



Comments on OVH SAS Data Retention Waiver Request

February 27, 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 OVH SAS. OVH requests this waiver in order to be allowed to retain certain data collected from registrants for only one year after OVH's sponsorship of the applicable domain name registration expires, instead of for two years, as would otherwise be required under the 2013 Registrar Accreditation Agreement. See <http://www.icann.org/en/news/announcements/announcement-27jan14-en.htm>.

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.

We have reviewed the material submitted by OVH SAS (see <http://www.icann.org/en/resources/registrars/updates/retention/waiver-request-ovh-sas-27jan14-en.pdf>), and the applicable provisions of the Data Retention Specification of the 2013 Registrar Accreditation Agreement (<http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#data-retention>). While IPC would not object in principle to the specific waiver requested, so long as it is adequately demonstrated that without a waiver OVH will face an irreconcilable conflict between its contractual obligations under the RAA and its legal duties under applicable national law, we question whether the materials thus far submitted constitute the adequate demonstration needed.

As we understand the OVH submission, its request for a waiver relies almost exclusively upon the argument that if it were to retain the data in question for two years after the expiration of the domain name registration sponsorship, it would be in violation of French data protection law, specifically Article 6-5 of the *Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers, et aux libertés*. The letter contained in the submission from the French national data protection authority, CNIL, dated 17 December 2013, expresses the view of that agency that "it does not seem to be the case here"¹ that the two-year retention period is "no longer than is necessary for the purposes for which they are obtained and processed,"² as required by Article 6-5 of the French statute. We read this as expressing CNIL's view that the two-year period is too

¹ Our English translation of "ce qui ne semble pas être le cas en l'espèce."

² English translation provided in the letter of Mme Poidevin, page 3.

long; but it is not entirely clear within the four corners of the documents submitted by OVH that this amounts to a conclusive demonstration that OVH will be in legal jeopardy under French law if it were to respect the contractual obligation it has taken on. Before it grants this waiver, ICANN should take whatever steps it reasonably believes will be sufficient (including seeking input from relevant law enforcement or related bodies) to establish and document the authoritative and actionable character of the CNIL statement upon which the submission relies.

Another aspect of the request may need clarification before ICANN takes final action upon it. The basis for concluding that the change from a two-year to a one-year retention period is necessary in order to cure the asserted conflict between the French data protection law and the RAA contractual requirement is unclear. The one-year retention period is derived from a different provision of national law, Decree No. 2011-219, which we understand to have been issued under the authority of a different statute than the one which is relied upon as the basis for the asserted conflict.³

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.

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 OVH SAS 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, Vice President

³ For example, it is not clear whether OVH is asserting that this decree is applicable to it in its role as domain name registrar, or whether it is arguing by analogy from its obligations under the decree in other roles that it may play in a particular instance, such as ISP or web hosting company.