for benefits including those expressed above and included in the UAM, ICANN should fully explore the viability of such a model.

Question 17: What types of safeguards would be included in the Terms of Use?

MarkMonitor supports appropriate Terms of Use, and we support many of the safeguard principles outlined in the UAM. However, we caution against rate-limiting to an extent that inhibits legitimate use for of the data for the important work that WHOIS enables, and we echo the concerns of the SSAC about excessive rate-limiting.⁹

Thank you for your consideration, and please do not hesitate to contact me to discuss this further.

Kind regards,

Brian J. King

Brian J. King
Director of Internet Policy and Industry Affairs

⁹ <https://www.icann.org/en/system/files/files/sac-101-en.pdf>