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John Jeffrey  
General Counsel of ICANN

Datum 09-10-2017  
Kenmerk 04696  
Betreft Gemeente Amsterdam FRL Registry B.V. - ICANN

Dear Sir,

I represent the city of Amsterdam and the limited liability company FRLRegistry B.V. regarding the discussion concerning the Registry Agreements ("RA's") concluded with my clients on 24 July 2014 and 15 May 2014 respectively.

ICANN states that my clients are in breach of Clause 2.5 of the RA.

My clients believe ICANN's position is mistaken. Publishing all of the registrants' data as required by the RA is a clear breach of the EU Regulation 2016/679 (the General Data Protection Regulation, "GDPR") that will go into effect 25 May 2018 and also a breach of the Dutch Data Protection Act which is based on the EU Directive 95/46/EC. In particular when the registrants are private citizens.

Publishing the registrant data the RA requires is "processing personal data". Processing is only lawful if it is done in conformity with one of the conditions of Article 6.1 of the GDPR (which are very similar to the grounds of EU Directive 95/46/EC).

The RA implies that such condition shall be the registrant's unambiguous consent (Article 6.1.a RA) where it says in Article 2.18 RA that my clients should require their registrars to obtain such consent with the registrants. This means that the registrars are required to ensure that the registrants may register their domain names only if they consent to, inter alia, the publication of their personal data through the whois. Should a registrant refuse his consent, he does not get the desired domain name.

The registrants' consents therefore are "bundled" with the conclusion of the registrants' agreements. Such "bundled" consents are deemed not to be freely given and therefore invalid. This is clearly stated in Article 7.4 of the GDPR. To overrule this presumption (which is possible) the controller must in this case demonstrate that publishing the registrants' data is either necessary for the execution of the agreement or that the registrant has an alternative for the services offered. Neither of which is the case here. Also the memorandum ICANN has obtained in this respect states as much in the answer given to ICANN's question 11 (memorandum by Christopher Kuner and Bastiaan Suurmond 25 September 2017). For the avoidance of doubt: given the lack of valid consent, no other condition of Article 6.1 of the GDPR allows for such publication.

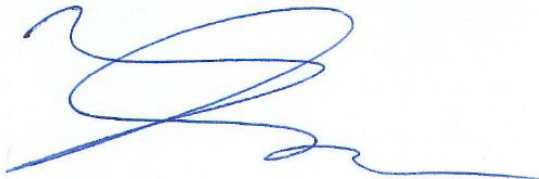
According to Dutch international private law, Dutch law is the law governing the RA. This follows from article 10:154 of the Dutch Civil Code read in connection with Article 4 of the European Regulation 593/2008.

Under the applicable Dutch law a clause that is in violation of the law is null and void. Therefore Article 2.5 in connection with Specification 4 is null and void to the extent that these clauses oblige my clients to publish the registrants' personal data. Therefore, contrary to ICANN's view, there cannot be a breach of contract. One cannot breach an invalid contractual clause.

Article 7.13 RA stipulates that in the event one of the provisions of the RA shall be invalid or unenforceable the parties should negotiate in good faith an alternative provision. My clients believe the way they have arranged for data protection is compliant with the GDPR since it establishes the correct balance between the privacy of the registrants and the legitimate interests of third parties that might need to know who operates a website. Therefore a clause that respects the law and is as close as possible to the invalid provision, could be a clause allowing for the system my clients use. This is my clients' starting point of the good faith negotiations that Article 7.13 RA requires.

I reserve all of my clients rights and remedies and await your answer.

Yours sincerely,



Jetse Spreij