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Directorate-General for Communications Networks, Content and Technology

Electronic Communications Networks and Services  
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CNECT D1

**Subject: Current ICANN Procedure for Handling Whois Conflicts with Privacy Law**

This section describes the Whois Procedure as implemented today, and identifies issues for consideration in the upcoming ICANN's review. In order to guide the reader through the comments, the same language provided by the ICANN-made questionnaire is used. The replies provided by the European Commission are marked in *italics*.

***Step one: Notification of Whois proceeding***

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The Whois Procedure currently requires a registry or registrar first to demonstrate evidence of potential conflict with national law. An effective procedure would emphasize consistent contractual requirements, while respecting applicable laws, and include review of valid and authoritative documentation as evidence of an issue to be addressed. The questions raised below aim to guide the discussion so as to reach a resolution that meets these objectives.

Some have expressed concern that the current Whois Procedure puts the contracted parties in the position of first signing an agreement that requires them to provide services that may contradict local laws. These stated concerns raise the question of the appropriate threshold to invoke a formal procedure.

In contrast, the data retention waiver process in the 2013 RAA first requires either a ruling of, or written guidance from, a governmental body of competent jurisdiction, or a legal opinion from a nationally recognized law firm in the jurisdiction, whose analysis indicates a conflict between the contractual requirements and local law. Considering all these issues, it would be helpful to hear from the community on the following questions:

**1.1 Is it impractical for ICANN to require that a contracted party already has litigation or a government proceeding initiated against it prior to being able to invoke the Whois Procedure?**

*As a preamble, it is important to recall that the attribution of domain names and the use of them by registrants to interact with the public on the Internet is a matter that goes beyond a purely private contract between parties, and needs to serve broader public interests involved in creating a safe and reliable environment, including preventing and fighting crimes on the internet, securing the protection of personal data of Internet users or ensuring respect and enforcement of consumer rights. Contractual obligations for registrars and registries that pertain to the Whois database(s) must therefore be construed in a way that ensures consumer protection, data privacy, the effectiveness of criminal investigations, and that the disclosure of personal data is lawful.*

*The procedural requirements proposed by ICANN to invoke the procedure for handling Whois Conflicts with privacy law (hereafter referred to as 'the Whois procedure') can be considered as placing a disproportionate burden on ICANN' registrars and registries.*

*At the same time, the decision of granting of an exemption to the implementation of the contractual requirements concerning the collection, display and distribution of Whois data should remain exclusively based on the most authoritative sources of interpretation of national legal frameworks and be carefully framed so as to ensure that waiving compliance from obligations that ultimately serve an important public interest is not done without full and appropriate justification.*

*Indeed, the current procedure invites a party to enter into a contractual relationship which could prove to be in breach of its local laws without any possibility for potential conflicts of law to be brought to ICANN's attention other than a litigation procedure, which may also involve significant and unnecessary legal expenses. ICANN should not force its contracted parties to face legal action as a result of certain provisions of its standard contracts being potentially in breach with regional and local laws.*

*Therefore, the European Commission welcomes the fact that, as ICANN states, no registrar nor registry has had to formally invoke the Whois Procedure to date because ICANN has shown openness to negotiate changes to contractual agreements to accommodate local data privacy restrictions through other available channels, such as the Registry Service Evaluation Process (RSEP), or the 2013 RAA's Data Retention Specification Waiver. The European Commission would encourage ICANN to continue this practice, but would also like to recall that although preventive measures are welcome, the requirement to be in breach of law to guarantee that there is a conflict of law might seem excessive, as the situation may require a case-by-case approach, a country-per-country approach or a regional approach.*

*In case the Whois Procedure is invoked, the European Commission would recommend interpreting the requirement of demonstrating evidence of a potential conflict widely and e.g. accepting information on the legislation imposing requirements that the contractual requirements would breach as sufficient evidence. The current wording allows for such an extensive interpretation as it lets any "action" suffice, which can be construed to comprise legislative action. This would allow a registry or registrar to invoke the Procedure in good time and come to an understanding with ICANN before sanctions or other negative consequences are imposed. However, in case of conflict the opinion of authoritative (regulatory or judicial bodies) shall prevail over opinions of private legal counsellors.*

*The procedure should also have a starting date as it should have an ending date. The resolution of the conflict should take place within a reasonable amount of time (recommended duration of 6 months maximum).*

### **How can the triggering event be meaningfully defined?**

*Again, the European Commission would recommend interpreting the requirement of producing initial evidence of a potential conflict widely and e.g. accepting information on the legislation imposing requirements that the contractual requirements would breach as sufficient to notify ICANN of a potential breach and thus start the procedure, so as to avoid the imposition of sanctions.*

*Where conflicts of law are evident and substantiated, ex-ante measures could be put in place such as a proper jurisdictional analysis being carried out by ICANN's legal and compliance department;*

*analysis of the relevant jurisprudence and case-law; engagement with the relevant governmental regional and local authorities; or acceptance of recommendations and legal opinions issued by competent bodies in the area of concern, as well as by judicial competent authorities or also legal opinions issued by law firms within the jurisdiction concerned.*

*It must be noted that the European Commission remains concerned of ICANN's language in the documentation provided, when making reference to "authoritative documentation as evidence", and which equates the legal value of the evidence provided by an opinion of a "governmental body of competent jurisdiction" with the one provided by the "legal opinion of a nationally recognised law firm". ICANN could take into account, for instance, to opinions of competent advisory bodies such as national data protection authorities rather than to well-founded opinion of private legal experts. Against this background it is worth noting that issues of interpretation or application of laws and conflicts of jurisdiction in an authoritative manner remains a matter privy to the competent courts and judicial bodies.*

*In addition, ICANN's 2005 GNSO council resolution, approved by the Board in 2006 and mentioned by the IPC in their comments as noting that the burden of proof can be measured in terms of whether an affected party can "credibly demonstrate that it is legally prevented by local/national privacy laws or regulations from fully complying with applicable provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS" provides a good starting point in terms of principles of for this review. It is by all means desirable that the contracted party provides sufficient safeguards for granting a waiver request because such demonstration requires de adequate legal backing. This however, should not prevent that the threshold is lowered down in some jurisdictions like the European Union in which compliance is already satisfactory under standards defined at regional level and applied at national level in 28 Member States, and not necessarily under the parameters determined by ICANN.*

## **1.2 Alternatively, does that suggest the Whois Procedure has not been invoked because of an absence of enforcement action?**

*The procedure may have never been invoked for reasons such as:*

- a) Absence of conflict of law;*
- b) Possibility to negotiate changes to contractual agreements to accommodate local data privacy restrictions;*
- c) General lack of understanding of contracting parties in the area of EU data protection;*
- d) Complexity of the procedure against risks posed by lack of compliance;*
- e) Low level of compliance by Registries and Registrars in areas where there are clear and complex conflicts of law;*
- f) Excessive level of trust in compliance monitoring by ICANN;*
- g) Low awareness of risks for regional and national authorities;*

## **1.3 Are there any components of the triggering event/notification portion of the RAA's Data Retention Waiver process that should be considered as optimal for incorporation into a modified Whois Procedure?**

*As a general comment, both processes should be completely brought in line, in the matter less cumbersome for the contracted parties (Registry / Registrar) but at the same time effective and with adequate checks and balances to guarantee that lawful provisions of the ICANN contracts with registrars and registries related to Whois data collection, display, distribution and retention are complied with.*

#### **1.4 Should parties be permitted to invoke the Whois Procedure before contracting with ICANN as a registrar or registry?**

*Again, the preferred means of solving such conflicts would be through the alternative ways pointed out by ICANN itself, which allow for a resolution before signing the contract. In the alternative, parties should be allowed to alert ICANN as soon as possible when it becomes evident that a conflict exists between an ICANN contractual agreement and national rules. There should be no need to wait for any official administrative procedure or litigation process to be initiated.*

*While assessing the particular conflict of laws brought to ICANN's attention, the organisation could refer to previous cases which have already triggered the Whois procedure by other registrars or registries in the country concerned and in which it is prima vista evident that the contractual provisions were contrary to national law.*

#### **1.5 Would reaching different solutions with different registries with respect to exemption or modification of Whois requirements in light of different laws in various jurisdictions raise questions of fair and equal treatment?**

*Due to legal fragmentation across countries, unequal treatment cannot be avoided. With respect to the interpretation of data protection rules in the EU, it is recommended to engage with government authorities and/or National Data Protection authorities at local level since EU Member States have implemented the EU Data Protection Directive differently.*

*This unequal treatment might not necessarily lead to market fragmentation but to enhanced compliance and swift overcome of technical complexities in managing registrant data. In legal terms such different treatment across different legislation would not differ from any other issue or context where the same factual situations are governed by different laws in various jurisdictions, as long as all subjects in a given jurisdiction would be treated equally (i.e.: all parties within the same country or region) under the same WHOIS related requirements and in compliance with national law.*

#### **Step two: Consultation**

Currently, the Whois Procedure calls for consultations between ICANN and the contracted party. Where appropriate, ICANN will consult with local/national enforcement authorities or other claimants together with the contracted party. In addition, it prescribes that ICANN seek counsel from the relevant national government, pursuant to advice from the GAC. Under 2.3 of the Whois Procedure, the contracted party must notify ICANN of any changes it proposes to make as a result of legal/regulatory action affecting Whois-related contractual obligations.

With an emphasis on supporting compliance with the contractual Whois obligations to the greatest extent possible, identifying the relevant parties to the process is a crucial next step. In addition to ICANN and the contracted party, the relevant data protection authorities (DPAs) or other legal/governmental entities, as well as intellectual property and trademark owners, and the general public have an interest in how Whois requirements are implemented in each jurisdiction. Public interest considerations may also be relevant insofar as accessing domain name registration information via Whois is an important tool for transparency. In addition, as the process reflects ICANN's values of transparency and stakeholder engagement, all affected parties should be made aware of any issues and provided opportunities to contribute to the discussion.

Looking ahead, it will be important to consider how to include all the relevant parties' interests in the resolution of WHOIS requirements' conflicts with national laws.

**2.1 As the current Whois Procedure incorporates consultation between the contracted party and ICANN, as well as relevant legal or other government authorities, are there other relevant parties who should be included in this step?**

*It is recommended that ICANN, through the Governmental Advisory Committee, draws up a list of relevant contacts of Data Protection Authorities in order to establish working relations and clarify issues of competence and authority.*

**What should their roles be in the consultation process?**

*The consultation shall be led in good faith and in an effort to reach a resolution. Relevant authorities can contribute by issuing guidance; providing expert support; pointing out relevant regulation and jurisprudence or contribute to the interpretation of case-law. National data protection authorities may help ICANN better understand national data protection frameworks and contribute to enhance its levels of compliance, as well as to foster an environment of healthy competition.*

***Step three: Analysis and recommendation***

This provision assumes that the parties can reach a compromise that will meet most of both parties' objectives. According to the Whois Procedure, any solution would be presented to the ICANN Board for a decision after preparation of a public report and recommendation. Prior to the publication of that public report and recommendation, the registrar/registry may request certain items be redacted from the report, such as communications between the contracted parties, and ICANN's General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN.

In the ideal scenario, this step would include detailed guidelines for ensuring confidentiality, as necessary, balanced with the openness and transparency practices of ICANN. The registrar/registry is also provided a chance to comment to the Board on the public report and recommendation, which they may request to be kept confidential prior to any Board resolution. The report's recommendation should include justification for the decision, including the anticipated impact on operational stability, reliability, security, or global interoperability of the DNS.

**3.1 How is an agreement reached and published? What standards for confidentiality, accountability and transparency are considered in advance of publication?**

*As a matter of principle in public policy, transparency should prime over confidentiality. Confidentiality shall be limited to the minimum necessary. In order to protect personal data, commercial data, etc. Article 4 (as well as other relevant sections) of the European Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents can provide an example.*

*In case that an agreement is reached, it is a matter of due diligence that ICANN not only make the arrangement public through its online resources but duly notify the relevant competent authorities at national or regional level, where applicable.*

**3.2 If there's an agreed outcome among the relevant parties, should the Board be involved in this procedure?**

*The ICANN Board should not be involved in decision-making issues departing from the arrangement agreed between ICANN's contractual or legal department and the relevant counterpart. To the contrary, the ICANN board should remain fully involved for what concerns transparency of the process and of the final arrangement or outcome, and for equal treatment reasons.*

#### **Who should make the final determination to grant an exemption or modification?**

*The final determination shall be done by ICANN upon evidence that the conditions set forth in the WHOIS conflict of law process have been sufficiently met, and that the necessary (properly qualified) evidence has been provided that a conflict of laws exists or that a waiver should be granted. It is however relevant to stress that in case of conflict between ICANN's final determination to grant and exemption or modification and a national law, the final determination, if ICANN was to ignore applicable law, should probably be brought to a competent court.*

#### **Step four: Resolution**

Under the Whois Procedure, a determination is made by the Board, which considers the ICANN public report and recommendations, and can take one of four possible actions: approving or rejecting the recommendation with or without modifications; seeking additional information from affected parties; scheduling a public comment period on the public report and recommendation; or referring the report to the GNSO for its comment. A clearly defined, timely decision-making process is necessary for an effective resolution process.

Because granting or denying exemptions or modifications can have broader impacts beyond the single applicant, public dialogue may be an important piece of determining a resolution. To that end:

#### **4.1 Would it be fruitful to incorporate public comment in each of the resolution scenarios?**

*Yes. All measures mentioned above (public report and recommendations, seeking additional information from affected parties; scheduling a public comment period on the public report and recommendation; or referring the report to the GNSO for its comment) are welcome, but the European Commission remains unconvinced of the legal value that those measures may have in complicated matters of application of laws which are of competence of public authorities.*

*The European Commission would suggest adding to ICANN's transparency measures at least the notification of the changes to the relevant competent authorities at national level. It is suggested that ICANN uses its Governmental Advisory Committee as channel to convey changes in sensitive matters of public policy such as data protection, data retention and conflicts between contractual clauses and national laws.*

#### **4.2 What other avenues for engagement may be used to reach a mutually agreeable resolution?**

*Again, the preferred means of solving such conflicts would be through the alternative ways pointed out by ICANN itself and the additional suggestions contained in these comments, which allow for a resolution before signing the contract.*

#### **Step five: Public notice**

Publication of the Board's decision, together with the public report and recommendation, on the ICANN website is the final step. If an exemption or modification is granted, step five provides that ICANN will issue an explanation for the organization's decision to forego enforcement of compliance

with the contractual provision in question or allow modification of the requirement. The Board will publish its rationale for each decision.

Looking ahead to on-going implementation of exemptions or modifications once a resolution is reached:

**5.1 What impacts would an exemption or modification have on the contract and on others in the same jurisdiction?**

*As noted above, the same exemption should apply to others in the same jurisdiction who can demonstrate that they are in the same situation. It could be considered whether an exemption or modification could have an erga omnes effect for a given jurisdiction. This would help reduce the cost of the contracting process, of the compliance process and avoid litigation.*

5.2 Is the exemption or modification termed to the length of the agreement? Or is it indefinite as long as the contracted party is located in the jurisdiction in question, or so long as the applicable law requiring the objection is in force? The latter applies.

*The exemption should be limited to the duration of the agreement, unless the conditions that gave shape to the agreement are changed. Otherwise renovation shall be granted. By logic the exemption or modification shall be in place as long as the party is subject to the jurisdiction in conflict with ICANN rules. If the applicable law was to change, or the contracted party moved to a different jurisdiction, the conditions should be reviewed to assess if the exemption is still justified.*

**5.3 Should an exemption or modification based on the same laws and facts then be granted to other affected contracted parties in the same jurisdiction without invoking the Whois Procedure?**

*As suggested above, an exception granted to a registrar or registry in a given jurisdiction could be applied to all registrars or registries in the same jurisdiction and identical situation. However, a minimum degree of control over evidence of the conflict of laws and adequate documentation should be required, without granting the exemption immediately.*

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