



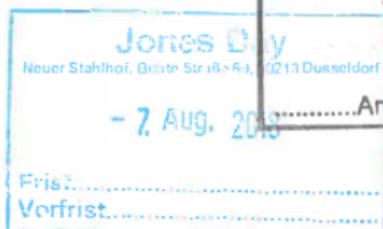
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Bonn, August 1, 2018

In the preliminary injunction proceedings

ICANN ./. EPAG Domainservices GmbH



Docket- No.: 19 W 32/18

we comment on the Applicant's pleading of 11.07.2018 as follows with all due brevity:

It is not accurate that the European Data Protection Board (EDPB) "*supports or is consistent with the Applicants view in all relevant aspects*" (submission of 11 July 2018, p. 1). On the contrary: The EDPB merely confirms that it has taken note of the Temporary Specification ("*The EDSA [sic!] has so taken note of the Temporary Specification [...]*", Appendix **AG 5**, p. 1) - and expressly points out that in its letter it only refers to the Applicant's questions that are "*requiring immediate further consideration*" by the Applicant on the way to the development of a WHOIS model compatible with the GDPR ("*[...] the EDPD [sic!] will respond to the questions raised by your letter in relation to those issues*



requiring immediate further consideration as ICANN proceeds to develop a GDPR-compliant WHOIS model.", Appendix **AG 5**, p. 1). The EDPB thus clarifies that the Applicant's previous efforts are not sufficient.

Where the Applicant points out that the EDPB allegedly shared the Applicant's view, that the Registrant should be given an opportunity to provide contact details for persons other than himself, it disregards the EDPB's basic statement: The EDPB expressly states that Registrants should in principle not be obliged to provide personal data. (*"The EDPD [sic] considers that registrants should in principle not be required to provide personal data directly identifying individual employees (or third parties) fulfilling the administrative or technical functions on behalf of the registrant"*, Appendix **AG 5**, p. 4). However, the RAA contains precisely this obligation in conjunction with the Temporary Specification (see our submission of July 10, 2018, Sections 3.2.2 and 7).

The EDPB ultimately only confirms the obvious: Where no personal data is collected, there are no concerns under data protection law. If the Applicant wishes to open the option of indicating administrative and technical contacts, there must be no obligation to provide personal data. The EDPB has not commented on the the legal requirements to be implemented in the latter case, and the Applicant has not yet taken the necessary steps to be able to collect data on the basis of consent in a legally unobjectionable manner and to transfer it to the Applicant and other parties involved (see our submission of 10 July 2018, Sections 3.2 and 4). The EDPB also requires respective clarifications of the Temporary Specification (Appendix **AG 5**, p. 4)

Furthermore, the EDPB correctly points out that the lawfulness of the collection of personal data is to be considered separately from its publication. However, the Applicant draws the wrong conclusions: The mere fact that the EDPB comments on the publication does not prove that the EDPB considers the previous collection of personal data to be lawful. This is a distortion of the EDPB's statement; it had previously commented on the legal requirements, as described above. As a result, the question of the publication of data can only arise with regard to data that was lawfully collected beforehand. We explained this in detail in our submission dated July 10, 2018.

The results can be summarized as follows: From the EDPB's point of view, the compulsory collection of personal data - i.e. precisely the practice which the Applicant intends to enforce in court with its main application - is prohibited. Insofar as the Applicant now only requires the optional collection and transmission with its alternative claim, this is not covered by the contract -



and even if it were, the Applicant first had to create the legal and factual preconditions in order to enable the Defendant to collect the data on this basis.

Finally, we take the liberty of pointing out that the Applicant is subject to a misconception if it claims as on the last page of its pleading that the GDPR cannot serve as a legal basis for complete rejection of the fulfilment of the contractual obligation to collect Admin-C and Tech-C data. The GDPR is designed as a prohibition with reservation of permission. It is not a question of finding a legal basis for the fact that the data processing requested by the Applicant is not possible, but rather of finding legal bases which allows data processing. However, this is exactly what the Applicant has not yet succeeded in doing.

For further details we refer to our submission of 10.07.2018.

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