

JONES DAY

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Via fax in advance: [REDACTED]
Via courier
Regional Court of Bonn
10th Civil Chamber
Wilhelmstraße 21
53111 Bonn

DR. JAKOB GUHN
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In the proceedings

of **Internet Corporation for Assigned Names and Numbers (ICANN)**, represented by its president, Göran Marby, 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA,

- Applicant -

Attorneys of record: JONES DAY Rechtsanwälte,
Neuer Stahlhof, Breite Straße 69, 40213 Düsseldorf

versus

EPAG Domainservices GmbH, represented by its managing director, [REDACTED]
[REDACTED]

- Defendant -

Attorneys of record: Rickert Rechtsanwaltsgesellschaft mbH
Kaiserplatz 7-9, 53113 Bonn

Docket no.: LG Bonn 10 O 171/18

We kindly ask the court to consider the following statement from the European Data Protection Board (EDPB) regarding the current proceedings, which supports or is consistent with the Applicants view in all relevant aspects.

On July 5, 2018, the EDPB wrote a letter to the Applicant in response to some questions raised by the Applicant. In this letter the EDPB explicitly refers to the current proceedings. The EDPB confirms the view of the Applicant that the collection of Admin-C and Tech-C data is not in conflict with the GDPR.

I. The EDPB

As the Applicant explained in its briefs, all parties involved took part in a process for the development and implementation of the Temporary Specification in order to adapt the Registrar Accreditation Agreement (we have submitted the RAA entered into with the Defendant as **Appendix AS 4**) to new GDPR provisions. Further, the EDPB, which replaced the Art. 29 Working Group on May 25, 2018, endorsed the statements issued by the Art. 29 Working Group in preparation the GDPR entering into force (e.g., the brief of immediate appeal, p. 10). In this letter the EDPB again endorses the implementation of the Temporary Specification and comments on certain questions ICANN previously raised. The EDPB also explicitly refers to the current proceedings before this chamber as outlined below. We attach a copy of the letter as well as a German translation thereof as

- **Appendix AS 13** -.

II. Collection of Admin-C and Tech-C data is legitimate

The EDPB comments on the question of legality of the collection of Admin-C and Tech-C data. It explicitly welcomes the option for the registrant to delegate these tasks to a competent third person. The EDPB remarks:

“On 25 May 2018, ICANN initiated legal proceedings against a registrar who announced that it would no longer collect information on the technical and administrative contacts associated with a particular domain name registration. On 30 May 2018, the Regional Court of Bonn, denied ICANN's request for injunctive relief, on the basis that

The Applicant has not demonstrated that the storage of other personal data than that of the domain holder, which continues to be indisputably collected and stored, is indispensable for the purposes of the Applicant. It is obvious that more data makes the identification of persons behind a domain and contacting them appear more reliable than if only one data record of the person generally responsible for the domain is known. However, the domain name holder

registered or to be registered is the person responsible for the contents of the relevant website, who does not necessarily have to be different from the Tech-C and Admin-C categories, in other words, can combine all those functions an itself.'

ICANN has appealed the decision on 13 June 2018. In its motion for appeal, ICANN further clarifies that it is not an obligation for registrars to require registrants to name an administrative or technical contact person different to the registrant. In other words, the contact information for the administrative and technical contacts can be the same as the contact details of the registrant itself. ICANN also clarifies that the administrative or contact person may be a legal person and that it is not necessary that the contact information provided directly identifies a natural person.

*The EDPB considers that registrants should in principle not be required to provide personal data directly identifying individual employees (or third parties) fulfilling the administrative or technical functions on behalf of the registrant. **Instead, registrants should be provided with the option of providing contact details for persons other than themselves if they wish to delegate these functions and facilitate direct communication with the persons concerned.** It should therefore be made clear, as part of the registration process, that the registrant is free to (1) designate the same person as the registrant (or its representative) as the administrative or technical contact; or (2) provide contact information which does not directly identify the administrative or technical contact person concerned (e.g. admin@company.com). For the avoidance of doubt, the EDPB recommends explicitly clarifying this within future updates of the Temporary Specification.”*

(Emphasis added)

With the passage **highlighted above** the EDPB, thus, seems to share the view of the Applicant with regard to Admin-C and Tech-C tasks that **the option of providing contact details for persons other than themselves if they wish to delegate these functions is in line with the GDPR**, because it is a useful option for the registrant and it facilitates direct communication with the persons concerned.

III. The collection of non-personal data is in any case in line with GDPR

Further, the EDPB shares its view that the GDPR is not applicable if the Admin-C and Tech-C data refer to legal persons or anonymized contact details. The EDPB states in this regard:

3. Registration of legal persons

In its letter of 10 May 2018, ICANN asks whether the proposed interim compliance model should apply to domain name registrations that include personal data associated with a registration of a legal person.

The GDPR does not apply to the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person.

While the contact details of a legal person are outside the scope of the GDPR, the contact details concerning natural persons are within the scope of the GDPR, as well as any other information relating to an identified or identifiable natural person.

(Emphasis added)

Thus, the EDPB acknowledges the limited applicability of the GDPR regarding the collection of Admin-C and Tech-C data by the registrar, because such data very often does not refer to personal data at all. Further, as there is no obligation for the Defendant to only collect personal data as Admin-C and Tech-C reference, collection of non-personal data is one lawful way for Defendant to fulfill its obligation.

IV. The collection of personal data is in line with GDPR

The EDPB also comments on circumstances when Admin-C and Tech-C data contains personal data, implying that even collection of personal data could be acceptable under the GDPR. In particular, the EDPB raises some concerns in case of publication of such personal data by default:

The mere fact that a registrant is a legal person does not necessarily justify unlimited publication of personal data relating to natural persons who work for or represent that organization, such as natural persons who manage administrative or technical issues on behalf of the registrant.

For example, the publication of the personal email address of a technical contact person consisting of `firstname.lastname@company.com` can reveal information regarding their current employer as well as their role within the organization. Together with the address of the registrant, it may also reveal information about his or her place of work.

*In light of these considerations, the EDPB considers that personal data identifying individual employees (or third parties) acting on behalf of the registrant **should not be made publically available by default** in the context of WHOIS. If the registrant provides (or the registrar ensures) generic contact email information*

(e.g. admin@domain.com), the EDPB does not consider that the publication of such data in the context of WHOIS would be unlawful as such.

(Emphasis added)

The manner of publication of data under certain circumstances necessarily requires prior collection of such data. Thus, the statement above allows the conclusion that the EDPB does not question the legality of collecting personal data for Admin-C or Tech-C contacts as such. While the question of publication is not subject to the dispute at hand, the Applicant would like to point out that the Temporary Specification does not provide for full publication of the Admin-C and Tech-C data.

The Applicant has explained in detail that such personal data – if provided - is not published by default. Such data is only published if the data subject has **explicitly consented** to full publication. According to Sec. 2.4 Temporary Specifications

“2.4. In responses to domain name queries, Registrar and Registry Operator MUST treat the following fields as "redacted" unless the contact (e.g., Admin, Tech) has provided Consent to publish the contact's data: (...).”

If the data subject does not consent, WHOIS refers to an anonymized communication instead, Sec. 2.5 Temporary Specification. We refer to our further explanations in our immediate appeal of Section VIII, page 16 et seq.

Thus, the Applicant indeed ensures that the Admin-C and Tech-C data is not publicly available by default.

V. Conclusion and impact on the current proceedings

With these proceedings, the Applicant requests the Defendant to cease and desist from offering and/or registering second level domain names without collecting Admin-C and Tech-C data. Because - and this is not in dispute between the parties - the Defendant has the contractual obligation to collect such data from the registrant.

The Applicant has outlined in its briefs that there is certainly a legitimate way to fulfil this contractual obligation.

With this letter of 5 July 2018, the EDPB has taken the opportunity to communicate its view on key questions of the proceedings. The EDPB does not raise concerns where the collected

data for Admin-C and Tech-C does not constitute personal data. Further, the EDPB does not raise concerns in relation to the collection of personal data of Admin-C and Tech-C as long as such information is not published by default, which is not the case here.

Therefore, the EDPB statement implies that the GDPR does not serve as a legal basis to categorically reject the contractual obligation to collect Admin-C and Tech-C data. Furthermore - because the Applicant has taken care of restricted access to personal data as requested from EDPB - the Applicant considers its view as confirmed that also the collection of personal data of Admin-C and Tech-C – if provided by the registrant on its free will – is legitimate under the GDPR.

We trust that also the Defendant takes this statement from EDPB into consideration.

Dr. Jakob Guhn
Rechtsanwalt