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5 May 2018

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

Dear Ms. Ismail:

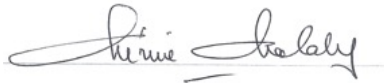
On behalf of the ICANN Board, I am writing to provide you an update on the Board's consideration of the GAC's advice in the [San Juan Communiqué](#) concerning the European Union General Data Protection Regulation (GDPR) and WHOIS. At the Board's 3 May 2018 meeting, the Board continued its discussions about the GAC's advice, and took action to initiate the first step of the process 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 (i.e. the [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](#) "Process").

As you are aware, the ICANN Board is considering adopting an "Interim Model (May 25)" for how ICANN and gTLD registries and registrars could continue to comply with existing ICANN contractual requirements and community-developed policies in light of the GDPR. The Interim Model (May 25) attempts to balance the values of the existing practices and policy work that has established the current WHOIS system with the new law. The Board's current thinking and approach on the proposed Interim Model (May 25) is inconsistent or could be viewed as inconsistent with certain items of the GAC's advice, and as a result the Board would find great benefit in having an exchange with the GAC on these matters. For example, it would be helpful to understand which elements of the GAC's advice are intended to apply to (1) the Interim Model (May 25) requirements (to be provided in a Temporary Specification) that would be applicable to registries and registrars on 25 May 2018 versus (2) the requirements that result from the "Ultimate Model" to be developed by the community through the one-year policy development process triggered by the Board's adoption of the Temporary Specification. Reaching a common understanding of the GAC's advice in relation to the Interim Model (May 25) versus the Ultimate Model would greatly assist the Board's deliberations on the GAC's advice.

Additionally, attached to this letter is a scorecard identifying other questions or concerns the Board has regarding the GAC's advice and areas where further information regarding the advice would be beneficial. Please note that in order to provide more clarity, the Board has attempted to edit pieces of the advice to reflect the terminology used above for describing the Interim Model (May 25) versus the Ultimate Model. Those edits are for consideration and subject to confirmation by the GAC.

The Process requires the Board's response to be the subject of an exchange between the Board and the GAC. To this end, the Board proposes to discuss these matters via a conference call with the GAC during the week of 7-13 May 2018. The Board acknowledges the short notice of this request but given the fast-approaching effective date of the GDPR realizes the need to move as quickly as possible to address the GAC advice prior to the Board taking action on an Interim Model (May 25).

The Board looks forward to continued discussion with the GAC on these important matters and stands ready to provide any additional information that may be helpful to the GAC in advance of the proposed conference call. The Board also would welcome any additional clarity or guidance from the GAC on these matters in the interim.



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 5 May 2018

	<b>Communicative Reference</b>	<b>GAC Advice</b>	<b>Category</b>	<b>Proposed Response</b>
1	V.1.a.	The GAC advises the ICANN Board to instruct the ICANN Organization to: i. Ensure that the proposed <u>ULTIMATE</u> model maintains current WHOIS requirements to the fullest extent possible;	Defer	The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.
2	V.1.a.	The GAC advises the ICANN Board to instruct the ICANN Organization to: ii. Provide a detailed rationale for the choices made in the <u>ULTIMATE</u> model, explaining their necessity and proportionality in relation to the legitimate purposes identified;	Defer	The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.

**Board-GAC Scorecard – San Juan, Puerto Rico Communiqué  
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	<b>Communique Reference</b>	<b>GAC Advice</b>	<b>Category</b>	<b>Proposed Response</b>
3	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>iii. In particular, <u>for the ULTIMATE model</u>, 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>	Defer	<p>The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.</p>
4	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>iv. <u>For the ULTIMATE model</u>, 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>	Defer	<p>The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.</p>

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5	V.1.a.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, <u>from 25 May 2018</u> until the time when the <u>ULTIMATE</u> WHOIS model is fully operational, on a mandatory basis for all contracted parties;</p>	<p>Subject for discussion during Board-GAC 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>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 DPAs would be appreciated.</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. As part of the Board-GAC consultation progress, it could be useful to receive additional clarity from the GAC with regard to this approach to understand whether or not it is consistent with the GAC’s advice.</p>
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	<b>Communique Reference</b>	<b>GAC Advice</b>	<b>Category</b>	<b>Proposed Response</b>
6	V.1.a.	The GAC advises the ICANN Board to instruct the ICANN Organization to:  vi. <u>For the ULTIMATE model</u> , Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory cross-referencing needs; and	Defer	The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.
7	V.1.a.	The GAC advises the ICANN Board to instruct the ICANN Organization to:  vii. <u>For the ULTIMATE model</u> , Ensure confidentiality of WHOIS queries by law enforcement agencies.	Defer	The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.

**Board-GAC Scorecard – San Juan, Puerto Rico Communiqué  
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	<b>Communique Reference</b>	<b>GAC Advice</b>	<b>Category</b>	<b>Proposed Response</b>
8	V.1.b.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> <li>i. Complete the <b>ULTIMATE</b> 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;</li> </ul>	Defer	<p>The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.</p>
9	V.1.b.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> <li>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</li> </ul>	Could be accepted immediately	<p>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.</p> <p>In the Board’s response, it could explain that additional implementation mechanisms were considered, such as a global contract amendment, but given the required steps and timeline constraints (e.g. 6 -7 months at a minimum to negotiate a global amendment), this approach was not viewed as viable option given the May 2018 implementation deadline for GDPR. ICANN org will continue to discuss potential implementation options with the Board and community as appropriate.</p>

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10	V.1.b.	<p>The GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>iii. <u>For the ULTIMATE model</u>, 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.</p>	Defer	<p>The Board would defer dealing with this piece of advice that relate to the Ultimate Model until the PDP is well advanced. In addition, the Board could facilitate a discussion between the GAC and the GNSO regarding this piece of advice.</p>