



Comment on WHOIS Requirements and National Law Conflicts

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC). The BC's comments arise from the perspective of Business users and registrants, as defined in our Charter¹:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

On 22-May-2014, ICANN opened a public comment period to solicit community feedback on the Whois National Law Conflict Procedure.²

BC Principles For Resolving National Law Conflicts with WHOIS Requirements

The Business Constituency believes that the current process for Handling WHOIS Conflicts With Privacy Law generally strikes an appropriate balance, by providing a clear path to resolve potential conflicts, without unnecessarily undermining contractual requirements developed through the bottom-up process and approved by the multistakeholder community. To the extent that the community deems it necessary to revise this process, the BC would urge that the same balance be sought in any potential revision.

That the existing conflict process has never been invoked speaks to the great care the ICANN community took in developing this consensus policy to reflect accepted legal norms, and the rarity with which such issues arise. So while it is appropriate that structures exist to address conflicts, and that those structures be periodically reviewed, the record suggests that evolutionary, rather than revolutionary, changes are needed.

In any revised conflict resolution model Business Constituency would urge that it adhere to the following principles:

Respect the rule of law: ICANN contracts do not and should not supersede the rule of law. In those rare instances in which ICANN contractual language clearly conflicts with established law in a certain jurisdiction, the exemption process should provide a clear, tightly focused process for resolving such conflicts.

Maintain a high threshold for conflict resolution: With respect to questions 1.1-1.5, the BC believes ICANN should continue to maintain a high threshold for triggering a conflict resolution procedure. While all agree on the importance of ICANN contracts respecting the rule of law, the conflict resolution process must not be allowed to become a vehicle for gaming the contractual process. Without commenting on the direct question posed in 1.1, the BC believes that the triggering mechanism(s) for the conflict process should be driven by governments, rather than by the contracted parties themselves. Establishing such a threshold should be no obstacle to

¹ Business Constituency Charter, at <http://www.bizconst.org/charter.htm>.

² <https://www.icann.org/public-comments/whois-conflicts-procedure-2014-05-22-en>

legitimate conflicts, about which governments have been very forthcoming with guidance, but will serve to reduce gaming, and preserve a level playing field among contracted parties.

The BC also suggests an alternative to having governments alone drive the conflict resolution process. For example, governments might elect to recognize decisions reached by an independent panel of legal experts selected by the stakeholder community. Once the proceeding has been initiated by an affected party, ICANN and governments could submit positions to such panels, which would recommend a resolution that could potentially be more widely applied.

Minimize the scope of exemptions: Exemptions should be granted in such a manner as to preserve as much underlying contractual language as possible within the scope of the governing legal framework. With regard to questions 5.1 and 5.2, exemptions and/or modifications should be tailored to respond only to the identified conflict, and should remain in effect unless and until:

- the contracted party changes jurisdictions;
- the underlying legal conflict is resolved; or
- the law has been amended to eliminate the conflict.

Exemptions and modifications should be geographically specific, and should not be extended to registrants and registrations not covered under the underlying national law.

Engage the community: The ICANN community should serve as a check against abuse of the conflict resolution process. With respect to questions 2.1 and 4.1, the BC is in favor of allowing constituency groups to provide comment and input at key points in the exemption/modification process. This will serve as an additional check against abuse or gaming of the conflict resolution process. Given the expected low volume of conflict-resolution requests, the added time required to engage in the public comment process should not provide a significant impediment to speedy resolution. Furthermore, with regard to question 3.2, the BC believes the Board should grant final approval to all exemption/modifications.

This comment was drafted by David Fares, Tim Chen, and Susan Kawaguchi with help from John Berard, Andy Abrams, and Stephen Coates. It was approved in accordance with the BC charter.