

## **GAC/Board informal consultation on GDPR-related GAC Advice - 8 May 2018**

### Summary Notes

#### **I. Context and Objective of the Call**

- Consistent with the recent [letter](#) from ICANN Board Chairman to the GAC Chair (5 May), this call was intended to be the initial step of 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](#), to apply when the Board determines that it may take an action that is not consistent or may not be consistent with the GAC's advice
- In her introduction, the GAC Chair noted that the ICANN61 GAC Advice related to GDPR compliance was issued on the basis of an understanding of ICANN's timeline and terminology that has since evolved. She agreed with the ICANN Board Chair that it would be productive to discuss each piece of advice in light of the [Board's scorecard](#), while clarifying the terminology and status of each considered compliance model.

#### **II. Overviews and Clarifications related to ICANN's GDPR-compliance models and applicability of GAC Advice**

Although the call was structured to address each individual piece of GAC advice in order, comments and questions from participants on various subjects were raised throughout the call. This section of the notes captures many of the broader overall comments shared during the call. Several concepts were raised several times during the call, but to maintain brevity, these notes endeavor to mention concepts only once.

- The ICANN Board Chairman clarified that there are only two compliance models to be considered going forward:
  - 1) the "Interim Model" to be adopted by 25 May 2018 through a Temporary Specification requiring its implementation by the 2500 or so contracted parties
  - 2) the "Ultimate Model" that would result from a GNSO PDP to be launched automatically as part of the adoption of the Temporary Specification, with the aim to replace the Temporary Specification within one year.
- The ICANN Org clarified that the "Interim Model" which would be adopted by 25 May 2018, would essentially be consistent with the so-called [Calzone model](#) introduced on 8 March 2018 prior to the San Juan meeting, with slight variations resulting from feedback provided on it by Data Protection Authorities (Art. 29 Working Party).

- ICANN Org clarified that the organization as an institution does not hold any WHOIS data and in fact there is no single WHOIS database. As a result, ICANN Org considers itself a joint data controller, but not a data processor. The law specifically targets data processors who are the individual contracted parties. Based on existing technical protocols, those parties each maintain a “slice” of something called WHOIS data and must make their own decisions about compliance with the law.
- ICANN Org clarified that it is not a regulator – and therefore cannot force contracted parties to do anything that is “above the law”. Moreover, the law is not constructed to give ICANN the mandate to tell contracted parties what to do. As a result, the organization has no power to supersede local law with policies set by the community. Thus, as the organization moves forward with any implementation model, it will always adhere to the interpretations of the law offered by DPAs.
- Given its limited standing, ICANN Org reminded call participants that the organization only has the power to enforce WHOIS through contracts and if the contracted parties determine via their own lawyers or by discussions with individual DPAs that they are in violation of the law, they will not publish and may cease collecting WHOIS information and the result will be a fragmented WHOIS system no matter what ICANN does.
- ICANN Org noted that an underlying problem is that the GDPR legislation was not designed for organizations or institutions like ICANN and the WHOIS system. There are two ways under which this approach could be challenged. The first would be to somehow (with the help or advice from European member states or the European Commission) establish ICANN as the legal entity responsible for the WHOIS system. ICANN Org would like to have that responsibility and is actively investigating how to move in this direction. The second would be to challenge the DPA interpretation of the law in the European courts – according to the principles set in the GDPR itself. During the call, the ICANN CEO made several calls for assistance from GAC members to help the organization to explore these strategies.
- Regarding the inclusion of accreditation models for access to non-public data in the “Interim Model” to be adopted by 25 May 2018, the ICANN Org indicated that it did not have an accreditation program at this time, would not know how to write one in the time remaining before 25 May, would not have the time to implement one before 25 May and as of yet had no guidance from Art. 29 WP on the matter as DPAs indicated they would not themselves have the time to consider such program before 25 May 2018

and probably not until July or August of this year. Further accreditation discussion are referenced below in conjunction with GAC Advice numbers 5 and 6.

- ICANN Org indicated that the May 25 “Interim Model” may include some requirements (not further specified during the call) for contracted parties to provide access to non-public data consistent with their own assessment of what is permitted or required under the GDPR (inclusive of declarative requirements on purpose, logging of requests and relevant disclosures to data subjects).
- While noting that uncertainty remained as to the process for doing so, the ICANN Board and ICANN Org respectively suggested that the “Interim Model” (to be adopted by 25 May 2018) could possibly evolve further before the conclusion of a PDP and adoption of the “Ultimate Model”, in a number of circumstances, including:
  - If part of the model adopted on 25 May were to be determined to not be compliant with the GDPR by Data Protection Authorities.
  - As the result of further clarification by the Article 29 group. (ICANN Org noted that it is still engaged with the Article 29 group seeking clarification where it believes ambiguities remain in the advice. The model could further evolve based on that feedback.)
  - if the ICANN Community reached consensus on changes to be made
  - As a result of implementation discussions with contracted parties.
  - As a result of continued discussions and engagement with the GAC
- Regarding applicability of GAC Advice to the Ultimate Model, ICANN Board member Chris Disspain explained that it is not appropriate, and not possible, for the ICANN Board to accept GAC advice which would apply to the outcome of GNSO Policy Development Process (PDP) that has not yet been initiated, because the ICANN Board has no way to either ensure or enforce that a PDP meets such requirements. What the ICANN Board could do, however, is to facilitate the GAC and GNSO working together on such policy considerations.
- On several occasions, the GAC Chair conveyed to the ICANN Board the GAC’s position (agreed on its 7 May preparation call) that the ICANN61 Advice related to GDPR compliance was meant to apply to the “Interim Model” as described above.
- Considering the information above, several GAC Members (including France, the UK and Switzerland) suggested that it was not useful to discuss applicability of GAC Advice to the “Ultimate Model” at this point and the discussion of the advice should focus on its

applicability to the “Interim Model”. The subsequent consideration of each piece of advice during the call focused on its application to the “Interim Model”.

### **III. Discussion of GAC Advice: current understanding of possible Board action**

At the recommendation of the ICANN Board Chair with concurrence from the GAC Chair, the call participants endeavored to review each piece of the GAC Advice individually.

- **Advice #1 - Ensure that the proposed interim model maintains current WHOIS requirements to the fullest extent possible**
  - In this area, the ICANN Org noted it is looking for the “sweet spot” between what the GDPR says and what ICANN policies currently say. The ICANN CEO noted that a comparison between the Calzone model and recent DPA advice reveals that the two approaches are fairly close.
  - The ICANN Board indicates that it may accept this advice, pending further consideration of whether the advice was meant to ensure that the proposed model is not “over compliant” through considering the rationale of the GAC Advice, as well as any clarifications by the GAC.
  - The ICANN Org considers feedback from DPAs as validating that ICANN has reached its goal of maintaining WHOIS to the greatest extent possible.
  - Concerns were raised by the ICANN Board regarding providing justification of ICANN’s decisions in a legal brief, as it may prevent further engagement with DPAs and subsequent evolutions of the model.
  
- **Advice #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**
  - The ICANN Board indicates it may accept this advice.
  - No detailed discussion ensued during the call.
  
- **Advice #3 - 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**
  - The ICANN Board indicated that while it needed to decide on whether to reconsider the proposal, it may accept the advice.
  - Ensuing discussion focused on the substance of the compliance model to be adopted by 25 May 2018, some of which is reflected in the previous section II of this summary.

- During that ensuing discussion, ICANN Org also clarified that the Calzone model is the model that was reviewed by the DPAs and that review included use cases provided by the community as well as the helpful explanation of the legitimate interests in WHOIS data shared by the GAC. ICANN org noted that comparison materials shared with the DPAs revealed that compared to the Calzone model that the GAC input was farther apart from the proposed model than the Article 29 guidance.
  - The ICANN CEO wrapped up this discussion noting that data processors are responsible to make sure that when they supply data to an entity pursuant to the law, that the entity given access use the information appropriately and consistent with the law.
- **Advice #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**
    - The ICANN Board indicated it may reject the Advice.
    - ICANN Board member Becky Burr pointed to implementation difficulties in relation to this advice, namely that it would likely require manual processing of millions of records and potentially create liabilities for contracted parties.
    - ICANN Org indicated it had received “as clear advice as possible” from the Art. 29 WP that personal data included in an email address related to a legal entity’s WHOIS record should be protected, and that this applied to 50 million existing WHOIS records. It is a challenge for contracted parties to determine when personal identifying information (PII) exists and how to remove it in order to be compliant with the law.
    - But even where clear advice has been shared, ambiguities (e.g., matters of consent) remain. Additional discussions between GAC, ICANN Board and ICANN Org revolved around the issue of collecting consent of natural persons not entering the data of a legal entity themselves, or the treatment of WHOIS records for natural persons involved in commercial activities. These lead to consideration of the need to seek additional DPA guidance. It was signaled however that implementing this GAC advice may require reversal of current DPA guidance.
- **Advice #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**
    - The ICANN Board indicated that it may reject this advice.
    - ICANN Org pointed to the inability of ICANN to cause contracted parties to develop models in due time for the 25 May 2018 deadline, noting that

contracted parties and other parts of the community were currently working diligently to develop such models. ICANN Org will continue to move forward with work in this area.

- Ensuing discussions touched on the respective roles of ICANN and the GAC regarding accreditation models. While some GAC members considered ICANN responsible for developing such models and opposed any operational role of the GAC, ICANN Org indicated it did not mean to ask that the GAC assume any operational role when it previously suggested the GAC provide ICANN with lists of authorized entities that should get access to non-public data.
  - ICANN Org's explained that regarding law enforcement entities, it considered that governments would be uniquely situated to identify and share information with ICANN about the specific "police" forces that should be eligible to access needed WHOIS data.
  - In requesting information from the GAC regarding the accreditation of certain law enforcement entities or exploring criteria for a code of conduct, ICANN Org explained that it believes the GAC can still play a critical role in helping to develop an accreditation model as well as the proper criteria for a code of conduct for those who would seek to show that they have a legitimate purpose and be certified to access WHOIS data.
  - The ICANN CEO noted that development of an accreditation model will still be theoretical because it ultimately needs to be blessed by the DPAs and even the most perfect model developed by the community could ultimately be rejected.
- **Advice #6 - Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory cross-referencing needs**
    - The ICANN Board indicated it may reject this advice because no accreditation program is currently available.
    - However, the ICANN Org indicated it may need to get back to the GAC considering its new understanding of the advice as referring to rate limiting and search capabilities of a GDPR-compliant WHOIS.
    - Discussion between ICANN Org and the GAC pointed to a possible misunderstanding on the terms included in the advice: while ICANN referred to the unacceptability of bulk access to data without justification under GDPR, GAC members referred to the need for differentiated treatment in terms of WHOIS query rate limiting and allowing purpose-based and legitimate cross-referencing searches.
    - Discussion of consistency of this advice with the GDPR and Art. 29 WP guidance evidenced a measure of disagreement between ICANN Org and some GAC

members. European Commission referred to the European Union position shared with ICANN and noted that Art. 29 WP guidance was not incompatible with legitimate needs of law enforcement, including relevant query volumes and cross-referencing capabilities to find out what registrant have registered elsewhere.

- Several GAC Members (including the European Commission, UK and Switzerland) questioned the rationale for potential rejection of this advice.
  - ICANN Org noted that in the absence of an existing accreditation model and with the recognition that the opportunity for DPA feedback on any model is still several months away, there are not enough available facts at this stage to act on this advice.
- **Advice #7 - Ensure confidentiality of WHOIS queries by law enforcement agencies.**
    - The ICANN Board indicated it may reject this advice considering that such a requirement is not a function of the ICANN model and that ICANN cannot prohibit what may be otherwise required under the GDPR.
    - ICANN Org indicated this matter may need follow-up with DPAs as it shared with the GAC initial feedback it received in its consultations from French DPA representatives that law enforcement queries may not be disclosed to data subject only when such requests are based on legal process.
  - **Advice #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**
    - The ICANN Board indicated it may accept this advice.
    - The ICANN Org indicated that it believed it had met and will continue meeting the objectives outlined in the advice. It mentioned its intention to share with Art. 29 WP any changes made to the Calzone model.
  - **Advice #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**
    - The ICANN Board indicated it may accept this advice.
    - The ICANN Org indicated it will ensure that the "Interim Model" to be adopted on 25 May 2018 includes access to non-public data.

- **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.**
  - The ICANN Board indicated it may accept this advice.

#### IV. Next Steps

- As noted in the call objectives, the purpose of this “pre-consultation” call was to help the Board understand whether, based on the discussion, it still believed it to be necessary to reject elements of the GAC’s advice regarding the interim GDPR implementation model. As noted above in section III, upon closing the discussion, it was acknowledged that there are indeed a few items where rejection is believed to be necessary. As a result, the ICANN Board will provide a revised scorecard to the GAC as soon as possible indicating those specific pieces of advice.
- The GAC is then expected to provide a response to the revised scorecard (including additional clarifications and possible alterations of GAC advice as appropriate) before the next meeting of the ICANN Board on this topic (currently scheduled for Sunday 13 May 1630 UTC).
- In the meantime:
  - ICANN Org indicated it intends to proceed to share additional clarifying questions with the Article 29 Working Party, as a follow-up on guidance received so far and engagement to date.
  - The ICANN CEO reiterated the willingness of the ICANN Org (including that of its legal department and legal advisors) to consult with EU Member States, the European Council and the European Commission on the means and mechanisms for ICANN to be considered to take on the legal responsibility for the WHOIS system. This effort could potentially imbue the organization with the necessary legal standing to obtain clarifications of the law and improve alignment of GDPR-compliance models with relevant public policy concerns of the GAC.

GAC Support Staff  
May 2018



## **GAC/Board pre-consultation on GDPR-related GAC Advice - 8 May 2018**

### Conference Call Attendance

#### **GAC Members:**

Manal Ismail, GAC Chair  
Cathrin Bauer Bulst, European Commission (PSWG)  
Ghislain de Salins , France  
Paul Blaker, United Kingdom  
Finn Petersen, Denmark  
Annaliese Williams, Australia  
Harry Chapman, New Zealand  
Jorge Cancio, Switzerland  
Laureen Kapin, USA – Federal Trade Commission (PSWG)  
Pär Brumark, Niue  
Peter Roman, US DOJ (PSWG)  
Cristina Monti, European Commission  
Ashley Heineman, United States  
Brian Beckham, WIPO  
Luisa Paez, Canada  
Karel Douglas, Trinidad and Tobago  
Miguel Munoz, Mexico  
Shelley-Ann Clarke-Hinds, Trinidad and Tobago  
Iringa Kahangama, Federal Bureau of Investigation (PSWG)  
Rita Forsi, Italy  
Petri Kuurma, Finland  
Alejandra Erramuspe, Uruguay  
Beran Gillen, Republic of the Gambia  
Georgios tselentis, European Commission  
Arturo Gómez, Mexico Federal Police (PSWG)  
Chris Lewis-Evans, UK National Crime Agency (PSWG)  
Per-Ake Wecksell, Swedish Police (PSWG)

#### **Board Members:**

Avri Doria  
Becky Burr  
Chris Disspain  
Cherine Chalaby  
Maarten Botterman  
Jonne Soininen  
George Sadowsky

Ram Mohan  
Sarah Deutsch  
Maemura Akinori  
Lito Ibarra  
Kaveh Ranjbar  
Matthew Shears  
Leon Sanchez  
Lousewies van der Laan

**ICANN Org Staff:**

Göran Marby  
Akram Attalah  
John Jeffrey  
David Olive  
Elena Plexida  
Tarek Kamel  
James Cole  
Cassia Oliveira  
Wendy Profit  
Vinciane Koenigsfeld  
Erika Randall  
Susanna Bennett  
Dan Halloran  
Jamie Hedlund  
Michelle Bright  
Samantha Eisner

**GAC Support Staff:**

Robert Hoggarth  
Tom Dale (Independent Secretariat)  
Fabien Betremieux  
Gulten Tepe  
Julia Charvolen

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