



## Comments on NAMEWEB BVBA Data Retention Waiver Request

April 21, 2014

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 NAMEWEB BVBA. See <http://www.icann.org/en/news/announcements/announcement-2-21mar14-en.htm>. However, our ability to do so has been seriously compromised by ICANN's failure to post the text of the request itself until April 16, 2014, just five calendar days prior to the comment deadline. See <http://forum.icann.org/lists/comments-nameweb-21mar14/msg00001.html>. Paragraph 2 of the Data Retention Specification of the 2013 RAA ("Specification") requires a 30-day public comment period on ICANN's preliminary determination to grant a waiver. However, that determination cannot be meaningfully reviewed by the public unless the basis for the request is also fully disclosed; so the 30-day comment period should not start to run until this disclosure occurs. Accordingly, IPC requests that the public comment period be extended to May 16.

We offer the following preliminary comments, without prejudice to additional views we may wish to offer if the public comment period is extended to a full 30 days following posting of the waiver request, as we have just asked.

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. Our very brief opportunity to review the material submitted by NAMEWEB BVBA (see <http://forum.icann.org/lists/comments-nameweb-21mar14/msg00001.html>) leaves us with questions about whether the waiver procedure is being implemented in that fashion in this case.

The NAMEWEB BVBA waiver request asserts two grounds for the assertion that "collection and/or retention of the data element(s) specified in the Data Retention specification to the 2013 RAA, noted below, violates applicable law."<sup>1</sup> The first asserted ground is "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

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<sup>1</sup> We note that the waiver request does not actually specify as to which data elements under the specification a waiver is sought.

applicable law.” The second ground listed is “a data retention waiver determination previously granted by ICANN.”

On the first ground, the waiver request cites to a provision of the Belgian privacy law. However, ICANN’s preliminary determination quotes, in unofficial English translation, a completely different provision of that law, which does not contain the language cited in the waiver request. A more fundamental problem is that the waiver request does not appear to contain any ruling or guidance from “a governmental body of competent jurisdiction” i.e., one with authority to enforce the Belgian privacy law. Instead, the request attaches a letter from the Article 29 Data Protection Working Party, an “independent European advisory body” established under EU legislation. Before granting any waiver on this ground, ICANN should clarify whether this entity, whose role appears to be advisory only, is empowered to enforce Belgian law, or at least to issue statements of an authoritative and actionable character that are binding upon companies that are subject to Belgian law.

As to the second ground, NAMEWEB’s waiver request, which is dated January 30, 2014, cites the ICANN preliminary determination (dated January 27, 2014) to grant a data retention waiver request made by a French registrar, asserting incompatibility with French law. Since the Belgian request was submitted before ICANN’s determination on the French waiver request became final, this ground could be rejected for that reason alone. However, since ICANN ultimately did grant the French waiver request, it now needs to address the question of whether by doing so it established a presumption (under paragraph 3 of the Specification) in favor of similar waivers that might be sought by registrars subject to the jurisdiction of countries other than France. IPC submits that the answer is no, that the decision on the French waiver request did not create a presumption in favor of similar requests from registrars subject to jurisdiction in Belgium or other countries besides France. As IPC noted in its comments filed February 27 on the French registrar’s waiver request, see <http://forum.icann.org/lists/comments-ovh-sas-27jan14/msg00000.html> :

“IPC also believes that if the waiver is granted, its precedential effect under paragraph 3 of the Data Retention Specification must be limited to other registrars located in and subject to legal jurisdiction in France, since it is French law that provides both the basis for the claimed conflict and support for the proposed remedy. In other words, if ICANN ultimately decides to grant the requested waiver, ICANN should clearly state that, for purpose of the waiver process spelled out in paragraph 2 of the Specification, the “applicable jurisdiction” is France, and the “applicable law” is the French statute (and, if its role is clarified, the French decree) cited above.”

In affirming its preliminary determination with respect to the French waiver request, see <http://www.icann.org/en/news/announcements/announcement-12mar14-en.htm> , ICANN made no reference to which law it deemed applicable.<sup>2</sup> Having missed one opportunity to clarify the

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<sup>2</sup> Indeed, neither in the announcement affirming the preliminary determination, nor in the “Summary and Analysis” that ICANN staff posted of the IPC comment, see <http://forum.icann.org/lists/comments-ovh-sas-27jan14/msg00001.html> , did ICANN respond substantively to any of the issues raised by IPC in its comment. This leaves the distinct impression that, in its handling of the public comment period regarding the previous OVH request, ICANN was simply going through the motions. We urge ICANN not to repeat this error with regard to public comments received on this waiver request.

scope of the presumption created in paragraph 2 of the Specification, IPC urges ICANN not to do so again. Instead, if it ultimately decides to grant the waiver sought by NAMEWEB, ICANN should clearly state that it is doing so on the basis of a specific cited provision of Belgian law, and that the “applicable jurisdiction,” for purposes of future waiver requests, is Belgium.

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 NAMEWEB or any other registrar 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, or (to the extent applicable) during the reduced post-sponsorship period (one year) of retention that would be required if the waiver is granted. 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