

ICANN | GAC

Governmental Advisory Committee

17 May 2018

Mr. Cherine Chalaby
Chair
Internet Corporation for Assigned Names and Numbers (ICANN)

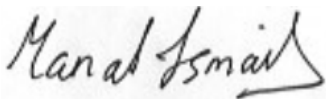
Subject: Response to the letter from the ICANN Board regarding the revised scorecard on the ICANN61 GAC GDPR Advice.

Dear Cherine,

GAC has considered the Board's "Scorecard" response to the GAC San Juan Communique, and the clarifications made in several recent Board/GAC discussions, and is providing further clarification to its advice (attached to this cover note).

The GAC would like the Board to defer rather than reject the 4 pieces of GAC Advice highlighted as "May be rejected" in the attached scorecard and would like to see those implemented as soon as there is an opportunity not waiting until an ultimate model is agreed.

Yours sincerely,

A handwritten signature in black ink that reads "Manal Ismail". The signature is written in a cursive style with a distinct flourish at the end.

Manal Ismail
Chair, Governmental Advisory Committee

GAC response to the updated ICANN board scorecard

- 1) The GAC advice was originally intended to apply to the interim model, but in many areas applicable to the “ultimate model”. Since the board intends to trigger a GNSO PDP to develop the ultimate model, the GAC understands that a potential adoption of its advice for the ultimate model can only be deferred until the GNSO PDP is finalized, while adoption of the advice for the interim model can be decided now. The GAC reserves the right to develop future advice on what will ultimately be considered for the “ultimate” model.
- 2) Paragraph (x) of Section 12.2 of ICANN Bylaws reads as follow:

“Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection (“**GAC Consensus Advice**”), may only be rejected by **a vote of no less than 60% of the Board**, and the Governmental Advisory Committee and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution”. Consequently, in case parts of the San Juan advice are rejected, the board should provide clear rationale as well as evidence that a vote took place and that at least 60% of the board members approved the rejection.
- 3) The GAC is concerned about the implementation phase of the interim model, specifically regarding the design and management of the accreditation programs.
- 4) Regarding the specific advice items identified by the board, the GAC provides comments in the table below.

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Advice	Content	Board position	Board Rationale	GAC comment
1	Ensure that the proposed interim model maintains current WHOIS requirements to the fullest extent possible	Likely to Accept		Board should provide evidence of how the advice was taken into account.
2	Provide a detailed rationale for the choices made in the interim model, explaining their necessity and proportionality in relation to the legitimate purposes identified	Likely to Accept		Board should provide evidence of how the advice was taken into account.
3	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	Likely to Accept		Board should provide evidence of how the advice was taken into account.
4	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	Likely to Reject		The GAC understands that implementation of this piece of advice might take some time and invites the board to consider deferring this piece of advice rather than rejecting it.
5	Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties	Likely to Reject		The GAC recognizes that there is no time to develop and implement an accreditation program by May 25. The GAC requests that this item be deferred.
6	Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory cross-referencing needs	Likely to Reject		The GAC requests further dialogue with the Board on this matter as our recent exchange indicated the further discussion would clarify the GAC's concern for the Board. The GAC requests that this item be deferred rather than rejected.
7	Ensure confidentiality of WHOIS queries by law enforcement agencies	Likely to Reject		This issue is of critical importance for law enforcement to preserve

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				the confidentiality of their investigative and crime mitigation effort. The GAC requests that ICANN seek additional guidance from Article 29 to ascertain if their guidance on logging and auditing applied to law enforcement queries. The GAC requests that this item be deferred rather than rejected.
8	Complete the interim 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	Likely to Accept		
9	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	Likely to Accept		The GAC commends the board for swift adoption of its advice.
10	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	Likely to Accept		Board should provide evidence of how this advice was taken into account.