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Via fax in advance: [redacted]
Via courier
Appellate Court of Cologne
19th Senate for Civil Matters
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URGENT! Please forward immediately!

In the immediate appeal proceedings

Internet Corporation for Assigned Names and Numbers (ICANN)

- Applicant -

Attorneys of record: JONES DAY Rechtsanwälte,
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versus

EPAG Domainservices GmbH

- Defendant -

Attorneys of record: Rickert Rechtsanwaltsgesellschaft mbH / Fieldfisher (Germany) LLP

Docket- No.: 19 W 32/18

we make reference to the Regional Court's decision dated 16. July 2018 (hereinafter the "Remedy Order") and comment on it as follows:

The Applicant is of the opinion that the Remedy Order of the Regional Court is not justifiable. The Remedy Order does not consider relevant facts and legal aspects of the General Data Protection Regulation (hereinafter "**GDPR**"). Therefore, the Applicant wishes to clarify the facts and legal aspects of the Remedy Order hereafter.

A. The legal assessment of the Remedy Order is not based on the relevant facts

The legal assessment of the Remedy Order is not based on the relevant facts. Instead, the Remedy Order the Regional Court speaks of an allegedly contentious fact and also speaks of circumstances, which are allegedly not possible in the registration process and in the previous registration practice. In this regard, the Applicant feels compelled to draw attention to the following facts:

I. The Remedy Order suggests that there is a dispute between the parties as to whether it is still possible for the Registrant to voluntarily provide the Admin-C and Tech-C contact details in the Defendant's registration process:

> *"The fact that - which is in dispute between the parties – the option to deposit contact data also for the so-called Admin-C and Tech-C is technically no longer provided by the Defendant, insofar even a voluntary provision by the registrant is currently not possible, does not lead to a change of the Chamber's interpretation of the law according to the contested decision of 29 May 2018."* (Remedy Order, p. 2)

But this is not in dispute. The Defendant is still in the position to collect such data but is in the process of changing the system. However, the Defendant no longer requires that Admin-C and Tech-C data is provided:

> *"The Defendant took the GDPR as an opportunity to review its entire data processing processes. In the course of this review, the Defendant has come to the conclusion that a fundamental restructuring of these processes was necessary, and it is currently in the process of implementing this. The amendments also concern, among other things, the Defendant's collection practice with regard to the data on Admin-C and Tech-C that are the subject of the dispute at hand, and the Defendant has announced that it will no longer collect them after the technical systems have been amended accordingly.*
>
> […]
>
> *For the sake of clarification, we would like to point out that domain holders are currently still technically in a position to transmit the data in dispute to the Defendant (however, this is optional for them, and they can also insert placeholders). For technical reasons, it is currently not possible to refuse the acceptance of this data. However, if this data is still transmitted to the Defendant, it no longer uses it, and employees of the Defendant have no access to this data. The Defendant intends to stop the data collection completely as soon as the necessary technical amendments of the interfaces and IT systems have been completed."* (Defendant's submission dated 10 July 2018, p. 3)

Of course, the Defendant is able to further request for Tech-C and Admin-C data from the Registrant. The fact that the Defendant wishes to stop collecting such data by changing its registration process is further evidence of the urgency in this matter. In order to prevent a further domain name allocation without collection of these data and depriving a Registrant of the option to designate a third party as Admin-C and/or Tech-C the Applicant is seeking to have the Defendant ordered to stop offering and registering domain names without collecting the Admin-C and Tech-C data.

II. Furthermore, in order to justify dismissal of the Applicant's application for relief, the Regional Court states in the Remedy Order that "verification of consent" could not take place:

> *„(...) Because verification of consent of third parties indicated under the categories Tech-C and Admin-C - different from the Registrant's personal data - and verification of actual authorization for the collection of their data did not take place and could technically not have taken place within the framework of the registration process described. "* (Remedy Order, page 2, I., para. 2)

Here the court misunderstands what party has the responsibility to ensure consent – if required - is obtained if there is a third party designated as Admin-C or Tech-C. In fact, the Defendant as Registrar is responsible for establishing <u>its own</u> domain name registration process. If the registration process the Defendant has developed to date is not sufficient to ensure that the data is collected in accordance with the GDPR, it must adapt this registration process. For this we refer again to the statement of the Defendant's counsel in Appendix AS 9, page 13, according to which it is possible to obtain the legal consent of the Admin-C and the Tech-C. Nothing in the Temporary Specification and the RAA prohibits or prevents the Defendant from adapting its registration process to comply with the GDPR. To the contrary, Clause 1 of Appendix C of the Temporary Specification (Appendix AS 7) stipulates:

> "*Each Controller will observe the following principles to govern its Processing of Personal Data contained in Registration Data, except as required by applicable laws or regulations. Personal Data SHALL:*
>
> > *1.1.* ***<u>only be Processed lawfully</u>****, fairly, and in a transparent manner in relation to the Registered Name Holders and other data subjects ("lawfulness, fairness, and transparency");*" (Emphasis added)

Firstly, the Court has to differentiate between the requirement of consent and the question of "verification of consent". Secondly, both the consent and adequate "verification" thereof may be obtained by the Defendant during the registration process. The Regional Court did not appropriately consider that the Defendant is free in the design of its registration process towards a Registrant and its contractual terms with the Registrant to the

extent the Defendant does not violate its obligations towards the Applicant under the RAA and the Temporary Specification. For example, the Defendant could require the Registrant to provide it with a consent declaration - signed by the Admin-C and Tech-C. Or he can simply seek assurance from the Registrant that it has received consent from the Admin-C and Tech-C. This is also undisputed between the parties. Both ways would also provide a "verification of consent".

III. The Regional Court further wrongly believes that providing Admin-C and/or Tech-C data (if different from the Registrant) is optional, which, in the Court's view, makes it clear that the collection of this "optional" data may not be necessary.

The collection of data is **necessary** as soon as the Registrant has chosen the option to delegate the tasks of Admin-C and Tech-C. This is also implicitly conceded by further remarks of the Regional Court. It recognizes that the Admin-C and Tech-C could not be contacted if their data was not collected. The Regional Court states:

> *„The fact that these support persons due to the absence of their contact details cannot be contacted directly by the Defendant as Registrar affects in no way the legal position of the registrant. If necessary, the registrant's additional organizational effort is limited to merely forwarding notifications by the Defendant addressed to the registrant to the support persons employed by the registrant for the technical or administrative area."*

This additional effort of forwarding notifications is not only required for Registrar inquiries, but also for inquiries of any third party regarding the registered domain name. Effectively, this would defeat the purpose of delegating the tasks in the first place as the Registrant would have to continue to monitor any incoming correspondence and then forward it to the appropriate persons. Furthermore, the Registrant would then also have to manage the follow-up communication. And from a legal point of view it would be solely liable for any delayed reactions. Furthermore, this would complicate the work of third parties who are responsible for the security of the system and as such are dependent on quick and competent reactions.

The Regional Court apparently does not want to take this "additional organizational effort" into account when examining the necessity. It thus ignores the fact that avoiding this "extra effort" is a legitimate interest.

The parallels to authorized representatives named in the trademark registers are evident. The legislator has expressed in the relevant legal regulation that the trademark owner has a legitimate interest in being represented externally. It would be contradictory if it were legitimate for a trademark owner to delegate certain responsibilities but to argue at the same time that it would be illegitimate for a Registrant of a domain name to delegate certain responsibilities. The legitimate interest to delegate certain tasks becomes obvious

in particular in the event that the Registrant is not familiar with domain names and the rights and obligations associated with them.

IV. With regard to the alternative applications, the Regional Court opines that the alternative applications are not enforceable and therefore not admissible.

The Regional Court wrongly held that the alternative applications are "*too vague to determine how consent is to be secured or recorded in the registration process in the future and what specific action is therefore requested from the Applicant* [sic!]" (Remedy Order, p. 4). As stated above, the Defendant is responsible for its registration process. If the Defendant's current registration process does not foresee a legally compliant way to obtain the Admin-C's and Tech-C's consent if different than the Registrant, the Defendant must adapt it accordingly. The Defendant must also choose a legally compliant way of checking whether personal data is provided at all. The Regional Court's suggestion that the examination of whether personal data is provided cannot take place because the data has already been collected, is not correct. Each data collection enables the Controller to check the data. The Defendant must be able to examine the application and, if necessary, reject it if personal data is provided and no justification for the processing (e.g. consent of the data subject) is available.

Moreover, the Applicant considers its application to be sufficiently specific because it uses the legal terms "consent" and "personal data" from the GDPR, which the Applicant considers sufficiently determinable. In this regard, however, the Applicant had already placed the specifics of the court's decision at the discretion of the court, sec. 938 German Civil Procedural Code *(ZPO)*. If the Senate deems it necessary to supplement the auxiliary request in such a way that the specific implementation of the legal requirements is to be described, we kindly ask for a corresponding notification from the court.

B. The Applicant's main claim is legally well founded

The legal reasoning of the Remedy Order is flawed. The dismissal of the main claim was inappropriate. The GDPR does not justify the Defendant to refuse its contractual obligation to Applicant to collect Admin-C and Tech-C data.

The Defendant is contractually obligated to collect Admin-C and Tech-C data pursuant to Sections 3.3.1.7 and 3.3.1.8 RAA. The Regional Court of Bonn does not question the validity of Defendant's contractual obligations. It appears that the Regional Court maintained its position that the Defendant may refuse - based on § 242 German Civil Code - performance of its obligations to the extent such performance would violate the GDPR. However, the Defendant did not credibly show that collection of Admin-C and Tech-C data is in any case violating the GDPR. Also the Regional Court's reasoning is not convincing:

I. The main claim may not be rejected based on Art. 5 GDPR

The Regional Court had raised concerns regarding the legitimate purpose of collecting Admin-C and Tech-C data in its first order of 29 May 2018.

Accordingly, the Applicant again described in detail the "legitimate purpose" of data processing within the meaning of Art. 5 (1) (b) GDPR (see Immediate Appeal of 13 June 2018, p. 11 and pp. 22-23; Submission of 17 July 2018, pp. 5-6). To avoid repetitions, reference is made in full to the previous submissions.

And also the European Data Protection Board ("EDPB") has confirmed implicitly in its letter of 5 July 2018 that giving the Registrant the option to delegate the Admin-C and Tech-C to a third person constitutes a legitimate purpose:

> *"The EDPB considers that registrant 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. Instead, registrants should be provided with the option of providing contact details for persons other than themselves if they wish to delegate these functions and facilitate direct communication with the persons concerned [...]"* (Emphasis added)

It has remained undisputed throughout the proceedings that designating a third person as Admin-C and Tech-C is an option (as required by the EDPB). Any Registrant is free to not designate a third person (see application for preliminary injunction, p. 9 et seq.).

In its Remedy Order dated 16 July 2018, the Regional Court does not cite any provision of the GDPR that is allegedly violated by collection the Admin-C and Tech-C data. Indeed, the Regional Court does not indicate which provision of the GDPR it presumes to be applying. As the Remedy Order does not even mention the criteria of legitimate purpose (Art. 5 GDPR), however, the Applicant assumes that the Regional Court appears to no longer maintain the position that the data processing lacks a legitimate purpose (Art. 5 GDPR).

II. The main claim may not be rejected based on Art. 6 GDPR

Even though the Regional Court has not cited any provisions, the Applicant assumes that the Regional Court held on the basis of Art. 6 GDPR that the Defendant would not be able to collect the Admin-C and Tech-C data in a justified manner. Because the Regional Court's reasoning makes reference to "*consent*" and "*general justifications for storing and processing data*". Further, the Regional Court held that the collection of Admin-C

and Tech-C data could not be based on consent as no "*verification of actual authorization*" could take place and the requirements for a general justification were not met as there would be "*no necessity to collection personal data*":

> "*Insofar as the Applicant with its original (main) application demands substantively a continuation of the Defendant's previous practice, according to which it enabled the registrant to refer to third parties as Tech-C and Admin-C by providing a corresponding input option, this proves impermissible under data protection law.* ***Because verification of consent of third parties indicated under the categories Tech-C and Admin-C - different from the registrant's personal data - and verification of actual authorization for the collection of their data did not take place and could technically not have taken place within the framework of the registration process described.*** *Thus, in terms of data protection law* ***this practice had to be measured against the general justifications for storing and processing data****. However, the Chamber does still not see the necessity to collect personal data for the additional categories Tech-C and Admin-C. …. If an input was (and would continue to be) purely optional in this respect, the Applicant may also not claim any "necessity" for the purposes brought forward by it."* (Emphasis added) (Court Order of 16 July 2018, p. 2/3.)

The Court's reasoning is flawed. The GDPR neither requires a "verification of consent" from every entity relying on consent with respect to its processing activities, nor does the GDPR foresee an absolute imperative under which the "necessity" criterion is applied. Rather "necessity" needs to be determined in relation to the respective purpose of the processing, which can be *freely* determined by the controller (see Auernhammer, DSGVO, Art. 5 Rn. 17). Accordingly, the Regional Court cannot cite any legal basis in the GDPR from which it derives this criterion or on which it bases its explanations on the allegedly missing "necessity" of data collection in the present case.

1. The GDPR does not require a "verification of consent"

The requirement of a "verification of consent" has no basis in the GDPR or any relevant precedents.

Art. 7 GDPR sets out the "conditions for consent". Art. 7 (1) GDPR stipulates:

> "*Where processing is based on consent, the controller shall be able to demonstrate that the data subject has consented to processing of his or her personal data.*"

However, Art. 7 (1) GDPR is merely a burden of proof rule (see Ehmann/Selmayr, DSGVO, Art. 7 Rn. 19; Gola, DS-GVO, Art. 7 Rn. 60; BeckOK DatenschutzR/Stemmer DS-GVO Art. 7 Rn. 86). However, Art. 7 (1) GDPR is **not a condition for validity of the consent** (see Gola, DS-GVO, Art. 7 Rn. 61.).

Even if such a "verification of consent" requirement would exist, which it does not, this would only give the Defendant reason not to comply with its contractual obligation if such a "consent control mechanism" could not be implemented and it would therefore be impossible for the Defendant to fulfill its contractual obligation without complying with the GDPR. Neither the RAA nor the Temporary Specification prohibit or prevent the Defendant from requesting any evidence it may deem fit from the Registrant or the third person demonstrating that the third person has consented to the processing of its data.

That a Controller relies on the fact that another independent controller (here the Registrant) has obtained consent is common market practice. In cases where one company seeks consent for processing data of a data subject in order to send advertising e-mails to the data subject, such consent often does not only relate to that specific company but also to other entities. In such cases, each entity sending advertising to the data subject is an (independent) controller in relation to the data subject's data. However, not each entity will verify separately that the first entity has collected consent. Rather, they will rely on contractual provisions warranting that consent was obtained by that first entity. In the case at hand, the Registrant – who generally is the first independent controller – must represent pursuant to Clause 3.7.76 RAA that the third person (here the Admin-C and Tech-C) has consented to the data processing. Again, if the Defendant is of the opinion that it does not want to rely on such representation, it is free to request any further evidence it may deem fit. Neither the RAA and the Temporary Specification prohibit the request of such evidence nor does the Defendant even allege that it would violate the RAA and the Temporary Specification by asking for such additional evidence.

2. The Regional Court erroneously applied the "necessity" criterion

With respect to the "necessity" of the data collection, the Regional Court held it

> ***"does still not see the necessity to collect personal data for the additional categories Tech-C and Admin-C.*** *It is true, that from an abstract perspective a larger amount of data naturally also offers wider possibilities to acquire information for the storing entity. However, the fact that the contact data for the Admin-C and Tech-C categories was also in the past always collected on a voluntary basis, since the registrant was able but not required to make entries here, e.g., to provide his own data under these categories, makes it clear that these additional data, the future collection of which the Applicant also requires from the Defendant, are not necessary.*" (Emphasis added) (Court Order of 16 July 2018, p. 2/3)

The Regional Court bases its order on a non-existent general necessity requirement, which has no basis in the GDPR, thus – without justification or legal basis – limits the

parties' freedom of contract, and, in particular, their freedom to set their own data processing purposes.

Such necessity criterion cannot be inferred from Art. 5 (1) lit. c) GDPR. Art. 5 (1) lit. b) GDPR requires that the data shall be collected for "*specified, explicit and legitimate purposes*". Art. 5 (1) lit. c) GDPR then specifically stipulates that the personal data shall be "*adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed ('data minimisation')*". Thus, the relevant question is not whether collection of the Admin-C and Tech-C data relating to a third person is necessary for registering a domain name in general. The relevant question under Art. 5 (1) lit. c) GDPR is, whether the collection of the Admin-C and Tech-C data is necessary for the purpose of the data collection in the present case, i.e., inter alia enabling communication with the Admin-C or Tech-C that the Registrant entrusted with administering the domain name. Such purpose cannot be achieved by other means. In particular, the Registrant forwarding any communication is not equally effective as it requires the Registrant to become active. It would severely limit the Registrant in how the Registrant organizes its processes. This is not the intention of the GDPR. If the Higher Regional Court would uphold the "absolute necessity" requirement seemingly imposed by the Regional Court, this would mean that also in case the third party validly consented to the processing of its data, processing of the data could not take place. The justification under Art. 6 (1) (a) GDPR – consent of the data subject – would not cure the a breach of Art. 5 GDPR.

The "necessity" criterion as applied by the Regional Court also does not arise from Art. 6 (1) lit. f) GDPR. Pursuant to Art. 6 (1) lit. f) processing (collection) of Admin-C and Tech-C data is lawful, if processing (collection) is necessary for the purposes of the legitimate interests pursued by the controller or by a third party […], necessity also has to be determined in relation to the purposes of the legitimate interests pursued by the controller or by a third party.

The Regional Court held:

> "*The fact that these support persons due to the absence of their contact details cannot be contacted directly by the Defendant as registrar affects in no way the legal position of the registrant.* ***If necessary, the registrant's additional organizational effort is limited to merely forwarding notifications by the Defendant addressed to the registrant to the support persons employed by the registrant for the technical or administrative area.***" (Emphasis added) (Court Order of 16 July 2018, p. 3.)

The principle of necessity pursuant to Art. 6 (1) lit. (f) GDPR requires that equally suitable and milder means are available to satisfy the legitimate interest of the controller or the third party.

By stating "*the registrant's additional organizational effort is limited to merely forwarding notifications by the Defendant addressed to the registrant to the support persons employed by the registrant for the technical or administrative area*" the Regional Court demonstrates that not collecting Admin-C and Tech-C data is NOT equally suitable in an outsource scenario as the Registrant would still have to administer and forward such "*notifications*".

Applying the "necessity" criterion as an absolute imperative, as done by the Regional Court, would lead to absurd consequences. The GDPR, for example, acknowledges expressly in Recital 47 that the "*processing of personal data for direct marketing purposes may be regarded as carried out for a legitimate interest*", as "*legitimate interest could exist for example where there is a relevant and appropriate relationship between the data subject and the controller in situations such as where the data subject is a client or in the service of the controller*". Assessing "necessity" in this case without taking into account the concrete purpose of the processing – developing the customer relationship – would very likely result in rendering the processing not "necessary" and therefore unlawful putting an end to any direct marketing efforts in existing customer relationships whose permissibility is, however, acknowledged under the GDPR as well as the ePrivacy Directive.

The Applicant trusts that this interpretation on "necessity" is clearly determined by the GDPR. In case the Senate considers such interpretation on necessity of data collection as questionable, however, it may refer this question to the ECJ.

B. The Applicant's alternative claims are well founded

The Regional Court expressly acknowledges the alternative claims:

> "*Insofar as the Applicant now asserts that the Defendant is responsible, on the basis of the contract concluded between the parties, to collect contact data for the so-called Admin-C and Tech-C based on consent or in case no personal data is involved, this should, in the view of the Chamber, be correct.*" (Court Order of 16 July 2018, p. 3.).

Yet the Regional Court has rejected the alternative claims. The Court's assessment is flawed.

I. Rejection of the alternative claim 2 a) is flawed – collection based on consent is possible

The Regional Court has expressed that the Defendant could not collect the Admin-C and Tech-C data based on consent because the Defendant could not verify consent in the context of the existing registration process:

> *"The application is too vague to determine how consent is to be secured or recorded in the registration process in the future and what specific action is therefore requested from the Applicant* [sic!].
>
> *In any case, the Defendant's previous registration practice is in this respect not suited to collect, store and process data in a way that complies with data protection law, in particular because* ***the Defendant in the context of the existing registration process cannot verify whether the registrant has received the consent of the third party. Even if the registrant had to make such a declaration at the time of registration, the Defendant, as the storage and processing entity, should not automatically rely on this.*** *In this respect, it is also not sufficient for the Defendant to subsequently check that unauthorized contact data could be sorted out under the categories Tech-C and Admin-C. Rather, the Defendant may only store and process the correspondingly recorded data - even for a possibly short interim period - if the Defendant has obtained the consent of the natural person concerned."* (Emphasis added) (Court Order of Bonn of 16 July 2018, p. 4)

The premise of the Regional Court's ruling is misguided. The Defendant as the data controller is obligated under the GDPR to ensure compliance with the GDPR. There is no legal basis requiring the Applicant to "*determine how consent is to be secured or recorded in the registration process in the future*". Absent any provisions to the contrary in the Temporary Specification and the RAA, the Defendant is free to choose any means of securing and recording consent provided that it is in compliance with the GDPR. This includes that the Defendant could require the Registrant to provide the Defendant with documentation the Defendant deems fit that demonstrates that the third person who is designated as Admin-C or Tech-C has consented to the processing of its data.

Whether or not the Defendant's current registration practice complies with the GDPR including whether the Defendant currently requires the Registrant to furnish proof of the third party's consent is irrelevant for the Defendant's contractual obligation vis-à-vis the Applicant to collect Admin-C and Tech-C data. It is decisive that the Defendant *can* collect these data in a way that complies with the GDPR. Because this is the case, the Defendant must fulfil its contractual obligation to collect the relevant data in a manner that complies with the GDPR.

II. Rejection of the alternative claim 2 b) is flawed – collection of non-personal data is possible

The Regional Court held that a collection of non-personal data was not possible because determining whether data was personal data or non-personal data could only take place after collection of the data:

> "*The same concerns apply to the second dimension of the alternative application insofar as this application addresses cases where, exceptionally, the*

> *data collected under the Admin-C or Tech-C categories are not personal data, but rather those of a legal person on which the registrant conferred the technical or administrative management of the domain concerned. Here, too, it would naturally only be possible to carry out a subsequent check by the Defendant. The question of whether personal data are involved can always only be assessed after the registrant has already made corresponding data entries.*" (Court Order of Bonn of 16 July 2018, p. 4)

By applying this argument, each and every processing of data would be unlawful where there would be a possibility that personal data of a third party could be entered. § 242 German Civil Code would only allow the Defendant to refuse performance to the extent the Defendant would violate any applicable law. In case where the Court would hold that only collection of non-personal data was permissible, the Defendant would be free to obligate any Registrant to only provide non-personal data. In fact, by applying the Regional Court's logic, also the collection of the data for the Registrant would not be permissible. The Defendant also has no possibility to verify in advance that the data submitted in relation to the Registrant truly originates from the person designated as the Registrant. In other words, any person could just provide data of another person and the Defendant has no means to verify this in advance.

For the reasons mentioned above, the Remedy Order has no legal basis. And further, for the reasons outlined above as well in Applicant's application for relief and immediate appeal, the order has to be granted.

The Applicant further refers to its submission of 18 July 2018 – announced to the Regional Court per telephone on 12 July 2018 – which refutes the factual and legal argumentation of the Defendant raised in its brief of 11 July 2018.

The Applicant trusts that the Senate will truly consider all these raised facts and legal arguments in a case of such high importance for the Applicant and the domain name system as such. Because the Defendant is not only questioning the role of millions of Admin-Cs and Tech-Cs of domain name registrations allocated by the Defendant, it is moreover challenging these Admin-C and Tech-C functions as such, no matter which Registrar is collecting the data.

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