

ARTICLE 29 Data Protection Working Party



Brussels, 11 December 2017

Dr. Cherine Chalaby and Mr. Göran Marby
Chairman and President and CEO of the Board of Directors
Internet Corporation for Assigned Names and Numbers (ICANN)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Dear Mr Chalaby and Mr Marby,

I am writing to you regarding the ongoing discussion on the application of privacy laws to the WHOIS directories.

The EU Data Protection Authorities, united in the Working Party on the Protection of Individuals with regard to the Processing of Personal Data (hereinafter: WP29) have expressed their concerns regarding the unlimited publication of WHOIS-data on the Internet since 2003. These concerns have been reiterated in following letters to ICANN in 2006 and 2014.

WP29 is aware of the current discussions within ICANN about the publication of WHOIS directories in view of the General Data Protection Regulation (GDPR), which will become applicable law on 25 May 2018. Note has been taken of the statement from ICANN of 2 November 2017 about WHOIS-data. In this statement, ICANN announces that actions against registries or registrars for noncompliance with contractual obligations related to the handling of registration data are deferred under certain conditions. One of these requirements is to share a compliance model with ICANN.

WP29 wishes to stress that the unlimited publication of personal data of individual domain name holders raises serious concerns regarding the lawfulness of such practice under the current European Data Protection directive (95/46/EC), especially regarding the necessity to have a legitimate purpose and a legal ground for such processing. Determining whether (and to what extent) these concerns are justified is ultimately for the DPAs to decide, although the primary responsibility for ensuring compliance with the law is with the data controller(s).

At first glance it would seem that since ICANN and the registries jointly determine the purposes and means of the processing of personal data for the WHOIS directories, ICANN and the registries are joint controllers. This would mean that both ICANN and the registries

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental rights and rule of law) of the European Commission, Directorate General Justice and Consumers, B-1049 Brussels, Belgium, Office No MO59 02/27

Website: http://ec.europa.eu/justice/data-protection/index_en.htm

must ensure that personal data are processed in accordance with the obligations of the European data protection laws.

WP29 welcomes that ICANN has finally decided to seek qualified legal advice and to engage with DPAs on that basis. While this comes late and an earlier reaction to the WP29 advice could have helped to avoid the current state of uncertainty, the WP29 reiterates its longstanding invitation to enter into a dialogue with ICANN and its stakeholders to discuss the issues, including possible ways to address them.

In theory, three of the six legal grounds (from art. 7 of the Data Protection Directive 95/46/EC) are available for publication of WHOIS-data by ICANN:

- Consent from the individual domain name holder;
- Necessary for the performance of a contract;
- Necessary for the purposes of the legitimate interests pursued by the controller (except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject).

As of 31 July 2017, ICANN has amended its Registry Agreement by means of the 2017 Global Amendment to Registry Agreements. ICANN since then requires that registries impose an obligation on registrars to obtain consent for the publication of personal data in WHOIS directories from individual domain name holders.

Concerning the unlimited publication of WHOIS-data on the Internet, on first examination, and without prejudice to a more detailed assessment:

- since this consent is a requirement for obtaining a domain name, it is not freely given and therefore would not be a valid legal basis for the publication of WHOIS-data;
- even though ICANN concludes contracts with registries which require them to publish WHOIS directories, the individual domain name holders are not a party to these contracts. Therefore, ICANN and the registries would not be able to rely on the ground 'necessary for the performance of a contract';
- ICANN and the registries would also not be able to rely on a legitimate interest for making available all personal data in WHOIS directories to the general public.

Whilst the data protection authorities united in WP29 recognize that, inter alia, enforcement authorities entitled by law should have access to personal data in the WHOIS directories, they also underline that the original purposes of the WHOIS directories can be achieved via layered access. In this respect, the unlimited publication of WHOIS-data does not appear to meet the criteria of article 6.1 (c) of directive 95/46/EC (personal data must be adequate, relevant and not excessive in relation to the purposes of the WHOIS directories). WP29 has stressed the importance of layered access to the personal data contained in the WHOIS directories since 2003.

Since the GDPR is based on the same principles as the data protection Directive, and there is no fundamental change in the available legal grounds, WP29 urges ICANN to analyse whether modifications to its WHOIS-policy are needed. Several registries are exploring their options regarding layered access to their WHOIS directories to fulfil their obligations under current European and national privacy laws.

Should ICANN be considered as a joint controller, it would also need to comply with the requirements of art. 4 of the current Data Protection Directive. This notably means that ICANN must either indicate one or more relevant establishments in the EU, or appoint representatives in the Member States. It is up to the data protection authorities to decide which party they will address if there are joint controllers. From 25 May 2018, ICANN may benefit from the one-stop-shop principle in the GDPR, and suffice with the appointment of one lead establishment or one representative in the EU. The DPA in this Member State will then be the lead DPA and the point of contact for ICANN.

I look forward to your early reply.

On behalf of the data protection authorities united in WP29,

Yours sincerely,

On behalf of the Article 29 Working Party,

Isabelle FALQUE-PIERROTIN
Chairwoman