



Comments on German Data Retention Waiver Requests

June 20, 2014

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on ICANN's preliminary determination to grant the Data Retention Waiver Requests submitted by three accredited registrars subject to legal jurisdiction in Germany. See <https://www.icann.org/news/announcement-3-2014-05-22-en>.¹

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. IPC has a long-standing and deep-rooted interest in a robust, reliable and accessible registration data directory system. Because the collection, accessibility, and appropriate retention of such registrant contact data is so critical to maintaining the accountability and transparency of the entire Domain Name System, IPC believes that any procedure for obtaining a waiver of contractual requirements related to these important functions should be implemented with the utmost care, and with the goal of preserving the uniform application of these requirements to the greatest extent possible.

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. 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. If it ultimately decides to grant the waivers sought, ICANN 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.

Finally, IPC wishes to stress that this waiver applies only to the post-sponsorship period of retention of the data listed in the cited provisions of the Data Retention Specification, and that it can have no impact whatever upon any other obligations of any of the registrars involved (or of any other registrar, German or otherwise) under the 2013 RAA or other ICANN policies. These

¹ This is the fourth time this year that ICANN has posted for public comment a document relating to data retention waiver requests (in three cases, a preliminary determination that such a waiver request should be granted), and the fourth time IPC has commented. In none of these instances was the document posted on ICANN's public comment page. In two of the previous three instances, no summary or analysis of the public comments received was ever posted; and in the third instance, while comments were summarized, they were not analyzed. Nor have any of these public comments been in any way responded to. ICANN's failure to respond substantively to any of the issues raised by IPC in its three previous comments leaves the distinct impression that, in its handling of the public comment process regarding data retention waiver requests, ICANN is simply going through the motions. ICANN's handling of these matters is inconsistent with its professed commitment to transparency and accountability, including its commitments under the Affirmation of Commitments, and should be remedied.

include, but are not limited to, 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.² IPC's non-objection to the waiver request is conditioned on these limitations, and we urge ICANN to state these limitations clearly in its final decision on the waiver request.

Respectfully submitted,

GNSO Intellectual Property Constituency

by Steve Metalitz, IPC VP

² In this regard, we note that the third of the legal opinions submitted in support of this data retention waiver request states that, during the life of the domain name registration contract, under German law the registrar can legally store all "WHOIS information, as set forth in the WHOIS Specification," because "such data is needed by the registrar to perform its contractual duties towards its registrant; therefore storage of the data is deemed legal while the contract is effective." See undated, unpaginated document headed "Retention Periods According to German law," first page, included in <https://icann.box.com/shared/static/pvlzlrhxn020ydbjsqbt.pdf>.