



Comments on COREhub Data Retention Waiver Requests

April 25, 2015

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on ICANN's preliminary determination to grant the Data Retention Waiver Request submitted by accredited registrar COREhub S.R.L. See <https://www.icann.org/news/announcement-2015-03-27-en>.

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 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 waiver sought, ICANN should clearly state that it is doing so on the basis of a specific cited provision of Spanish law, and that the "applicable jurisdiction," for purposes of future waiver requests, is Spain.

According to the material submitted in support of this waiver request, it is based not only upon a written legal opinion from a nationally recognized law firm (Clifford Chance), but also upon "a ruling of, or written guidance from, a governmental body of competent jurisdiction providing that compliance with the data collection and/or retention requirements of this specification violates applicable law," making reference to two attached letters to ICANN from the Article 29 Data Protection Working Party. IPC would object to granting this waiver request if this were the only ground for doing so, because the Article 29 Working Party is not a "governmental body of competent jurisdiction" to make rulings on the applicability of any Spanish law (including the law evidently relied upon in this case, Organic Law 15/1999, and Royal Decree 1720/2007). As stated in Article 29 of the EU data protection framework directive (Directive 95/46/EC), the Working Party "has advisory status" and has no authority to enforce or to make authoritative rulings regarding the data protection laws of Member States (see Art. 30, providing the Working Party with authority to provide advice, recommendations and opinions to the European Commission). We note that the waiver application itself, in the section

explaining “the manner in which the collection and/or retention of such data is believed to violate applicable law,” makes no reference whatsoever to the Article 29 Working Party letters, but relies solely upon the written legal opinion from the Clifford Chance law firm.¹

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 this registrar (nor of any other registrar, Spanish or otherwise) under the 2013 RAA or other ICANN policies. These 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

¹ Both the waiver application form and the legal opinion from Clifford Chance are available at <https://www.icann.org/en/system/files/files/waiver-request-corehub-srl-27mar15-en.pdf>.

² In this regard, we note that the waiver application itself acknowledges, on page 6, that “under Spanish law, personal data collected by COREhub for the performance of Registration Agreements may be ... retained by COREhub ... while such agreements are in force.” We also note that the legal opinion from Clifford Chance notes that “the personal data collected for the execution of an agreement can be maintained even after the formal termination of the agreement when at the time of the termination there is an issue of liability arising out of the agreement,” including “a claim by a third party against the data retainer as a consequence of the data subject’s conduct.” Legal Opinion at 8.