

7 August 2014

**Summary and Analysis of comments for:
Notice of Notice of Potential Grant of Registrar Data Retention Waiver Request
For 1API GmbH, ingenit GmbH & Co. KG and RegistryGate GmbH**

The comment period ran from 22 May 2014 to 22 June 2014. Two (2) public comment submissions were received, which may be viewed in their entirety at:

<http://forum.icann.org/lists/comments-1api-gmbh-07may14/>

Disclaimer: The summary is not a full and complete recitation of the comments received. It is an attempt to capture in broad terms the nature and scope of the comments. The summary has been prepared in an effort to highlight key elements of the submissions in an abbreviated format, not to replace the comments. Every effort has been made to avoid mischaracterizations and to present fairly the views provided. Any failure to do so is unintentional.

SUMMARY OF COMMENTS

One comment was received from Volker Greimann and stated that Key-Systems GmbH fully supports the waiver request requested by the three German registrars and hopes this will lead to ICANN making a final determination on the requested waiver permitting German registrars to remain in compliance with the RAA without having to violate German Data protection provisions.

The second comment was submitted by the GNSO Intellectual Property Constituency (the “IPC”) and said in part:

“IPC would not object in principle to the specific waiver requested, so long as it is adequately demonstrated that without a waiver the Registrar will face an irreconcilable conflict between its contractual obligations under the RAA and its legal duties under applicable national law.”

The IPC noted that in its three previous announcements granting data retention waiver requests, ICANN has never clearly specified the law which it deemed applicable as the basis for the waiver and contended that this raises questions concerning the scope of the presumption created in paragraph 2 of the Specification, under which other registrars subject to the same laws upon which ICANN based its decision to grant a waiver are presumptively entitled to a similar waiver. The IPC maintained that if ICANN ultimately decides to grant the waivers sought, it should clearly state that it is doing so on the basis of a specific cited provision of German law, and that the “applicable jurisdiction,” for purposes of future waiver requests, is Germany.

IPC also requested that ICANN make clear that the waiver applies only to the post-sponsorship period of retention of data and not to any of the obligations of the Data Retention Specification that apply during the term of the sponsorship or during the reduced one-year post-sponsorship period of retention that would be required if the waiver is granted, nor to any other obligations of registrars

under the 2013 RAA or ICANN policies, including all obligations with respect to the collection or maintenance of such data, as well as the obligation to make such data available to the public, through Whois or otherwise, during the term of the sponsorship.

In a footnote, the IPC also noted that although documents relating to proposed data retention waivers have been posted for comment, they have not been posted on ICANN's Public Comment page, and that in two of the previous three instances, no summary or analysis of the comments received was ever posted; and in the third instance, while comments were summarized, they were not analyzed. The IPC questioned whether in its handling of the comment process regarding data retention waiver requests, ICANN is simply going through the motions, and asserts that ICANN's handling of these matters is inconsistent with its professed commitment to transparency and accountability, including its commitments under the Affirmation of Commitments.

ANAYLSIS OF COMMENTS

ICANN appreciates the time spent by community members to provide their input on the potential grant of a data retention waiver to this Registrar.

Scope of Waiver If Granted

ICANN appreciates the comments regarding the appropriate scope of any waiver that may be granted and will take these comments into consideration.

Posting and Analysis of Public Comments

Regarding the observation that in two instances, no summary or analysis of comments was posted, ICANN notes that summaries and analyses were prepared by ICANN staff in a timely manner but inadvertently were not posted at the time the waivers were granted. ICANN regrets the oversight; those summaries and analyses have since been posted.

Regarding the observation that comments on data retention waivers were not posted on ICANN's Public Comment page, ICANN notes that the Public Comment page solicits public comment on "proposals that have been initiated by a topic-specific Working Group, the Policy Team or Staff" (see <https://www.icann.org/public-comments>) and provides for an official minimum comment period of 21 days and an official minimum reply period of 21 days. In this case, Section 2 of the 2013 RAA Data Retention Specification, which was developed through the multi-stakeholder process and has itself already been the subject of extensive community input and multiple Public Comment periods (see <https://www.icann.org/news/announcement-7-2012-06-04-en>, <https://www.icann.org/public-comments/proposed-raa-2013-03-07-en>, <https://www.icann.org/public-comments/proposed-raa-2013-04-22-en>) describes the process by which ICANN's office of general counsel may, as an operational matter, grant a waiver request. The Data Retention Specification provides that prior to granting any exemption, ICANN will "post its determination on its website for a period of thirty (30) calendar days," but it does not call for the minimum comment and reply periods specified on the Public Comment page. ICANN remains committed to transparency and accountability and notes that in furtherance of its objectives to

inform the ICANN community, ICANN posts many items for comment on its website for a period of thirty (30) calendar days that are not subject to the formal Public Comment and reply periods.

Conclusion

ICANN is committed to working with registrars and the ICANN community to balance and reconcile the data retention requirements of the 2013 RAA with local, regional and national laws and regulations.

Commentators:

Name:

Volker Greimann

Steve Metalitz

On Behalf of:

Key-Systems GmbH

GNSO Intellectual Property Constituency