

I. Background and Status of the Report

While thanking other members of the IAG and the ICANN staff for their work during the past eight months, I have to express my disappointment and disagreement with the report as it stands¹. To present this to the GNSO and the ICANN Board would fail both to address the implementation issues that have already been encountered with the existing policy and to present a balanced account of the arguments that have been developed during the IAG's work.

Allow me to recapitulate the principle objections to the report that I have already evoked in the conference calls in which I have been able to participate, and on the mailing List:

1. **The 2005 GNSO policy** referred to in Section 3.1.1 is not a consensus policy in any sense of the word. The report admits that “the Whois Procedure has not been invoked and yet numerous concerns have arisen from contracted parties and the wider community.” In short, the original procedure allowing “exception(s) to contractual obligations ...” has failed.

2. During the May conference call, anticipating that the IAG report might not resolve the problems, I asked for a vote among all IAG members on the mailing list to determine whether this report is in fact a majority report of the WG or a minority report. Although I had understood that the ICANN staff had conceded that a vote was appropriate, no such vote has been undertaken.

I maintain my request for a vote.

II. Specific comments and observations

3. Although the proposed **Alternative Trigger (Appendix 1)** is an improvement on the present situation, and vastly to be preferred to the “Dual Trigger” (Appendix 2), it still leaves a great deal to be desired:

(a) The (repeated) references to '**national**' law casually dismiss the fact that in the European Union the relevant laws are regional in character. The text should refer throughout to 'applicable local law';

(b) The (repeated) references to '**enforcement**' ignore the fact that the entities responsible for authoritative interpretation of applicable law are not necessarily the same as the entities responsible for enforcement. The language used in the report casually dismisses the relevance of the European and national data protection agencies throughout the EU.

(c) The Alternative Trigger proposal still maintains that **each Registry or Registrar would have to individually request a specific exemption**. That would be unjustifiably onerous, costly and time-consuming. I have asked ICANN and IAG to consider a system of 'block exemption' whereby all the contracted parties within the same jurisdiction would receive the same exemption on the basis of a single procedure. Ideally, in the case of the European Union, all contracted parties incorporated in the EU Member States would benefit from a single exemptions.

There are, furthermore, sound **competition grounds for an uniform collective approach**. Under the proposed Alternative Trigger, different contracting parties would be operating under different contract conditions, of varying exigence, at least for a long time to come. Meanwhile, this would tend to distort the domain name market and face Registrants with invidious distinctions depending on whether or not their Registrar had received an exemption.

1. Document dated 7 July 2015, revised and re-issued 9 September 2015.

(d) Regarding the proposed **public consultation phase**, I confess to entertain a certain scepticism. Although it may go against the grain in the ICANN context, I have to say that the general public world wide, and even most of the ICANN community would expect operators such as Registries and Registrars to respect the law (even without the threat of 'enforcement'). They would not expect to be invited to review and comment on written statements from the competent authorities on such a specific legal and technical matter case by case, as the requests for individual exemptions came through the process.

Rather I would suggest that the only interested parties who would wish to comment would tend to be those critics of privacy and data protection policies, who appear to have been responsible for adopting the original 2005 Whois policy, which is at the source of the problems that have had to be addressed by the IAG today.

III. **An alternative Whois policy**

For the sake of completeness, may I also recall that I had proposed that the IAG consider two further options:

- that ICANN should **adopt, globally, international Best Practice** in the matter of Privacy policy and Data Protection. This is not so far fetched: there are several other areas of policy and practice where ICANN applies a higher bar to performance than that which would be required elsewhere. And should continue to do so.

- alternatively, in the matter of exemptions from contract conditions, one could **reverse the burden of proof**. That is, the primary default would be that the contracted party would conform to applicable local law, and that ICANN would have the option to initiate a contrary procedure should it deem that the stability and security of the Internet and the DNS would otherwise be prejudiced.

In this context one may note that numbers of ccTLD Registries and their Registrars do already conform to applicable local law; to the best of my knowledge this practice has never been challenged by ICANN as prejudicing stability and security in any way.

However, ICANN staff have issued the opinion that the mandate of the IAG-WHOIS excludes consideration of alternative and improved policies, which is why the IAG has been obliged to spend a lot of time discussing the implementation of a policy which is seriously flawed in the first place

* * *

In the light of the above, may I once again invite ICANN and the IAG to reconsider the content of the report in question. I shall determine my definitive position in this respect, thereafter.

ICANN is currently being challenged to be accountable to the Community. For present purposes the relevant Community are all the Registrants of all the contracting parties whose personal data is not being protected in conformity with applicable local law consequent on ICANN's contractual conditions, as applied to Whois.