



The Internet Corporation for Assigned Names and Numbers

11 May 2018

Ms. Manal Ismail
Chair, ICANN Governmental Advisory Committee (GAC)

RE: Board Notice of Bylaws Consultation on GAC Advice in the San Juan Communiqué Concerning the European Union General Data Protection Regulation (GDPR) and WHOIS

Dear Ms. Ismail:

On behalf of the ICANN Board, I would like to thank you and your GAC colleagues for the productive call with the Board on 8 May 2018. As you are aware, the exchange between the Board and the GAC was the first step of the process¹ required when the Board determines that it may take an action that is not consistent or may not be consistent with the GAC's advice.

The Board understands from the additional clarity provided by the GAC during the discussion that the items of advice in the San Juan Communiqué related to the GDPR and WHOIS are intended to apply to the Interim Model (May 25) requirements that would be applicable to registries and registrars on 25 May 2018. Based on this understanding, the Board has made a preliminary determination that its current approach on the proposed Interim Model (May 25), to be implemented in a Temporary Specification, is inconsistent or could be viewed as inconsistent with certain items of GAC advice.

As required by the second step of the process for consultations between the Board and the GAC, the Board must "provide written notice to the GAC stating, in reasonable detail, the GAC advice the Board determines not to follow, and the reasons why such GAC advice may not be followed." In this regard, the Board has updated the scorecard (attached) originally included its letter on 5 May 2018 to reflect items of the GAC's advice that the Board may reject because its current approach on the proposed Interim Compliance Model (May 25) is inconsistent or could be viewed as inconsistent with the GAC advice.

¹ Process for Consultations between the ICANN Board of Directors and the Governmental Advisory Committee, including those required pursuant to Article XI Section 2.1.j of the ICANN Bylaws, available at: [https://gacweb.icann.org/download/attachments/27132063/2013-04-07-Process for Consultations between ICANN and GAC.doc?version=1&modificationDate=1376102118000&api=v2](https://gacweb.icann.org/download/attachments/27132063/2013-04-07-Process%20for%20Consultations%20between%20ICANN%20and%20GAC.doc?version=1&modificationDate=1376102118000&api=v2)



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The Board stands ready to hear from the GAC whether there are additional elements of GAC advice that it believes have been rejected by the Board, as well as coordinating an appropriate time and agenda for the required Bylaws Consultation meeting between the GAC and the Board.

The Board looks forward to continued discussion with the GAC on these important matters.

Sincerely,

A handwritten signature in cursive script, reading 'Cherine Chalaby', written in dark ink. The signature is fluid and includes a long horizontal flourish at the end.

Cherine Chalaby
Chair, ICANN Board of Directors

Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)

As of 10 May 2018

	Communique Reference	GAC Advice	Board’s Preliminary Position	Additional Details
1	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> i. Ensure that the proposed model maintains current WHOIS requirements to the fullest extent possible; 	May be accepted	<p>As outlined paragraphs 6.2 – 6.4 of the Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union’s General Data Protection Regulation, dated 8 March 2018 (the “Cookbook”), the Interim Compliance Model balances compliance with the GDPR while maintaining the existing WHOIS system and procedures concerning registration data to the greatest extent possible.</p> <p>This balancing takes into account ICANN’s Bylaws, which requires that, “Subject to applicable laws, ICANN shall use commercially reasonable efforts to enforce its policies relating to registration directory services and shall work with Supporting Organizations and Advisory Committees to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider safeguards for protecting such data.” Also, this balancing acknowledges that it is either expressed or implied in all of ICANN org’s agreements that the contracted party must comply with all applicable laws.</p> <p>Additionally, ICANN org and the Board have considered operational constraints for implementing the Interim Compliance Model by 25 May 2018, and acknowledges that some features, such as an accreditation program or distinguishing between registrations of natural and legal persons cannot be achieved.</p>

Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)

	Communique Reference	GAC Advice	Board’s Preliminary Position	Additional Details
2	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> ii. Provide a detailed rationale for the choices made in the model, explaining their necessity and proportionality in relation to the legitimate purposes identified; 	May be accepted	<p>Section 5 of the Cookbook provides rationale for the choices made for each element of the Interim Compliance Model. The rationale includes a discussion of comments received by the community, including competing view points on certain elements, as well as a legal analysis justifying the elements of the Interim Compliance Model.</p> <p>ICANN org is continuing to refine the rationale for the Interim Compliance Model, taking into account feedback during ICANN61, and additional information and analysis submitted by the community.</p>

**Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)**

	Communique Reference	GAC Advice	Board’s Preliminary Position	Additional Details
3	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>iii. In particular, reconsider the proposal to hide the registrant email address as this may not be proportionate in view of the significant negative impact on law enforcement, cybersecurity and rights protection;</p>	May be accepted	<p>As addressed in paragraphs 5.5.10 – 5.5.11 of the Cookbook, there are competing community points of view on whether or not anonymized email addresses should be substituted for the email addresses for registrant, administrative, and technical contacts in public WHOIS.</p> <p>The Interim Compliance Model attempts to balance the legitimate interests expressed in the competing viewpoints and has highlighted this matter as an area where additional guidance from European data protection authorities (DPAs) would be appreciated. In its 11 April 2018 letter, the Article 29 Working Party stated that it “welcomes the proposal to significantly reduce the types of personal data that shall be made publically available, as well as its proposal introduce alternative methods to contact registrants or administrative and technical contacts, without public disclosure of registrants’ personal email addresses (referred to as ‘anonymized email, web form, or other technical means’).”</p> <p>Given this, the Board may reject this advice and proposes to include this matter as a topic for discussion during the Bylaws Consultation.</p>

Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)

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4	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p>	<p>May be rejected; subject for discussion during Bylaws Consultation</p>	<p>Whether or not the Interim Compliance Model should apply to contact details supplied by registrants who are legal persons is an area with competing community viewpoints, as described in Section 5.4.2 of the Cookbook.</p> <p>The GDPR applies to the processing of personal data which is defined as any information relating to an identified or identifiable natural person, the data subject. Thus, registrations that include personal data of natural persons are subject to the GDPR. Still it is not always easy to draw a clear line between personal data relating to natural or to legal persons, for example, in case of natural persons with such a close financial, personal or commercial entanglement with the legal person so that information about the legal person can be related to such natural persons (e.g., in case of a sole proprietorship or a GmbH owned by one person).</p> <p>Additionally, ICANN org is seeking clarity from European data protection authorities on this topic in an effort to identify an approach that provides sufficient protections against liability with respect to personal data included in registration data of legal persons. Such guidance may not be available to be incorporated into the Interim Compliance Model by 25 May 2018 or implemented by registries and registrars by 25 May. Because of this, the Board may reject this advice and proposes to include this matter as a topic for discussion during the Bylaws during the Bylaws Consultation.</p>

**Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)**

5	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the WHOIS model is fully operational, on a mandatory basis for all contracted parties; 	<p>May be rejected; subject for discussion during Bylaws Consultation</p>	<p>As described in the Cookbook, there are competing views in the community about (i) which elements of WHOIS data should be published in public WHOIS, and (ii) how to access non-public WHOIS data, while an accreditation program for layered/tiered access is being developed.</p> <p>In its 11 April 2018 letter, the Article 29 Working Party welcomed “the fact that the Final Interim Model involves layered access and foresees an ‘accreditation program’ for access to non-public WHOIS data. That being said, important details remain absent regarding the circumstances in which access will be provided, to what extent and under which conditions and safeguards.”</p> <p>While the accreditation program is being developed and implemented, the current proposal in the Interim Compliance Model would require registries and registrars to provide reasonable access to full registration data to third parties for the purposes of the legitimate interests pursued by the third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the registrant which require protection of personal data.</p> <p>ICANN org is seeking additional clarification from the Article 29 Working Party concerning an accreditation program for access to full WHOIS data. Such guidance may not be available to be incorporated into the Interim Compliance Model by 25 May 2018 or implemented by registries and registrars by 25 May. Given this, the Board may reject this advice and proposes to include this matter as a topic for discussion during the Bylaws Consultation.</p>
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**Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)**

	Communique Reference	GAC Advice	Board’s Preliminary Position	Additional Details
6	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>vi. Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory cross-referencing needs; and</p>	<p>May be rejected; subject for discussion during Bylaws Consultation</p>	<p>Based on existing consensus policies and contracts with ICANN org, registries and registrars currently are required to operate a registration data directory service (e.g. WHOIS) providing free public query-based access to up-to-date data concerning active domain name registrations.</p> <p>In its 11 April 2018 letter, the Article 29 Working Party took note of the additional work and analysis to be undertaken by ICANN on the accreditation program, including clarifying “how access shall be limited in order to minimize risks of unauthorized access and use (e.g. by enabling access on the basis of specific queries only as opposed to bulk transfers and/or other restrictions on searches or reverse directory services, including mechanisms to restrict access to fields to what is necessary to achieve the legitimate purpose in question).”</p> <p>ICANN org is seeking additional clarification from the Article 29 Working Party on this matter in light of the advice from the GAC about the noted features of an accreditation program. However, such guidance may not be available to be incorporated into the Interim Compliance Model by 25 May 2018. As a result, the Board may reject this advice and proposes to include this matter as a topic for discussion during the Bylaws Consultation.</p>

**Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)**

	Communique Reference	GAC Advice	Board’s Preliminary Position	Additional Details
7	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p>	<p>May be rejected; subject for discussion during Bylaws Consultation</p>	<p>With respect to whether the identity of those submitting WHOIS queries be known to registrants or other third parties, the Interim Compliance Model does not propose any new requirements regarding the disclosure of the identity of the requesting user.</p> <p>With respect to non-public WHOIS data, in its 11 April 2018 letter the Article 29 Working Party stressed “the need to implement appropriate technical and organisational security measures that result in appropriate identification, authentication and authorization of the entities which are allowed to access WHOIS data. Moreover, ICANN should ensure that registrars and registries have appropriate logging and auditing mechanisms in place to detect possible misuse.”</p> <p>ICANN org is seeking further clarification about the confidentiality of WHOIS queries, in particular how they relate to public and non-public WHOIS data and whether all queries (including those from law enforcement) would be required to be logged. Such guidance may not be available to be incorporated into the Interim Compliance Model by 25 May 2018. Given this, the Board may reject this advice and proposes to include this matter as a topic for discussion during the Bylaws Consultation.</p>

**Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
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8	V.1.b.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> i. Complete the model as swiftly as possible, taking into account the advice above. Once the model is finalized, the GAC will complement ICANN’s outreach to the Article 29 Working Party, inviting them to provide their views; 	May be accepted	ICANN org is diligently working to consider input from the community and DPAs to refine the Interim Compliance Model. The Board would welcome the GAC’s outreach efforts to the Article 29 Working Party to reinforce ICANN org’s invitation for DPAs to provide their views on the Interim Compliance Model.
9	V.1.b.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> ii. Consider the use of Temporary Policies and/or Special Amendments to ICANN’s standard Registry and Registrar contracts to mandate implementation of an interim model and a temporary access mechanism; and 	May be accepted	As noted during discussion at ICANN61, ICANN org continues to brief the ICANN Board on possible implementation mechanisms for the Interim Compliance Model. Among the options being considered is the option for the Board to adopt a temporary specification utilizing the procedure for Temporary Policies as outlined in Specification 1 of the Registry Agreement, and the Consensus and Temporary Policies Specification of the 2013 Registrar Accreditation Agreement. ICANN org will continue to discuss potential implementation options with the Board and community as appropriate.

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10	V.1.b.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> iii. Assist in informing other national governments not represented in the GAC of the opportunity for individual governments, if they wish to do so, to provide information to ICANN on governmental users to ensure continued access to WHOIS. 	May be accepted	<p>The Board is considering directing the President and CEO that ICANN org’s Government Stakeholder and IGO Engagement teams facilitate regular engagement and capacity building activities with governments around the world. As part of their engagement activities, these team members could continue to raise awareness about the changes to the WHOIS system related to compliance with the GDPR, and opportunities for inputs from governments.</p>