

16 June 2014

**Summary and Analysis of comments for:  
Notice of Preliminary Determination To Grant Registrar Data Retention Waiver for  
NAMEWEB BVBA**

The comment period ran from 21 March 2014 to 21 April 2014. Two public comment submissions were received, which may be viewed in their entirety at:  
<http://forum.icann.org/lists/comments-nameweb-21mar14/>

*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**

A comment from Volker Greimann stated that the waiver request does not provide any insight into the legal basis of the ability of the registrar to retain the data for a period of one year after the end of the agreement with the registrant and asked for a more detailed explanation of the basis for this retention period.

A comment submitted by the GNSO Intellectual Property Constituency (the “IPC”) 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.”

However, the IPC questioned whether the waiver procedure was being implemented with sufficient care and with the goal of preserving the uniform application of its requirements to the greatest extent possible.

The IPC noted that the waiver request cited to a provision of Belgian privacy law, but asserted that ICANN’s posting included an unofficial English translation of a completely different provision of the law which did not contain the language cited in the waiver request.

The IPC noted that the waiver request was not accompanied by any ruling or guidance from a “governmental body of competent jurisdiction” but instead attached a letter from the Article 29 Data Protection Working Party. The IPC requested that ICANN clarify whether this entity is empowered to enforce Belgian law or to issue statements of an authoritative and actionable character that are binding upon companies that are subject to Belgian law.

The IPC also noted that NAMEWEB's waiver request cited the previous preliminary determination to grant a waiver request made by a French registrar, which ultimately was granted, and requested that ICANN address whether ICANN has established a presumption in favor of similar waivers that may be sought by registrars subject to the jurisdiction of countries other than France.

The IPC proposed that if a waiver is granted, it be made clear that the applicable jurisdiction for purposes of subsequent waiver requests seeking to rely on this waiver be clearly stated to be Belgium.

The IPC also requested that any waiver granted apply only to the post-sponsorship period of retention 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.

## **ANALYSIS**

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

### **Legal Basis for Retention of Data**

ICANN appreciates the comment seeking additional insight into the legal basis of the ability of the Registrar to retain the data for a period of one year after the end of the agreement with the registrant. The Data Retention Specification calls for ICANN and Registrar to discuss the matter in good faith in an effort to reach a mutually acceptable resolution of the matter, and legal representatives of ICANN and Registrar have been engaged in such discussions in an effort to understand and clarify the scope of Registrar's obligations under Belgian law.

### **Discrepancy in Law Cited**

ICANN notes the IPC's observation that the law that was posted apparently did not contain the language cited in the waiver request, but ICANN also notes that there was simply a typographical error in the citation to the law. The Registrar cited Article 5 of Chapter 2; in fact the language in question is contained in in Article 4, Subparagraph 5, of Chapter 2, and the language cited in the waiver request was set forth in the materials posted.

### **Scope of Governmental Authority**

ICANN notes the IPC's request for clarification regarding the status of Article 29 Data Protection Working Party. ICANN appreciates the Article 29 Working Party's contributions and advice and hopes that it will play a role in the resolution of these data protection issues through participation in ICANN community dialogue or in other ways. ICANN does not maintain that this body is empowered to enforce Belgian law or to issue statements of an authoritative and actionable character that are binding upon companies that are subject to Belgian law. Legal representatives of

ICANN and Registrar have been engaged in discussions in an effort to understand and clarify the scope of Registrar's obligations under Belgian law and to reach a mutually acceptable resolution of the matter, as called for by the Data Retention Specification.

### **Citation of Previous Waiver**

With respect to IPC's request that ICANN address whether ICANN has established a presumption in favor of similar waivers that may be sought by registrars subject to the jurisdiction of other countries who cite a waiver granted to a French registrar, ICANN does not intend to establish a presumption in favor of similar waivers that may be sought by registrars located in a jurisdiction other than the jurisdiction for which a waiver has previously been granted. Paragraph 3 of the Data Retention Specification provides as follows:

If (i) ICANN has previously waived compliance with the requirements of any requirement of this Data Retention Specification in response to a Waiver Request from a registrar that is located in the same jurisdiction as Registrar and (ii) Registrar is subject to the same applicable law that gave rise to ICANN's agreement to grant such waiver, Registrar may request that ICANN to grant a similar waiver, which request shall be approved by ICANN, unless ICANN provides Registrar with a reasonable justification for not approving such request, in which case Registrar may thereafter make an Wavier Request pursuant to Paragraph 2 of this Data Retention Specification.

### **Scope of Waiver If Granted**

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

### **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:**

No affiliation identified

GNSO Intellectual Property Constituency