



May 10, 2018

RE: Follow-up to WP29 23 April meeting

Andrea Jelinek
Chairperson, Article 29 Data Protection Working Party

Dear Chairperson Jelinek,

Thank you for the opportunity to meet in Brussels on 23 April 2018. We appreciated that the application of the European Union's General Data Protection Regulation (GDPR) to WHOIS is of interest to a wide range of stakeholders globally, and the opportunity to further discuss with you ICANN's proposed interim model for compliance is helpful to addressing areas that will benefit from clarification. As we shared, your guidance and willingness to continue to engage on these important matters is most appreciated as we work to develop our compliance framework while balancing the inputs ICANN has received from the Article 29 Working Party (WP29), the 2,500 parties (with whom ICANN has contracts enshrining the Domain Name System's policies and procedures), governments, and the Internet community.

As we discussed during our meeting, we appreciate that ICANN's role in providing the technical coordination of the WHOIS system is a unique matter before you, as you work to provide implementation guidance in light of the public interest nature of WHOIS, compared to most data collection and usage purposes. We appreciate partnering with you and all stakeholders on this effort.

We continue to work with the ICANN Board of Directors together with the community on the important next steps to be in compliance with the law. As we also shared with you, our timeline includes work to address the advice from ICANN's Governmental Advisory Committee, as well as developing the contractual framework to enforce compliance with the proposed "Interim Compliance Model". Our continued dialogue with the WP29 is part of our overall work including evaluating all of our available options to ensure we in a position to maintain a stable and secure Internet and comply with our Bylaws obligations relating to WHOIS.

As we promised during our meeting, we wanted to follow-up as well with questions to the guidance provided in your 11 April 2018 letter and from our 23 April 2018 meeting. Your responses to these questions would be very helpful in solidifying our understanding of your guidance.

Plan of Action

1. The Commission Nationale de L'informatique & Libertés (CNIL) has communicated that it does not plan to immediately impose fines after 25 May 2018, rather it intends to encourage

compliance, especially for businesses that have established a roadmap to become compliant.

- a. Is this the view of other members of the WP29?
 - b. Do such indications from the CNIL have relevance to Article 60 GDPR and the duty for lead supervisory authorities to cooperate with the other supervisory authorities?
2. During the 23 April meeting, ICANN shared a timeline with a plan for action/roadmap for ICANN and the 2,500+ registries and registrars (as data controllers) to come into compliance with the GDPR.
- a. Is it sufficient for ICANN to provide a coordinated plan of action for the 2,500 + data controllers (ICANN, registries, and registrars), or must individual registries and registrars submit plans?
 - b. Is there a specific process for submitting a plan of action for review and approval by the WP29?
3. In our discussions, you've indicated that you do not currently have the authority to provide forbearance to ICANN organization while it seeks to implement its plan of action once we have clarification of outstanding issues. We also understand that DPAs, can however, take into consideration measures which have already been taken or which are underway when DPAs determine an appropriate regulatory response upon receiving a complaint.
- a. Has the plan of action submitted by ICANN provided sufficient information for fines not to be immediately imposed on ICANN and the 2,500+ data controllers who operate the WHOIS system for the public benefit?
 - b. Is there any additional information that ICANN could provide to put the WP29 in a position to issue a statement according to which the national supervisory authorities will not enforce the GDPR against ICANN and the contracted parties for a certain period of time and under certain to-be-negotiated conditions?
 - c. If WP29 confirms that GDPR does not allow national supervisory authorities nor the European Data Protection Board to grant forbearance for individual data controllers as stated during the 23 April meeting, is the WP29 in a position to issue a statement acknowledging the important functions fulfilled by the WHOIS service, the recent efforts undertaken by ICANN to ensure the compliance of the WHOIS system and reassuring that such efforts (measures taken or underway) will be duly considered when determining the appropriate regulatory response upon/if receiving possible complaints from data subjects?
4. In light of the difference between ICANN providing the technical coordination of WHOIS in the public interest and the uniqueness of that role as compared to traditional for-profit

entities, are there avenues ICANN should consider to simplify its proposed compliance approach while ensuring it can meet its public interest obligations?

Purpose Specification

5. WP29 describes ICANN’s mission by referencing the first sentence in ICANN’s Bylaws [Section 1.1(a)], i.e. to “ensure the stable and secure operation of the Internet’s unique identifier systems...” While focusing on the first sentence of ICANN’s mission, this does not consider the additional specificity provided in the Bylaws about how ICANN is to carry out its mission.

With respect to the WP29 guidance to ICANN to “take care in defining purposes in a manner which corresponds to its own organizational mission and mandate”, and “not to conflate its own purposes with the interests of third parties,” the following details in the Bylaws with respect to ICANN’s mission and mandate should be considered:

- a. The Bylaws require ICANN to perform its mission “for the benefit of the Internet community as a whole...” (Sec. 1.2) In this regard, ICANN’s mission and mandate specifically requires ICANN to take into account the interests of others – not just ICANN organization.
- b. The Bylaws include a specific requirement for ICANN to undertake a periodic review of WHOIS. This review must take into account whether WHOIS is meeting the legitimate needs of others. (“The Board shall cause a periodic review to assess the effectiveness of the then current gTLD registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data.”) [Sec. 4.6(e)(ii)]
- c. The Bylaws specifically obligate ICANN to “adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection” prior to authorizing an increase in the number of gTLDs in the root zone. [Section 4.6 (d)]
- d. ICANN’s mission with respect to names, while narrow, is not limited to technical stability. Specifically, the Bylaws provide that ICANN’s purpose is to “coordinate the bottom-up, multistakeholder development and implementation of policies for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS”. [Bylaws Section 1.1(a)(i) and Annex G-1 and G-2.]

The topics, issues, policies, procedures and principles for which ICANN is to coordinate include for example, resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names) and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar.

- e. But for ICANN acting in a coordinator role for the WHOIS system, and its ability to contractually enforce policies developed by the community about WHOIS, it is likely that many registries and registrars would cease providing this service as it represents only a cost of doing business for them.
6. ICANN considers that each element included in the purpose description provided in Section 7.2.1 of the proposed Final Interim Model (page 34) is in furtherance of the coordinator role that ICANN is performing in ensuring access to the decentralized databases that make up WHOIS. An understanding of the underlying assumptions made by the WP29 when considering the purposes in the Final Interim Model, would enable us to further solidify if need be.
 7. In light of the comments from the WP29 (as well as the International Working Group on Data Protection in Telecommunications a.k.a. the Berlin Group) about limiting data processing to only what is required by ICANN's narrow technical remit, does the WP29 take issue with the continued collection and transfer of the full WHOIS data set in any of the following activities?
 - a. Collection of full WHOIS data from registrant by registrar
 - b. Transfer of full WHOIS data from registrar to registry
 - c. Transfer of full WHOIS data from registrar to data escrow provider
 - d. Transfer of full WHOIS data from registry to data escrow provider

Access to non-public WHOIS data

8. The WP29 reiterates that any publication of WHOIS data relating to a natural person must be necessary to achieve the legitimate, specified and explicit purposes which are to be determined clearly by ICANN. We would be grateful to understand further:
 - a. Whether the proposed interim compliance model must apply to domain name registrations that include personal data associated with a registration of a legal person?
 - b. In the following example extract of WHOIS output, must Göran Marby's name, email address, or other details be redacted from publication in public WHOIS?

Doman Name	icann.org
Registrant Name	Göran Marby
Registrant Organization	ICANN
Registrant Street	12025 Waterfront Drive, Ste 300
Registrant City	Los Angeles
Registrant State/Province	California
Registrant Postal Code	90094
Registrant Country	US

Registrant Phone	+13103015800
Registrant Phone Ext	
Registrant Fax	+1 310 823 8649
Registrant Fax Ext	
Registrant Email	goran.marby@icann.org

Security

9. In the 11 April letter, WP29 “encourages ICANN to develop appropriate policies and procedures applicable to incidental and systematic requests for access to WHOIS data, in particular for access by law enforcement entities.” The WP29 notes that law enforcement agencies might be arranged through for example Europol provided that this can be done in accordance with the applicable legal frameworks. We would appreciate knowing to which “applicable legal frameworks” are the WP29 referring.
10. ICANN would like further clarification about the WP29’s guidance that “ICANN should ensure that registrars and registries have appropriate logging and auditing mechanisms in place to detect possible misuse.” Given this guidance:
 - a. Must the identity of the person/entity submitting a WHOIS query be required to be visible to the registrant or other third parties? If so, would this apply to all queries of a registry’s or registrar’s WHOIS database, including queries of data published in public WHOIS?
 - b. Must requests from law enforcement for access to non-public WHOIS be required to be visible to the registrant or other third parties?

International Transfers

11. To ensure that transfers of personal data to third countries or international organizations comply with the requirement contained in Chapter V of the GDPR, ICANN will require such transfers to take place on the basis of an adequacy decision of the Commission (as provided for in Article 45), or for example, where the controller or processor has provided appropriate safeguards, and on condition that enforceable data subject rights and effective legal remedies for data subjects are available as provided for in Article 46. Given this, does the WP29 have any concerns with ICANN’s proposed approach to international transfers of personal data?

Data Retention

12. In the 11 April letter, the WP29 “urges ICANN to re-evaluate the proposed retention period of two years and to explicitly justify and document why it is necessary to retain personal data for this period.” We understand that there is no uniform EU-wide data retention rule due to a ruling by the European Court of Justice, and thus it is difficult to understand exactly what data retention policy and duration an organization should consider. Does the WP29 have a view of the appropriate data retention period that should be considered?

Codes of conduct and accreditation

In the 11 April letter, the WP29 “encourages ICANN to explore a wide range of mechanisms that could be used to identify third parties who have a legitimate ground for accessing non-public WHOIS data, under which conditions, and under which safeguards.”

13. When advising on the purposes of processing personal data, the WP29 “cautions ICANN not to conflate its own purposes with the interests of third parties, nor with the lawful grounds of processing which may be applicable in a particular case.” However, with respect to the processing activities about access to non-public WHOIS data, the WP29 “encourages ICANN to explore a wide range of mechanisms that could be used to identify third parties who have a legitimate ground for accessing non-public WHOIS data, under which conditions, and under which safeguards.” We would be grateful if the WP29 could clarify its views on these matters as the two statements seem to perhaps be contradictory?
14. Does the WP29 have specific concerns with ICANN’s approach of working with the ICANN Governmental Advisory Committee, which is comprised of over 175 governments and over 30 International Governmental Organizations (IGOs), including the European Commission and other Member States, to identify categories of third parties who have a legitimate interest in the non-public WHOIS data so that public policy considerations are taken into account?
15. Does the WP29 have suggestions for additional mechanisms that could be used to identify third parties who have a legitimate ground for accessing non-public WHOIS data, under which conditions, and under which safeguards?
16. Would codes of conduct or accreditation/certification mechanisms as envisaged by article 41-43 GDPR be available to ICANN and the Domain Name System (DNS) community as a framework for developing a program for those with a legitimate interest to access non-public WHOIS data?

We look forward to continuing to work with you on these important matters and appreciate any additional guidance you may be able to provide.

Best regards,



Göran Marby
President and Chief Executive Officer
Internet Corporation for Assigned Names and Numbers (ICANN)