

RECOMMENDATION 13

#	Comment	Contributor	EPDP Response / Action Taken																		
<p>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 Org negotiates and enters into a Joint Controller Agreement (JCA) with the Contracted Parties.</p> <p>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.</p>																					
<table border="1"> <caption>Pie Chart Data</caption> <thead> <tr> <th>Response Category</th> <th>Count</th> <th>Percentage</th> </tr> </thead> <tbody> <tr> <td>Support recommendation as written</td> <td>19</td> <td>45%</td> </tr> <tr> <td>Support intent of recommendation with edits</td> <td>4</td> <td>10%</td> </tr> <tr> <td>Intent and wording of this recommendation requires amendment</td> <td>2</td> <td>5%</td> </tr> <tr> <td>Delete recommendation</td> <td>0</td> <td>0%</td> </tr> <tr> <td>Not designated</td> <td>17</td> <td>40%</td> </tr> </tbody> </table>				Response Category	Count	Percentage	Support recommendation as written	19	45%	Support intent of recommendation with edits	4	10%	Intent and wording of this recommendation requires amendment	2	5%	Delete recommendation	0	0%	Not designated	17	40%
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<p>Support recommendation as written</p>																					
1.	No comments provided in support of this recommendation	<ul style="list-style-type: none"> Volker Greimann; Key-Systems GmbH Zoe Bonython; RrSG Domain.com, LLC & affiliates 	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>																		

#	Comment	Contributor	EPDP Response / Action Taken
		<ul style="list-style-type: none"> • Michele Neylon; Blacknight Internet Solutions Ltd • Mark Massey; Domain Name Rights Coalition • Sivasubramanian Muthusamy; Internet Society India Chennai • Monica Sanders; i2Coalition • DR. JAIDEEP KUMAR MISHRA ; DIRECTOR MINISTRY OF ELECTRONICS AND INFORMATION TECHNOLOGY, GOVERNMENT OF INDIA • David Martel • Etienne Laurin • Ben Butler; SSAC • Farzaneh Badii; Internet Governance Project 	
2.	While we support the recommendation, it is with the caveat that the JCA will not equally allocate responsibility among the parties. Instead, it will identify which party is controller/processor for each set of processing in our rather complex ecosystem.	Sara Bockey; GoDaddy	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>

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3.	<p>Understanding and specifying the roles and responsibilities of ICANN and the contracted parties is a critical and unavoidable part of compliance with the GDPR. There can be disagreements about the appropriate definition of roles, indemnification, and so on, but there cannot be any serious disagreement about the need to enter into such an agreement.</p> <p>Based on our understanding of the GDPR, ICANN and the contracted parties are joint controllers with respect to the Whois (or RDDS). We also believe that a joint controller agreement is the best way to achieve clear and simple lines of responsibility when there are multiple participants and complex processing structures. This will protect data subjects by preventing a splitting of responsibilities in ways that allow the controllers and processors to avoid responsibility.</p>	Ayden Férdeline; NCSG	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>
4.	<p>Based on the factual and legal analysis conducted to date by the EPDP of the data elements processed by the respective parties (ICANN, the Registrars and Registries), it appears that a joint controller relationship exists. COA therefore supports this recommendation. If, however, further findings on this topic result in a different determination of roles and responsibilities, then COA ultimately supports the appropriate controller/processor arrangement that can enable ICANN to assume sufficient legal responsibility such that ICANN can compel relevant contracted parties to respond to WHOIS queries from accredited requestors, most likely as part of a Unified Access Model currently being explored by ICANN.</p>	Dean S. Marks; Coalition for Online Accountability	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>
5.	<p>ICANN is either a controller, dictating which data contracted parties must collect (as evidenced by the tone of this questionnaire), or a joint controller. In either case, an agreement is required by law.</p>	Tucows Domains Inc.	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>

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6.	<p>Microsoft supports whatever controller/processor arrangement enables ICANN to assume enough legal responsibility such that ICANN can compel its contract parties to respond to Whois queries from accredited requestors, most likely as part of a Unified Access Model currently being explored by ICANN.</p> <p>We agree that a joint controller arrangement looks promising and we support the recommendation that ICANN Org negotiates and enters into a Joint Controller Agreement (JCA) with the Contracted Parties.</p>	<ul style="list-style-type: none"> Jeremy Dallman, David Ladd – Microsoft Threat Intelligence Center; Amy Hogan-Burney, Richard Boscovich – Digital Crimes Unit; Makalika Naholowaa, Teresa Rodewald, Cam Gatta – Trademark; Mark Svancarek, Ben Wallace, Paul Mitchell – Internet Technology & Governance Policy; Cole Quinn – Domains and Registry; Joanne Charles – Privacy & Regulatory Affairs; Microsoft Corporation 	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>
7.	<p>We support the rationale offered in the initial report. There has been criticism of the joint controller approach, but more based on concerns regarding the implementation. To date, no other concept has been proposed with a sufficient level of detail to even assess the legality. Absent a sound alternative proposal, the joint controller approach shall be pursued.</p> <p>The parties at risk of being sanctioned as well as the wider community should bear in mind that</p> <ul style="list-style-type: none"> - not having the arrangements / agreements in place or - having agreements in place that do not provide adequate rights to the data subjects <p>poses significant risks on contracted parties. Implementing a joint controller setup does not seem to have any of the two above risks. If and when competent authorities constitute that fewer or other requirements are sufficient, the concept can be changed, but for the time being, the community should ensure that there will be no compliance risks that could not only put contracted parties but also ICANN at stake.</p>	<ul style="list-style-type: none"> Lars Steffen; eco – Association of the Internet Industry Wolf-Ulrich Knoblen; ISPCP Constituency 	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>

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8.	<p>Understanding and specifying the roles and responsibilities of ICANN and the contracted parties, is a critical and unavoidable part of compliance with GDPR. There can be disagreements about the appropriate definition of roles, indemnification and so on, but there cannot be any serious disagreement about the need to enter into such an agreement.</p> <p>Based on our understanding of the GDPR, ICANN and the contracted parties are joint controllers with respect to the Whois (or RDDS). We also believe that a JCA is the best way to achieve clear and simple lines of responsibility when there are multiple participants and complex processing structures. This will protect data subjects by preventing a splitting of responsibilities in ways that allow the controllers and processors to avoid responsibility.</p>	Farzaneh Badii; Internet Governance Project	<p>Support</p> <p>EPDP Response: The EPDP appreciates the support</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>
Support intent of recommendation with edits			
9.	<p>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 Org negotiates and enters into a Joint Controller Agreement or the appropriate Controller-Processor agreement with the Contracted Parties and the needed Data Processing Addendums.</p> <p>MarkMonitor believes that based on the factual and legal analysis conducted by the EPDP Team of the data elements processed by the respective parties (ICANN, the Registrars and Registries) that a joint controller relationship should exist. While we are open-minded as to the controllership scenario, we support formalizing a legal relationship that allows ICANN to enforce data disclosure requests made under reasonable access requirements and future accredited access requirements. Accordingly, we support this recommendation as to installing a Joint Controller Agreement and Data Processing Addendums, as necessary, to clarify the roles, responsibilities, and liabilities of the parties, thereby establishing the required legal framework and working solution to bring the ICANN ecosystem in line with GDPR.</p>	Brian King; MarkMonitor, Inc., a Clarivate Analytics company	<p>Concerns</p> <p>EPDP Response:</p> <p>Action Taken:</p> <p>[COMPLETED / NOT COMPLETED] – [Instruction of what was done.]</p>
10.	<p>The RySG suggests the following edits to Recommendation #13: “The EPDP Team recommends that ICANN Org negotiates and enters into required data protection agreements such as a Data Processing Agreement (GDPR Art. 28) or Joint Controller Agreement (Art. 26), as appropriate, with the Contracted Parties.</p> <p>In addition to the legally required components of such agreement, the agreement shall specify the responsibilities of the respective parties for the processing activities as described therein. Indemnification clauses shall ensure that the risk for certain data processing is borne by either one or multiple parties that determine the purpose and means of the processing.”</p> <p>While the RySG acknowledges the deliberations and work undertaken by the EPDP Team on this matter, we believe that ICANN Org and the Contracted Parties should work together to determine not only the terms of the agreements, but which type of agreement best reflects the</p>	Wim Degezelle ; RySG	<p>Concerns</p> <p>EPDP Response:</p> <p>Action Taken:</p> <p>[COMPLETED / NOT COMPLETED] – [Instruction of what was done.]</p>

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	<p>realities of the domain name ecosystem and the roles each party plays in the required data processing activities.</p> <p>Some Registries strongly believe that a Joint Controller Agreement (“JCA”) is the most appropriate form for a data protection agreement between ICANN and Contracted Parties because it (i) specifically allocates factual responsibility for data processing, (ii) defines and controls each party’s liability, and (iii) provides required transparency for data subjects. Under a JCA, ICANN and Contracted Parties can clearly structure their data processing relationship by defining roles and responsibilities where purposes and means of processing are shared. This approach more accurately reflects the complexities of the domain registration process and likely aligns with how DPAs would view the data processing performed by the parties, regardless of whether parties self-designate as sole controllers.</p> <p>The RySG also reiterates that speculation about future models for access should not influence the form of a data processing agreement between the parties. The RySG has previously raised concerns regarding the feasibility of a Unified Access Model (“UAM”). However, setting aside issues with the merits of that proposal, an arrangement where ICANN is solely responsible for decision-making regarding the disclosure of data to third parties is not prohibited merely because ICANN is party to a JCA with Contracted Parties. ICANN retains the flexibility to act as a sole controller outside of the shared purposes with Contracted Parties.</p>		
11.	<p>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 Org negotiates and enters into either a Joint Controller Agreement or Controller-Processor agreement with the Contracted Parties.</p> <p>The BC supports any controller/processor arrangement that will enable ICANN to assume sufficient legal responsibility such that ICANN can compel contracted parties to respond to Whois queries from accredited requestors, most likely as part of a Unified Access Model.</p>	Steve DelBianco; BC	<p>Concerns</p> <p>EPDP Response:</p> <p>Action Taken:</p> <p>[COMPLETED / NOT COMPLETED] – [Instruction of what was done.]</p>

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12.	<p>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 Org negotiates and enters into a Joint Controller Agreement or the appropriate Controller-Processor agreement with the Contracted Parties and the needed Data Processing Addendums.</p> <p>The IPC believes that based on the factual and legal analysis conducted to date by the EPDP of the data elements processed by the respective parties (ICANN, the Registrars and Registries) that a joint controller relationship exists. It therefore supports this recommendation as the application, negotiation and installation of a Joint Controller Agreement and the needed Data Processing Addendums will proportionality make clear the roles and responsibilities of each party and the attributable respective liability of each party. It will therefore in sum lay out the needed legal framework and working solution for the update ICANN ecosystem in line with GDPR and data protection laws. If further findings on this topic result in a different determination of roles and responsibilities, the IPC ultimately supports the appropriate controller/processor arrangement that can enable ICANN to assume sufficient legal responsibility such that ICANN can compel relevant contracted parties to respond to Whois queries from accredited requestors, most likely as part of a Unified Access Model currently being explored by ICANN.</p>	Brian King; IPC	<p>Concerns</p> <p>EPDP Response:</p> <p>Action Taken:</p> <p>[COMPLETED / NOT COMPLETED] – [Instruction of what was done.]</p>
Intent and wording of this recommendation requires amendment			
13.	[None]		
Delete recommendation			
14.	<p>DELETE Recommendation</p> <p>"pending further input and legal advice, the EPDP Team recommends" -- Go get the "further input and legal advice" and then come back with your recommendation. See additional comment below.</p> <p>"Last but not least, we have the fundamental issue of who is the data controller, and whether ICANN and the contracted parties are joint controllers. The EPDP Recommendation #13 is [see above] ICANN's legal department seemed surprisingly unprepared to deal with these questions, and ICANN Org's liaisons to the EPDP seemed to be missing in action through discussions of this issue until the very end. Because this issue touches on complex legalities and on the distribution of liability between ICANN org and the contracted parties, it is a sleeper issue that could blow up the whole process."</p> <p>https://www.internetgovernance.org/2018/11/25/whois-privacy-reform-hits-its-first-milestone/</p>	John Poole; Domain Name Registrant	<p>Divergence</p> <p>EPDP Response:</p> <p>Action Taken:</p> <p>[COMPLETED / NOT COMPLETED] – [Instruction of what was done.]</p>

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15.	The U.S. believes that this recommendation appears to go beyond what is necessary for the EPDP. Proposing a specific legal vehicle (i.e., Joint Controller Agreement) without adequate consideration of how this would impact ICANN and the different types of registries and registrars that are ICANN’s contracted parties is concerning and has the potential to derail the work of the group.	Ashley Heineman; NTIA	<p>Divergence</p> <p>EPDP Response:</p> <p>Action Taken:</p> <p>[COMPLETED / NOT COMPLETED] – [Instruction of what was done.]</p>
Not designated			
16.	No selection made and no additional comments submitted	<ul style="list-style-type: none"> • Greg Aaron; iThreat Cyber Group • George Kirikos; Leap of Faith Financial Services Inc. • Evin Erdoğan; ALAC • Monique A. Goeschl; Verein für Anti-Piraterie der Film- und Videobranche (VAP) • Fabien Betremieux; GAC • Lori Schulman Senior Director, Internet Policy; International Trademark Association (INTA) • Greg Mounier on behalf of Europol AGIS; Europol Advisory Group on Internet Security • Neil Fried; The Motion Picture Association of America • Sajda Ouachtouki; The Walt Disney Company • Tim Chen; DomainTools • Steve Gobin; Corporate domain name management 	<p>EPDP Response: none</p> <p>Action Taken: none</p> <p>[COMPLETED]</p>

#	Comment	Contributor	EPDP Response / Action Taken
		<ul style="list-style-type: none"> • Brian Beckham; Head, Internet Dispute Resolution Section • Theo Geurts • Ivett Paulovics; MFSD Srl URS Provider • Ashley Roberts; Valideus • Renee Fossen; Forum - URS and UDRP Provider • Stephanie Perrin 	