

February 16, 2018

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Dear Göran,

We note that ICANN has signaled its intent to announce its decision by mid-February on what model must be used by registries and registrars to address the challenges presented by the EU's General Data Protection Regulation (GDPR). We strongly urge ICANN to consult with contracted parties before finalizing its decision on a compliance model.

As of today's date, no such decision has been announced. We wish to highlight the confusion and damage to business being caused to all contracted parties by the ongoing delay in finding a solution to the GDPR issues facing both ICANN and its contracted parties. To reiterate, we are now approaching the final three months of a two-year implementation period; despite numerous repeated requests we remain in the dark about ICANN's vision for a unified, GDPR-compliant WHOIS service quite apart from the other consequences that arise as a result of GDPR. Given the need for orderly communication to the market and wider stakeholder constituencies, together with technical implementation work, this is simply unacceptable.

We therefore wish to make the following four points:

- ICANN has published proposed compliance models, which are incomplete sketches and do not represent fully developed or implementable solutions. Moreover, ICANN has not offered any legal analysis of the components of its models or rationale for why it believes that these are legally compliant with GDPR. Other stakeholders share our concern on this matter: for one, the GAC, in its 28 January letter, states that "there does not appear to be a consistent approach to ICANN's analysis of the issues created by the GDPR". Further, the European Commission, in its 7 February letter, establishes that "different data retention periods have been chosen for the different models, without any particular justification" and that there is "some confusion between purposes and the legal basis for processing".
- Numerous, but not all, contracted parties supported the submission of the eco Playbook to ICANN as a possible compliance model. While individual contracted parties may not have formally endorsed every aspect of the Playbook, many of us recognized that it offered a thorough and detailed consideration of various aspects of GDPR compliance for registries and registrars. We looked forward to engaging with ICANN and others on the various matters considered in the Playbook. We are disappointed that to date, ICANN has provided no analysis or feedback on this model.
- Although agreement on an interim compliance model is long overdue, we continue to believe that a "decision" by ICANN must also include input from and coordination with the contracted parties which are primarily responsible for the implementation of any chosen model. A course or model that does not include this input in a meaningful way is contradictory to ICANN's duties

to engage in good faith under its agreements with the contracted parties. We believe that ICANN and the contracted parties must work jointly on an interim compliance model, determine common ground, identify open issues and work towards an interim solution. Such deliberations should be transparent to the wider ICANN community but also explicitly recognize that it is the contracted parties that must quickly implement and rely on such an interim solution.

- Some level of risk may remain in any event, but clearly ICANN cannot in good faith force a model upon the contracted parties that would require assumption of unacceptable levels of risk.

Finally, let us stress again our disappointment with the process and progress made on this critically important subject to date. While ICANN has reminded the contracted parties that “we are in this together”, it continues to move forward unilaterally, without any coordination with contracted parties, and without due consideration of the impact of the upcoming deadline for compliance on contracted parties. This is the approach of a regulator, not the path of a counterparty to a contract that is engaging in good faith under such an agreement. ICANN has previously, for good reason, avoided the perception of a “regulator of the Internet” but through its recent actions, it has de facto begun to assume that role. In addition, ICANN has requested a community solution. Several thoughtful models have been proposed by the community but ICANN has taken inadequate initiative to create constructive dialogue or consensus around those models. Instead, ICANN has announced top-down decisions and half-formed proposals on this matter, creating uncertainty for the entire community.

We remain open for a meaningful dialogue **and will provide our summary of the outstanding open issues very soon with the intention that it prompts constructive discussion.**

Respectfully,

eco Association of the Internet Industry

Internet Infrastructure Coalition

Registrars Stakeholder Group

Registries Stakeholder Group

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