

Item 5: COUNCIL VOTE – Adoption of Implementation Advisory Group Recommendations to Update Procedure on WHOIS Conflicts with National

Comment from Volker Greimann on behalf of the Registrar Stakeholder Group

Registrars have reviewed the proposal contained in the IAG carefully and come to the conclusion that the proposed modification to the procedure is not helpful or desirable as would not improve the ability of contracted parties to comply with local law. Adding a trigger that is impossible to use in many jurisdictions means that the IAG has failed in the task assigned to them by this council.

The original GNSO recommendation as adopted by the ICANN board back in 2006 clearly references that a contracted party needs to clearly demonstrate such conflict, but does not specify which form such demonstration would have to have. This, correctly implemented, would give contracted parties a much needed amount of flexibility to provide such demonstration prior to being faced with enforcement action either by ICANN or by local (privacy) law enforcement. The originally proposed procedure goals are detailed in the final report, so we will not quote them here, but suffice it to say that the proposed new trigger does not meet the goals of the original recommendation.

The proposed new procedure is too narrow and too restrictive to be useful and adopting it at this time would limit the options of contracted parties to discuss and negotiate solutions with ICANN where local laws prevent them from following policies or contractual obligations. While the proposed trigger is broader than the trigger in the current procedure, it is a trigger that when taken to the real world is simply not effective as it assumes a role for certain agencies that these agencies do not have or will not take on. The alternative trigger essentially is a trap for contracted parties as it requires them to contact an agency primarily tasked with finding and penalizing violations of privacy laws and notifying them of a potential violation, essentially triggering the start of an enforcement action against the requester. The new trigger is therefore further exposing contracted parties to a risk that it was supposed to remove. This simply won't do, especially since a workable alternative trigger process is already in place for the Data Retention Specification of the 2013 RAA, which would satisfy the requirements of most contracted parties.

The council should refer this back to the IAG and request that they provide a recommendation that will prove useful in the real world and fully meets the expectations of the goals outlined in the original recommendation. We recognize that more workable trigger proposals have been discussed but were blocked by parties that would not even be affected directly by such conflicts. The arguments against those triggers were not convincing as the use of a trigger mechanism does not predicate the outcome of the process. We therefore propose that these triggers be revisited by the group with the understanding that the use of a trigger does not automatically result in ICANN dispensing the contracted parties affected from their responsibility but rather as the initiation of a process where based on the trigger mechanism further review is initiated by ICANN.