

To: GNSO Council

From: Thick Whois IRT

Date: 15 December 2016

Re: Privacy Issues in Thick Whois Implementation

The Thick Whois Implementation Review Team (IRT) has discussed extensively some changes in the privacy law environment that have occurred since the GNSO Council Consensus Policy Recommendations on Thick Whois were adopted by the ICANN Board on 7 February 2014, and wish to share with you our observations. While the IRT has not reached consensus on whether any of these changes require additional policy consideration by the GNSO Council, we are in agreement that some of these changes may complicate the process of implementing the thick Whois policy by some registrars and registries. While we have no reason to think that the implementation issues that these registrars and registries must address will impede the timetable the IRT has proposed for making the transition to thick Whois structure for all gTLD registries, as unanimously recommended by the Council, we wanted you to be aware of them. (The IRT's proposed transition plan is currently out for public comment.)¹

As you know, Recommendation #3 of the policy document approved by the ICANN Board read as follows:

As part of the implementation process a legal review of law applicable to the transition of data from a thin to thick model that has not already been considered in the Expert Working Group (EWG) memo is undertaken and due consideration is given to potential privacy issues that may arise from the discussions on the transition from thin to thick Whois, including, for example, guidance on how the long-standing contractual requirement that registrars give notice to, and obtain consent, from each registrant for uses of any personally identifiable data submitted by the registrant should apply to registrations involved in the transition. Should any privacy issues emerge from these transition discussions that were not anticipated by the WG and which would require additional policy consideration, the Implementation Review Team is expected to notify the GNSO Council of these so that appropriate action can be taken.

As required by Recommendation #3, ICANN staff conducted a legal review of law applicable to the transition of data from a thin to thick model and communicated the results of this review to the IRT in a Legal Review Memorandum dated 8 June 2015 (the "Legal Review Memo"). The Legal Review Memo concluded that "the analysis undertaken did not reveal any additional privacy issues not already considered by the Expert Working Group that would be implicated in the transition of data from a thin to a thick Whois model." The Memo focused its analysis on a survey of data protection laws within the EU, and based on that analysis advised the IRT that "there are some important and legitimate questions relating to data protection obligations under local law that must be addressed" as a part of the Thick Whois Policy implementation. It concluded that, in the current legal environment, obtaining consent

¹ <https://www.icann.org/public-comments/proposed-implementation-gns-thick-rdds-whois-transition-2016-10-26-en>

from domain name registrants “is likely to be the most expedient way of addressing the transition to thick Whois,” and noted that “registrars and registries must determine how best to manage their operations as they work to ensure they do not violate principles of local laws.”

In the short period since the Legal Review Memo was provided to the IRT, several important developments regarding EU data protection laws have occurred. Some of these changes may increase the uncertainty of the legal landscape; others may ultimately reduce that uncertainty; and some may have an impact only on certain registries or registrars.

The most important change was the adoption of the EU General Data Protection Regulation (GDPR) earlier this year.² When the GDPR comes into force on May 25, 2018, the current EU Data Protection Framework Directive, which dates from 1995, will be repealed, and the range of national data protection laws will be superseded by a single data protection law applicable across the entire European Union. This change should reduce the uncertainties that arise from the presence of inconsistent or even conflicting provisions of data protection laws in individual Member States under the current Framework Directive. At the same time, while the GDPR retains the recognition of data subject consent as an important basis for authorizing both the processing of personally identifiable information and the transfer of such data outside the EU for such processing, some affected registries and registrars may need to make changes in current practices in how that consent is obtained and documented, as well as with regard to what information needs to be provided to domain name registrants (as data subjects) at the time their personally identifiable information is collected in the domain name registration process. Each such registrar and registry will need to analyze how (if at all) its processes for obtaining and for processing Whois data will need to be adapted to the new GDPR requirements.

Another important series of changes in the overall EU data protection landscape since the completion of the Legal Review Memo involves mechanisms negotiated between the EU and US governments regarding the transfer of personal data from the jurisdiction of the former to the latter. The US-EU “Safe Harbor Program”, which previously provided one means by which to lawfully transfer personal data from the EU to the US, was invalidated by the European Court of Justice in October 2015. Its successor, the “EU- US Privacy Shield” announced in February 2016, and was adopted by the European Commission on 12 July 2016.³ The Privacy Shield has already been the subject of a legal challenge in European courts, whose outcome is uncertain. The impact of these developments on the transition to Thick Whois is unclear. The extent to which any registrars or registries relied upon the Safe Harbor to justify data transfers in the Thick Whois environment is unknown, so its invalidation may be of limited significance in this context. The extent to which registrars or registries are planning to rely upon the Privacy Shield program is also unknown.

² Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and Repealing Directive 95/46/EC (General Data Protection Regulation), 2016 O.J. (L 119/1).

³ See European Commission Press Release, “European Commission launches EU-U.S. Privacy Shield: stronger protection for transatlantic data flows” (available at http://europa.eu/rapid/press-release_IP-16-2461_en.htm).

Finally, in the wake of the invalidation of the US-EU Safe Harbor Program and the development of the EU-US Privacy Shield, the use of consent to effectuate transfers of personal data, which the Legal Review Memo identified as “likely to be the most expedient way of addressing the transition to thick Whois” (p. 10), has been called into question by regulators in the EU, particularly in the context of large and/or repeated transfers of personal data. Both the Irish and German data protection regulators, for example, have indicated that reliance on consent, standing alone, may be problematic and German regulators have determined that consent is not valid for “massive or routine” transfers of personal data.⁴ These policy statements must also be considered by affected registrars and registries as they seek to implement Thick Whois. However, nothing in the fate of either the Safe Harbor or the Privacy Shield operates to change the underlying data protection law in the EU, which, as noted above, will as of 2018 be subject to the uniform requirements of the GDPR.

The IRT believes that all these EU-based developments must be taken into account by registries and registrars as they seek to implement the consensus policy regarding Thick Whois while remaining in compliance with applicable privacy and data protection laws. Moreover, as the Legal Review Memo recognized, EU data protection laws “embody international principles which serve as basis for many data protection laws around the world.” (p. 3), Members of the IRT are also aware of other jurisdictions which have, or are in the process of, enacting regulations with a potential direct impact on thick Whois policies and procedures, such as laws that require personal data to be hosted locally within a particular jurisdiction, whether or not on privacy grounds. The proliferation of these laws and their applicability to the collection, storage, transmission and display of personal data should be a consideration for all gTLD registries and registrars, and in particular for how they implement the transition of gTLDs from a thin to thick Whois model.

In assessing the legal landscape, the 2015 Legal Review Memo pointed out several mechanisms within ICANN which may be available to affected parties to ensure that their operations remain in full compliance with applicable data protection laws. These include the Whois Conflicts Procedure; the possibility of obtaining waivers or forbearance of enforcement of contractual provisions in appropriate circumstances; and the availability of privacy or proxy registration services. All these mechanisms remain available, and indeed the ICANN Board has approved a policy for the accreditation of privacy and proxy services, which, when implemented, will provide a clearer and more transparent regime for their operations.

We hope that this letter provides the GNSO Council with a more complete understanding of how the IRT has considered these issues in the process of designing and proposing an implementation plan for the transition of all remaining thin Whois registries to a thick Whois model.

Sincerely,

Thick Whois Policy Implementation Review Team (IRT)

⁴ See Data Protection Commissioner of Ireland, “Transfer Abroad” Guidance (available at <https://www.dataprotection.ie/docs/Transfers-Abroad/y/37.htm>); Conference of the Data Protection Commissioners of the German Federation and the German States, DSK Position Paper on Safe Harbor Invalidation (available at <https://www.datenschutz.hessen.de/ft-europa.htm#entry4521>).

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