

November 14, 2017

To: Göran Marby, Chief Executive Officer
Theresa Swinehart, SVP Multistakeholder Strategy Initiatives
Akram Atallah, President Global Domains Division

Re: **Impact of the General Data Protection Regulation on the WHOIS system**
– **Additional Questions for Hamilton**

Dear Göran, Theresa and Akram,

Pursuant to Göran's invitation in Abu Dhabi, we would appreciate it if ICANN would ask the following GDPR/WHOIS related questions to Hamilton:

General:

How can the current WHOIS protocol be maintained to the greatest extent possible while still not violating GDPR, recognizing the strong public policy justifications for having WHOIS data quickly and easily accessible for the purposes set forth in the GAC advice dated Nov. 1, 2017?

Can Hamilton further analyze the viability for public disclosure and/or access to WHOIS/RDS data in compliance with GDPR in light of the recent CJEU decision in the issue of Manni (2017), and consideration of WHOIS/RDS data as a form of a public ownership record for domains?

Prior Consultation (Article 36)

Could ICANN and/or contracted parties, in their capacities as controllers, invoke the prior consultation provisions of Article 36 of the GDPR to gain greater clarity about the compatibility of either current or proposed modified WHOIS practices with the requirements of GDPR, by obtaining the "written advice" of a member state data protection authority? If so, what are the pro's and con's of doing so?

Code of Conduct (Article 40)

Does Article 40 provide a reasonable basis for ICANN and/or the domain name industry generally, to establish a GDPR compliant system for collection and transmission of data of natural persons in accordance with legitimate interests? If so, what advice does Hamilton have in connection with the preparation of a draft Article 40 submission (i.e. what is the procedure, what are the time lines to obtain advice prior to implementation of GDPR, etc.)? Could such a submission be made in advance of May 2018 to the Article 29 Working Group, whose opinion could later be adopted by the EDPB?

Use/Disclosure For Contractual Performance (Article 6(1)(b)):

How and under what circumstances can contractual performance be grounds for justifying collection, use and provision of access to personal data in the WHOIS/RDS? Is the fact that ICANN and the registry may be considered joint controllers relevant to the inquiry of whether the agreement with the registrant is independent of the registrar's agreement with ICANN? Is the fact that registrars and/or registries are obliged to adhere to WHOIS obligations pursuant to ICANN policy relevant to this inquiry? How does the availability of privacy/proxy services affect this analysis?

Use/Disclosure For Legitimate Interests (Article 6(1)(f):

In paragraph 3.8.5.1, the Hamilton memorandum opines "it will not be possible to claim legitimate interest as a legal ground for processing of personal data as currently performed through the WHOIS services on an unchanged basis." Could Hamilton expand on its view of what changes to current WHOIS policies would be minimally required to change this conclusion? Does the recent GAC advice on WHOIS change this analysis? Can Hamilton provide a deeper analysis of the balancing test required under the legitimate interests prong for processing, taking into account the recent CJEU decision in the issue of Manni (2017)?

Use/Disclosure For Public Interest (Article 6.1(e):

The Hamilton memo does not discuss Art. 6(1)(e) of GDPR as a possible basis for processing of registration data. This provision addresses "processing [that] is necessary for the performance of a task carried out in the public interest....". In view of the longstanding role of WHOIS data in advancing consumer protection, buttressing the rule of law online, and facilitating the ability of Internet users to know with whom they are dealing online, and in light of ICANN's over-arching responsibility to act in the public interest, could Hamilton analyze the extent to which Art. 6(1)(e) may provide a basis for processing of registration data? Is this a sufficient basis for a publically accessible WHOIS? If not, why not, and what type of access / disclosure / processing would be possible under this public interest prong?

Thank you for the opportunity to raise these additional questions, and we look forward to receiving Hamilton's advice on these issues. If you have any concerns or comments about our questions, please don't hesitate to contact me.

Regards,



Vicky Sheckler

Vice President, Intellectual Property Constituency