

Non-Commercial Stakeholders Group

*Representing the interests and concerns of
noncommercial Internet users in domain name policy*

13 October 2017

To: Theresa Swinehart, SVP Multistakeholder Strategy Initiatives
Akram Atallah, President Global Domains Division

cc: Dr Steve Crocker, Chair, Board of Directors
Göran Marby, Chief Executive Officer

Re: ICANN's non-compliance with European data protection law

Dear Ms. Swinehart and Mr. Atallah,

As you may be aware, the Non-Commercial Stakeholders Group (NCSG) represents the interests of non-commercial domain name registrants in the formulation of Domain Name System policy within the auspices of the Generic Names Supporting Organisation (GNSO). We are proud to have individual and organisational members in over 120 countries.

Since our inception, we have facilitated global academic and civil society engagement in support of ICANN's mission, stimulating an informed citizenry and building their understanding of relevant DNS policy issues. We have long sought to raise awareness of the need for ICANN to comply with privacy and data protection legislation, though it is with sadness that we state our perspectives were viewed as a threat, not an asset. We have never been treated as an equal partner alongside the other stakeholder groups.

We are aware that the Business Constituency¹ and the Intellectual Property Constituency² have written to you recently in relation to the impact of the European Union's General Data Protection Regulation (GDPR) on WHOIS, and the actions that these parties believe ICANN should take to achieve compliance with the GDPR.

We share the views of the Intellectual Property Constituency that ICANN "must leverage the deep knowledge within the community and take advantage of the knowledge and experience gained by many years of ICANN community activity and research in this area." Amongst our members are internationally-recognised data protection experts who have previously informed ICANN that existing domain name policies are incompatible with the data protection laws of many jurisdictions, not only in Europe. Through our participation in various ICANN working groups, we are also aware that ICANN has commissioned, and received, useful and tailored legal advice from the law firm Wilson Sonsini Goodrich & Rosati that we believe can satisfactorily answer the questions that the Business Constituency and the Intellectual Property Constituency have asked of you.

¹ <https://www.icann.org/en/system/files/correspondence/mack-to-crocker-marby-31aug17-en.pdf>

² <https://www.icann.org/en/system/files/correspondence/shatan-to-swinehart-atallah-02oct17-en.pdf>

It is our opinion, informed by the legal advice ICANN has obtained from Wilson Sonsini Goodrich & Rosati, that the comments from the Business Constituency and the Intellectual Property Constituency involve a misread of the GDPR which, at best, underestimates the risks associated with non-compliance and, at worst, entirely dismisses the public interest in respecting the fundamental right to privacy. That right, we remind you, is enshrined in the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the European Charter of Fundamental Rights, and in over 100 national constitutions.

We encourage ICANN to carefully consider the remarks of the business community and of the cybercrime fighting community who have been extremely vocal in the current Next-Generation Registration Directory Service Policy Development Process Working Group, in the light of their own risks. It is our view, that in the case of the intellectual property community, they are externalising the risks from their actions onto ICANN and the contracted parties. It is our strongly felt and deeply held opinion that ICANN policies must adhere to applicable laws, including privacy and data protection regulations. The current usage of WHOIS data by other parties cannot be a valid rationale to delay compliance or to seek a waiver from such obligations. ICANN owes no obligation to, and is not responsible for, how or why other parties use WHOIS. To do so would be reckless and expose ICANN, as the data controller, to real liability under the GDPR.

Since we have been raising data protection issues since the inception of ICANN, and inviting the Data Protection Commissioners to ICANN, we would like to remind you that we would appreciate being involved in any discussion and dialogue that is taking place in relation to compliance with the GDPR. We should not, as representatives of civil society, have to pound on the door to be included on panels or in discussions, as has consistently been the case. We look forward to an update on compliance efforts in Abu Dhabi.

As active stakeholders in the ICANN multistakeholder community, we want to participate in the policy changes which will see ICANN come into compliance with data protection law after a 19-year record of sweeping it under the rug. However, if we are excluded from the process, and feel that once again certain stakeholders with everything to gain and nothing to lose from the collection of end-user data are getting the ear of senior management, whilst we get the cold shoulder, we are afraid that we will have to launch a public campaign to raise awareness amongst Data Protection Authorities and civil society organizations regarding ICANN's continued, 19-year streak of non-compliance with data protection law. As we are sure you are aware, the new GDPR gives individuals the right to sue the Data Protection Authorities for failure to protect end-user rights, so should the business lobby and ICANN be successful in getting some kind of compromise that still abrogates the rights of individuals, we will have to try our hand in the Courts.

Warm wishes,

Tapani Tarvainen
Chair, Non-Commercial Stakeholders Group