

Joint-Controllership: Additional Questions to Consider

Below, please find some follow-up questions regarding responsible parties from both ICANN and the EPDP Team. The sources of the questions are specifically noted below. We expect to continue discussing these questions during Monday's call. The relevant text from the Initial Report is also included after the questions.

1. "It may be possible that ICANN and the contracted parties, if at all, are joint controllers for certain, limited, and clearly defined processing activities, but not for "any and all" such activities." (quote from ICANN memo)
 - Based on ICANN's review of the data processing workbooks, are there any processing activities for which ICANN believes it is a joint controller, or alternatively, processing activities for which ICANN believes it is an independent controller? (question from EPDP Team during small team call)
2. ICANN mentions multiple times in the memo that a detailed analysis needs to be conducted to determine the legal situation.
 - When does ICANN expect to conduct further legal analysis? Has there been any additional work following the delivery of the memo that ICANN is willing to share? (question from Thomas Rickert)
3. How should processing by Registries, ICANN, Data Escrow Providers, Dispute Resolution Providers, etc. be factored into the analysis since these parties have no direct contractual relationship with the data subjects and data may only be available to them in limited circumstances? (question from ICANN memo)
4. The EPDP Team has spent time discussing purposes of processing, but it does not seem that there has been an opportunity to focus attention on the means of processing. Both components should be equally analyzed to assess where there is controllership or joint controllership. The purposes and means need to be treated separately, to determine the extent to which each party determines the purposes and the means of the processing. (question from ICANN memo)
5. Controller agreement:
 - Would the contacted parties need to have a single joint controller arrangement between ICANN org and all Registries and Registrars? Or would ICANN org have separate joint controller arrangements with each of the 2,500 + Registries and Registrars? (question from ICANN memo)
 - Would every Registry be a joint controller with every Registrar, even if they don't do business together? Would resellers be part of the joint controller arrangement? Back-end providers? Data escrow providers? Proxy registration services? Dispute resolution service providers? Zone file users? The Trademark Clearinghouse? (question from ICANN memo)

6. What if one or more contracted parties disagree that they are joint controllers? What about contracted parties who primarily do business in jurisdictions outside of the European Economic Area; would they also be required to execute a (or "the"?) joint controller agreement? (question from ICANN memo)
 7. Who would be responsible for issuing notices to Registrants as the data subjects? What would happen if a notice is deficient? Would all parties be liable? (question from ICANN memo)
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INITIAL REPORT LANGUAGE

Processors, Controllers, Co-Controllers and Joint Controllers

Controller is the person or entity, that alone or jointly with others, determines the purpose and means of processing. Processing, in turn is *“any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction”*.

Pursuant to Art. 4 no. (7) GDPR “controller” means the natural or legal person, public authority, agency or other body which, **alone or jointly with others**, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.

Art. 26 GDPR specifies the joint responsibility in terms of specifying the manner in which those jointly determining the purposes and means of processing shall be responsible (“Joint Controller”). Decision-making power concerning purpose and means of processing directly correlates to determining responsibility.

In contrast to joint controllers, processors do not have the right to make decisions with regard to the purposes and means of processing, but act for the contractor (controller) with a duty to comply with the controller(s)’ instructions.

Nonetheless, insofar as the processors, as agents acting on behalf of the controller(s), have options to select or design the purpose or means of processing, they will then be considered to be controllers jointly with the contractor and correspondingly have additional obligations.¹

¹ Klabundein Ehmman/Selmayr, „Datenschutz-Grundverordnung“ Art.4 marg. no. 29

The purpose of processing is an “expected result that is intended or guides planned actions”. The means of processing is the “type and manner in which a result or objective is achieved”².

Processors are distinguished from [joint]controllers based on the following criteria:

- A person or entity that has no legal or factual influence on the decision concerning the purposes for and manner in which personal data is processed cannot be a controller.
- A person or entity that alone or jointly with others decides on the purposes of processing is always a controller.
- The controller may also delegate the decision(s) concerning the means of processing to the processor, as long as content-related decisions, e.g. concerning the legitimacy of processing, are reserved for the controller.
- Processors are independent legal persons who are different from the controller and who process data on behalf of the controller(s) without deciding on the purposes of processing.³

Where two or more different organizations jointly determine the purposes or the essential elements of the means of the processing they will be joint controllers and must enter into an agreement in the form required by Art. 26 of the GDPR. The participation of the parties to the joint determination may take different forms and does not need to be equally shared. Jointly must interpreted “as meaning ‘together with’ or ‘not alone’ in different forms and combinations” and “the assessment of joint control should mirror the assessment of ‘single’ control”. Therefore, it cannot be assumed that ICANN and the contracted parties are co-controllers for the processing of data, rather than joint controllers. A co-controllership would require two or more parties which are completely independent of one another, co-operatively working together in the processing of data but for different purposes.

ICANN and the EPDP Charter Questions and How the Above Principles are Applied Herein

As discussed below, the processing of registration data is covered by the overarching purpose of the registration of a domain name by all three parties in this process.

Purpose of Art. 26 GDPR

The regulation is to primarily protect of the rights and freedoms of data subjects.⁴ This document is intended to address the clear allocation of responsibilities in relation to ensure the rights of data subjects. In more complex role allocations, e.g. in the area of domain registration with several distribution levels, the data subject’s right of access and other rights are to be guaranteed across levels.⁵

“The definition of the term “processing” listed in Article 2 lit. b of the guideline does not exclude the option that diverse actors participate in diverse operations or sets of operations in

² Art. 29 Data Protection Working Party, Statement 1/2010 of 16 February 2010, p. 16, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_de.pdf

³ Art. 29 Data Protection Working Party, Statement 1/2010 of 16 February 2010, p. 18, 39, 40, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_de.pdf

⁴ *Bertmannin Ehmman/Selmayr* “Datenschutz-Grundverordnung” Art. 26, marg. no. 1

⁵ Art. 29 Data Protection Working Party, Statement 1/2010 of 16 February 2010, p. 27, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_de.pdf

connection with personal data. These operations can be executed simultaneously or in diverse stages. In such a complex environment it is even more important that roles and responsibilities are allocated to ensure that the complexity of joint control does not result in an impractical division of responsibility that would affect the effectiveness of data protection law.”⁶

Recital 79 GDPR furthermore clarifies that the regulation is to simplify monitoring by the supervisory authorities.

The factual control of the data processing, as well as control over external effects vis-à-vis the data subject, is determinative when reviewing responsibility.

Furthermore, processing should not be artificially divided into smaller processing steps, but can be uniformly considered as a set of operations. In this respect, data collection, passing on to the registry, review and implementation and ongoing management of the registration can be considered as one set of “domain registration” operations, because it pursues the overall purpose of registering the domain for a new registrant. This also applies if diverse agencies pursue different purposes within the processing chain, when engaged in the detail of smaller processing steps on a micro level. On a macro level, the same purpose is pursued overall with all small steps in the chain, so that a uniform set of operations specifically applies here (Art.29 Group WP 169, p. 25).

Differentiation is required when considering the operation of collecting and processing the data collected by the registrar from its customers in order to create an invoice, to maintain a customer account, and to manage the contractual relationship with its customers. This data fulfils another purpose that is not codetermined by the registry and ICANN.

Registry, registrar, and ICANN must be assessed as joint controllers for the set of operations of domain registration (Art. 4 no. (7) GDPR) as listed in the below table. Due to the factual and legal separation between registrar and registry, a domain registration can mandatorily be performed only by both entities jointly and governed by ICANN for gTLDs.

In this respect, it must be assumed that ICANN, registrars and registries jointly determine the purposes and means of processing that are compulsory for domain registration overall. In this respect, these are responsible for this set of operations pursuant to Art. 4 no. (7) and 26 GDPR.

This also corresponds to the legislative intent to have clear and simple regulations concerning responsibility in case of multiple participants and complex processing structures, and to prevent a splitting of responsibilities to protect the data subjects as far as possible.

Pursuant to Article 1 Section 1.1 of the ICANN bylaws, ICANN has responsibility:

“to ensure the stable and secure operation of the Internet's unique identifier systems as described in this Section 1.1(a) (the “Mission”). Specifically, ICANN:

⁶ Art. 29 Data Protection Working Party, Statement 1/2010 of 16 February 2010, p. 22, available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp169_de.pdf

(i) Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("**DNS**") and coordinates the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ("**gTLDs**"). In this role, ICANN's scope is to coordinate the 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 including, with respect to gTLD registrars and registries, policies in the areas described in Annex G-1 and Annex G-2;"

As already stated, ICANN fulfils this responsibility among other things by contractually specifying for the various participants the data which must mandatorily be collected and retained. With these legitimate provisions, ICANN specifies a purpose for the processing operation overall and thus becomes joint controller in addition to registry and registrar.

It should be noted that ICANN's responsibility is unaffected by the fact that certain requirements have been decided upon by multiple stakeholders or have determined and put into effect through a community effort. Such joint discussion or drafting of certain policies or requirements does not place ICANN in a role as the entity ultimately requiring the contracted parties to act in accordance with the policies issued by ICANN.

Joint and several liability

Pursuant to the joint responsibilities of all joint controllers herein, the data subject in accordance with Art. 26 (3) GDPR, may as a general rule fully assert its claims vis-à-vis to all controllers, regardless of the contractual allocation.

Even with a clear distribution of the responsibility between the controllers, all controllers are liable vis-à-vis external parties for the overall processing operation.

In this respect, Art. 82 (4) GDPR mandates joint and several liability for the data subject's right to compensation and supplements the liability regulations of Art. 26 (3) GDPR. The factual responsibility may be adjusted only *inter partes*. Therefore, having clear allocations between the parties is even more important *inter partes*.

Fines

However, such joint and multiple liability does not apply to fines under Art. 83 (4) lit. a) GDPR. In this respect, registry and registrar are liable pursuant to their role allocation for breaches in their area or against duties under the GDPR, which were incumbent upon them within the scope of the contractual basis.

Joint Controller Agreement

Joint controllers must furthermore specify, in a transparent form, who fulfills which duties vis-à-vis the data subjects, as well as who the contact point for data subject's rights is (Art. 26 (1) p. 2 GDPR).

However, the data subject is authorized to address any of the participating responsible agencies to assert its rights, regardless of the specification concerning competence (Art. 26 (3) GDPR).

The agreement is to regulate the specific controllers that are to fulfill the duties prescribed by GDPR. Pursuant to Recital 79 GDPR, the following must be specifically regulated in a transparent form:

- how the relations and functions of the controllers among each other are designed,
- how roles are distributed between controllers to fulfill data subject rights of registrants,
- through which controller a respective supervisory authority oversees, provides guidance and executes supervisory, monitoring measures and/or claims and fine assessments.

All controllers must fulfill information obligations independently from each other. However, Art. 26 GDPR suggests that multiple controllers fulfill information obligations centrally. Details shall be agreed upon between the parties.

Therefore, in relation to the above, as described, the EPDP, has set forth within the Initial Report, the Responsibility of each named party in relation to the specified Purposes, listed and based on the legal basis recommendations, for the respective Purpose and in relation to its duties performed for the data subject. It has furthermore, in line with the reasoning herein, provided a draft Joint Controller Agreement, as part of its legal recommendations, which correspondingly lays out the respective Purposes and responsibilities of each party in line with the respective duties owed to the data subject and the joint and severable liability prescribed to those duties, as described and specified.

Needed contractual changes to the RAA or the obligations owed to or by the Registrars and Registries and ICANN hereunder will need to be supplemented and put into place accordingly.

EPDP Team Preliminary Rec #1.

Based on the information and the deliberations the EPDP Team had on this topic and pending further input and legal advice, the EPDP Team recommends that ICANN negotiates and enters into a Joint Controller Agreement (JCA) with the contracted parties.

In addition to the legally required components of such agreement, the JCA shall specify the responsibilities of the respective parties for the processing activities as described below. Indemnification clauses shall ensure that the risk for certain data processing is borne by either one or multiple parties that have the primary interest in the processing.