

**Non-Commercial Stakeholders Group**

*Representing the interests and concerns of  
non-commercial Internet users in domain name policy*

To: Andrea Jelinek, incoming Chairwoman, Article 29 Data Protection Working Party  
Cc: Göran Marby, President and CEO, ICANN  
Cherine Chalaby, Chair of the Board, ICANN

23 April 2018

**RE: ICANN's Non-Compliance with European Data Protection Law**

Dear Mme. Jelinek and members of the Article 29 Data Protection Working Party,

I am writing to you on behalf of the Non-Commercial Stakeholders Group (NCSG) at ICANN. As you may remember, we recently sent a letter to you dated 5 March 2018.<sup>1</sup> We received a response from you on 11 April 2018, within which you also enclosed a letter you had sent to the ICANN CEO Göran Marby.<sup>2</sup> We were very pleased to see your response. The WP29 advice is consistent with many of the points made in contributions from the NCSG and by our members over many years. Thank you ever so much for sharing this correspondence with us.

At the time of sending this letter, we have not yet seen a comprehensive response from ICANN to your well-developed arguments, however we would like to share our perspective on the 12 April 2018 media release they issued upon receiving your letter.<sup>3</sup>

We disagree with the contents of ICANN's media release, and would like to explain why. As you may know, our organization, the NCSG, represents the interests of non-commercial domain name registrants in the formulation of Domain Name System policy under the auspices of the Generic Names Supporting Organization.

ICANN claims to be:

*“disappointed that the letter does not mention our request for a moratorium on enforcement of the law until we implement a model. **Without a moratorium on enforcement, WHOIS will become fragmented** and we must take steps to mitigate this issue.”<sup>4</sup>*

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<sup>1</sup> <https://www.icann.org/en/system/files/files/gdpr-comments-ncsg-article-29-wp-non-compliance-05mar18-en.pdf>

<sup>2</sup>

<https://community.icann.org/download/attachments/83329642/ICANN%20letter%20non%20commercial%20stakeholders%5B18323%5D.pdf?version=1&modificationDate=1523615407000&api=v2>

<sup>3</sup> <https://www.icann.org/news/announcement-2018-04-12-en>

<sup>4</sup> Emphasis added by the author of this letter

## **The WHOIS is already fragmented.**

Fragmentation of approaches in providing WHOIS information already exists in ccTLDs. There is also the usage of privacy-proxy services by some domain name registrants, a service that does not publicly display domain name registrants' personal information.

## **We do not believe a moratorium on enforcement of the law should be granted to ICANN.**

We are not aware of any provisions within the GDPR which permit enforcement of the regulation to be delayed. Furthermore, ICANN has had a window of two years to comply with the GDPR, like all other organizations who collect and process data have. During this time, however, NCSG has been consistently and repeatedly making ICANN aware of its non-compliance with this regulation and asking that action be swiftly taken to bring the WHOIS into compliance with the spirit of the law.<sup>5</sup> This issue is not new for ICANN at all, because the Article 29 Data Protection Working Party has been writing to ICANN since at least 2003 identifying privacy concerns with the WHOIS system.<sup>6</sup> We have documented at least 15 letters to ICANN from Data Protection Authorities, the International Working Group on Data Protection in Telecommunications, and the European Data Protection Supervisor between 2000 and 2018.

It is our impression that ICANN has a long history of violating basic data protection norms. ICANN has no convincing arguments as to why it cannot comply with the GDPR, and we fear that if a moratorium is granted, ICANN will use this as a precedent to further delay complying with the spirit of the GDPR.

Secondly, ICANN argues that:

*“a moratorium on enforcement action by DPAs would potentially allow for the introduction of an agreed-upon accreditation model and for the registries and registrars to implement the accreditation model in conjunction with the measures in the agreed final interim compliance model.”*

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<sup>5</sup> See, for instance, our letter to ICANN dated 19 October 2017, within which we reiterated our concerns that ICANN was dismissing the public interest in respecting the fundamental right to privacy:

<https://www.icann.org/en/system/files/correspondence/dammak-to-swinehart-atallah-19oct17-en.pdf>

<sup>6</sup> See Opinion 2/2003, ‘The Application of the Data Protection Principles to the WHOIS Directories’, [http://www.ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2003/wp76\\_en.pdf](http://www.ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2003/wp76_en.pdf)

**ICANN could comply with the GDPR by the 25 May 2018 deadline if it so desired.**

ICANN has made no efforts until this year to develop an accreditation model, despite the NCSG, and ICANN's own legal counsel, telling ICANN last year that such a system would be needed. Lack of preparation, disorganization, and other priorities are not, and cannot, be a justification for a moratorium on enforcement of the law.

Moreover, ICANN could comply with the GDPR by simply not displaying any personal data in the WHOIS output until such time as it develops an accreditation model.

We do not agree that if the personal information is removed from the public interface there will be havoc on the Internet. As we previously noted, there already exists fragmentation of approaches in providing WHOIS information, and some domain name registrants cloak their personal contact information by using privacy proxy services. Neither have led to cyber havoc. Moreover, there is plenty of useful information in a GDPR compliant WHOIS that can be used by security researchers and law enforcement agencies.

ICANN has suggested keeping the WHOIS open, by seeking a moratorium on the enforcement of the GDPR by suggesting that the WHOIS personal data is vital for the Internet "to protect the end users, trademark protection and for the anti-spam community." It has also enumerated other reasons which are not within its mission and mandate.

We believe ICANN, instead of seeking a moratorium, should define the purpose of WHOIS in accordance with its Bylaws and then come up with an accreditation model that is compliant with GDPR. If it cannot do so within the deadline or cannot implement the accreditation model then our suggestion above should be taken into consideration.

**ICANN is a data controller.**

ICANN does not acknowledge that it is a data controller and has not appointed a privacy officer as required under the GDPR (on its website, ICANN explicitly notes that its Chief Data Protection Officer is not a privacy officer for the purposes of the GDPR<sup>7</sup>). However, in its media release, ICANN presents itself as acting to protect the potential use of the WHOIS by third party actors. In presenting this list of "potentially adverse scenarios" we believe ICANN is acting as a data controller in seeking to maintain access to the WHOIS for these purposes.

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<sup>7</sup> <https://www.icann.org/en/system/files/files/cdpo-role-faq-09apr18-en.pdf>

We hope our comments are useful and we would be happy to answer any questions you may have. Thank you very much for your continued interest in ICANN, and for your work in protecting the rights of domain name registrants.

Yours sincerely,

Dr. Farzaneh Badiei  
Chair, Non-Commercial Stakeholders Group

### **About Us**

The only place within ICANN that is specifically reserved for the advancement of non-state and non-market interests is the Non-Commercial Stakeholder Group (NCSG) of the Generic Names Supporting Organization (GNSO). The GNSO, which develops policy recommendations for generic top-level domains, is sub-divided into four broad stakeholder groups for policy development through working groups of interested participants. Besides the NCSG, the four broad stakeholder groups in the GNSO include the Commercial Stakeholder Group (CSG), the Registrars Stakeholder Group, and the Registries Stakeholder Group.

Since the other three stakeholder groups all represent various business interests, the NCSG is the only place in the GNSO specifically reserved for non-business interests. The CSG houses three constituencies of specific business interests including the Intellectual Property Constituency, the Business Constituency, and the Internet Service Providers Constituency. The three commercial constituencies have been historically dominated by a small handful of large trademark interests who vote as a block on policy issues. The constituency within the NCSG that promotes non-commercial interests in policy development is the Noncommercial Users Constituency (NCUC). The NCUC represents more than 600 non-profit organisations and individuals who wish to advance non-commercial policy objectives at ICANN such as human rights, education, access to knowledge, freedom of expression, privacy rights and other non-commercial goals. The NCUC's members include universities, civil liberties groups, free software groups, religious organisations, artistic groups, ICT development organisations and other non-commercial actors dedicated to the public interest.