

GAC/ICANN Board Communique Clarification Call - ICANN70 Communique

21 April 2021 - 1300 UTC

I. Introduction

GAC and ICANN Board members convened to discuss a set of clarifying questions regarding the GAC ICANN70 Communiqué Advice. These questions were shared by the ICANN Board with the GAC on 20 April 2021.

Manal Ismail (GAC Chair), noted that it had been difficult for the GAC to fully consider these questions in less than 24 hours and she indicated that, depending on the nature of discussions during the call, the GAC may consider follow-up in writing after this call.

Maarten Botterman (ICANN Board Chairman), congratulated the GAC for adopting Consensus Advice in the context of a virtual ICANN meeting, considering the constraints on participation for GAC Members. Regarding the Board's clarification questions, he noted they were intended to support a better understanding of the GAC Advice, and welcomed any written follow-up from the GAC.

II. Clarifying Questions regarding the GAC Advice on EPDP Phase 2 Final Report

GAC Advice

§1.a.i EPDP Phase 2 Final Report

a. The GAC advises the Board to:

- I. to consider the GAC Minority Statement and available options to address the public policy concerns expressed therein, and take necessary action, as appropriate.

General Discussion

Becky Burr (ICANN Board) expressed regret that not enough time was provided for the GAC to consider the Board's questions but expected that these matters would be the subject of discussion for the foreseeable future. She indicated that the Board is seeking to find a mutually acceptable outcome with the GAC when it provides advice and stressed the Board's understanding that the GAC is providing policy rather than legal advice. In this context, she clarified that the ICANN Board is trying to understand if there is some way to reconcile this policy advice with the legal advice ICANN also receives.

As it related to the Board's clarification questions on the ICANN70 GAC Advice on this matter, Beck Burr presented them as belonging to two general categories - that is questions regarding 1) the centralized disclosure of registration data and 2) the distinction between legal and natural persons data.

Regarding the first topic, she noted that the ICANN Board has aimed to preserve WHOIS to the maximum extent possible through its adoption of the Temporary Specification on gTLD Registration Data, and considered the possibility of centralized disclosure decision making. However, she stressed that based on legal guidance to date, disclosure decisions are to be made based on facts and circumstances, and data controller responsibilities can't be shifted through contractual arrangement. Therefore, Contracted Parties are expected to remain liable for disclosure decisions and consequently will want to continue making disclosure decisions themselves as opposed to delegating those decisions to a centralized system or a third

party. Noting the Board's understanding that the GAC is interested in a more centralized model, she wondered whether the ICANN Board is missing something about available legal guidance, and what additional steps the GAC expects ICANN could take to secure the type of legal clarity and actionable guidance that would be required to create an effective centralized disclosure system.

Regarding the distinction between legal and natural persons data, the ICANN Board's understanding from the European Data Protection Board (EDPB) guidance is that Contracted Parties should not, by default, display personal data in registration information of legal persons. In addition, she shared that the EPDP team is getting advice on the kinds of tests that would be necessary to control risks associated with inadvertent publication of personal information, as well as on the fact that it is not possible to suppress associated risks entirely. In this context, the GAC was asked to share its view as to where such legal guidance could lead in terms of policy.

Goran Marby (ICANN CEO) recalled that the European Commission has the formal right to ask specific questions to Data Protection Authorities (DPAs) in these matters, and in particular, that the Belgian DPA actually asked the Commission to do so. He further noted that if the GAC feels it is important to receive further legal guidance on the SSAD, there may be an opportunity to do so through the European Commission.

Manal Ismail noted the Board's clarifying questions are very substantial, going beyond clarification, and seeking legal advice from the GAC. She stressed that the committee is not in the position to do so. She recalled that the GAC's role is to provide advice on policy matters. She referenced the GAC Minority Statement on the EPDP Phase 2 Final Report as providing details on all matters being discussed and stressed that the GAC was very careful in choosing the word "consider" in its ICANN70 Advice to provide flexibility for the ICANN Board.

Jorge Cancio (GAC Vice-Chair, Switzerland) underscored that the use of "consider" in the GAC's ICANN70 Advice was meant to draw the ICANN Board's attention to the GAC Minority Statement towards its factoring into Board consideration along with the many other factors it must consider such as GNSO Policy recommendations, advice from other ICANN Advisory Committees and compliance with applicable laws. He further noted that GAC Advice is without prejudice to being bound by the law as far as it is applicable.

Kavouss Arasteh (Iran) characterized the ICANN Board questions as sensible and sensitive. He noted that the GAC may need time to consider them carefully and thoroughly, in consultation among GAC members. He suggested this session be an exchange of views as opposed to direct responses to the Board's questions and that these questions needed to be considered from the perspective of the GAC's remit and responsibility. In particular, he noted the GAC does not provide legal advice but advice on policy. He also stressed that the GAC has no responsibility to follow external counsel's legal advice, which is meant for PDPs and the Board. He noted that the GAC's Minority Statement, as well as those of other stakeholders, aim to set policy objectives which may not always be feasible. Regarding references to Phase 2A in the Board's questions, he recalled that the GAC Minority Statement on EPDP Phase 2 preceded the launch of this new phase of the EPDP.

Maarten Botterman confirmed that the ICANN Board does not expect legal advice from the GAC, but is rather asking how far the GAC's policy advice on these matters was informed by legal advice, noting that the ICANN Board cannot accept advice that is against the law.

Goran Marby further clarified the Board assumption that the GAC is aware of the legal implications of its policy advice. As the ICANN Board is trying to respect the GAC's Advice it is seeking to understand whether anything was missed or whether there are specific legal assumptions in the GAC's Minority Statement.

Laureen Kapin (GAC Representative in the EPDP, United States) welcomed the objective of complying with applicable laws and indicated that the GAC shares this objective, noting that the committee is fortunate to have among its membership representatives of the European Commission that were involved in the drafting of the relevant legislation. Regarding the Board questions, she stressed the importance of reviewing the precise wording of the GAC Minority Statement which she noted was very specific and the subject of extensive debate and review among the GAC. In particular, she referenced several areas of focus in the GAC Minority Statement including: the fragmentation resulting from the SSAD recommendations and insufficient details provided for increased centralization and automated responses. In terms of available legal guidance, she recalled the Minority Statement's reference to the ICANN's CEO blog following a meeting with the Belgian DPA during which they stressed that their guidance did not mean to deter the development of a centralized model and that it seemed to be a better option in terms of security and for the data subjects. On that basis, she shared the GAC's belief that there is room for further exploration of centralization. She concluded that the gist of the GAC Minority Statement is that there are concerns with the configuration resulting from the current GNSO policy recommendations and that potential solutions to address concerns are not sufficiently developed.

Becky Burr suggested that the topic of automated responses to disclosure requests is a good example where the ICANN Board is seeking to reconcile policy and legal advice. She noted that the GDPR prohibits automatic processing of data that would result in substantial impacts on individuals and that legal advice from the Bird & Bird law firm indicates that in most circumstances the disclosure of personal data should be understood to have legal or materially significant impacts on individuals. She reported the ICANN Board being puzzled as to what kind of additional processing could be considered unless further advice is provided by the EDPB. Despite the Belgian DPA's input, she noted that while it is easy enough to develop centralized systems, the Board's understanding is that Contracted Parties will ultimately remain liable, that Contracted Parties are not willing to be liable for decisions made by a third party and that ICANN cannot require Contracted Parties to engage in behavior that they believe is in violation of applicable law.

Goran Marby recalled that the Belgian DPA did not think they could answer ICANN's questions in relation to a centralized model as a single DPA and instead indicated that the European Commission should ask the questions to the EDPB. He suggested that the crux of the matter is whether Contracted Parties would be willing to take a risk that the balancing tests underpinning disclosure decisions be made by another party. In this context, he wondered whether the ICANN org and community should continue to try and obtain legal guidance from the EDPB or the European Commission regarding the feasibility of a more centralized model and asked the GAC to help ICANN identify legal bases to do so. He further asked whether the GAC and the European Commission could help in convincing DPAs to provide guidelines on these matters.

Olivier Bringer (European Commission) shared his sense that there is a level of convergence on the issues to be addressed, that is: increasing the centralization of a future access model and resolving the distinction of legal vs. natural persons data. He highlighted that the GAC's Minority Statement was meant to stress that there is room for improvement in the proposed SSAD recommendations, in particular as it relates to automating certain tasks and increasing the level of centralization. Regarding Legal vs. natural, he noted good conversations ongoing in EPDP Phase 2A deliberations with different models being discussed to deal with complicated issues. He hoped that progress will be made and recognized the usefulness of advice being

provided by Bird & Bird in this process. In response to the ICANN CEOs comments on the European Commission's ability to ask EDPB for guidance on particular models, he shared his understanding that the legal basis for questioning the EDPB only relates to general interpretation of the law and that the type of specific question currently being asked have would not be appropriate. As a consequence, he suggested that the best way forward is to reconvene for conversations with the DPAs.

Goran Marby, noting that there seem to be a difference of views between the Belgian DPA and the European Commission as to the type of questions that can be asked of the EDPB, indicated that the Board would welcome a renewal of dialogue with the European Commission to encourage further discussions with the Belgian DPA to obtain additional feedback on these issues.

Discussion of Board Clarifying Questions

Board Question 1: Can the GAC provide more information on the legal risks associated with the possibility that a legal person's registration data could include personal data? In addition, has the GAC taken into account the recent legal advice from Bird & Bird on this topic to the EPDP Phase 2A team?

Manal Ismail recalled that the GAC is not in a position to provide legal advice and that GAC representatives in EPDP Phase 2A are taking all legal advice into account. However, she noted that the GAC Minority Statement pre-dates the launch of EPDP Phase 2A and the receipt of legal advice as part of this process, including very recently.

Laureen Kapin recalled that the GAC Minority Statement related to the issue of legal vs natural being critical to the SSAD and the need to address it, which she recognized is now being done in EPDP Phase 2A. In answer to the Board's clarifying question she confirmed that the GAC is aware of those risks and that its representatives in the EPDP are reviewing the legal advice and evaluating how it can inform the ongoing effort. She noted encouragement with recent Bird & Bird advice which identified the level of legal risk as being low in terms of implementing proposed measures to distinguish between legal and natural person's data.

Becky Burr noted that the phase 2A legal advice is largely consistent with advice from phase 1 and phase 2 while acknowledging that the ICANN Board is digesting more recent Bird & Bird advice on this matter.

Board Question 2: In the SSAD context, can the GAC confirm whether inaccuracy will result in liability only vis-à-vis data subjects, or even toward third parties relying on the accuracy of the data disclosed? As with the topic of legal vs. natural, the EPDP Phase 2A team has also recently received advice from Bird & Bird on this topic. The Board is interested to hear the GAC's input on this advice.

Manal Ismail indicated that this is an ongoing discussion on which the GAC has not had time to consult before the meeting.

Goran Marby indicated that legal counsel's preliminary review questions whether the GAC has inadvertently made misstatements in the ICANN70 Communiqué relating to the GDPR Accuracy Principle, and that ICANN is continuing to do research on this matter.

Becky Burr further stated that there are significant questions, even real doubts, that the accuracy principle in GDPR, and EU DPA more generally, is intended to protect users of the WHOIS as opposed to the data subject, and to create liability regarding data accuracy. She shared that for many data protection experts, the purpose of the accuracy provisions is to protect the privacy of individuals. The notion that a Contracted Party be held liable for inaccurate information provided by the data subject is a surprising read of the law. She noted that these provisions are distinct from the second Network and Information Security Directive (NIS2), which would create a direct accuracy obligation on Contracted Parties.

Brian Beckham (WIPO) noted existing guidelines by the European Data Protection Supervisor considering the right to privacy in relation to proportionality and purposes for which data is collected. He suggested that this may be less a matter of liability as opposed to a question of purposes for data processing. He further proposed that this be explored further offline. **Becky Burr** confirmed this a topic to be further explored.

Oliver Bringer welcomed further discussion of this matter and clarification of the GAC Minority Statement as needed. Regarding accuracy, he noted that the GDPR says in Art. 5, which he stressed is not a part of the chapter regarding the rights of the data subject, that accuracy is a general principle that, as a general rule, has to be ensured by the data controller.

Laureen Kapin noting the ICANN's CEO reference to legal analysis of the GAC Advice on this matter, requested that the Board specifically points out the statement in the ICANN70 Communique that they believe is incorrect. **Goran Marby** provided a quote of language in the GAC Minority Statement in the session chat pod and indicated that the ICANN Board will follow up with further legal analysis of the issue of accuracy.

Manal Ismail concluded the discussion by confirming the need for following-up on this matter after the call.

Board Question 3: Given that contracted parties are responsible and liable for disclosure, how did the GAC expect the EPDP to have concluded with a centralized rather than a fragmented disclosure system? Does the GAC believe that the law supports a centralized system? If so, what is the source for this interpretation of the law? How does the GAC envisage ICANN compliance being able to be in a position to evaluate the substance of a contracted party's decision and compel possibly a different disclosure decision than the one taken by a contracted party, when the contracted party is legally responsible and liable for that decision?

Manal Ismail acknowledged that there was no discussion of this question during the call and noted that the GAC Minority Statement provides a thorough explanation of the GAC's view on this matter.

Board Question 4: Does the GAC feel that ICANN org should continue to pursue clarity regarding the question whether shifting decision-making would impact liability of the contracted parties /the Strawberry model with the European DPAs?

Manal Ismail indicated that the GAC would not oppose ICANN seeking more legal clarity. **Jorge Cancio** shared the belief that everyone is in favor of obtaining more legal certainty. **Goran Marby** agreed with this statement.

Becky Burr indicated being struck by the nature of the questions the European Commission can ask to EPDB, and the inability to convince the EDPB to provide more guidance. She wondered whether there is a viable

process to secure more actionable guidance on the viability of a centralized model that would ensure that Contracted Parties are not liable for decisions they do not make. She further stated that this is a question that everyone is struggling with and that the ICANN Board is not sure that additional legal clarity can be obtained.

Board Question 5: The issue of controllership of the processing of personal data cannot be determined as a matter of policy. It is determined by the application of the law to the facts of a given processing operation. Did the GAC take this into consideration when formulating its advice?

Manal Ismail confirmed that the GAC had taken this into consideration.

Board Question 6: In the SSAD, we don't yet know exactly how/where/when/and by whom personal data will be processed (or even what personal data will be processed) because the system hasn't been designed yet. How does the GAC envisage policy development in this area without knowing these implementation details?

Manal Ismail shared the GAC's understanding that policy is developed before it is implemented and therefore wondered what is the intent of the questions and what part of the GAC Minority Statement is targeted. She also shared the expectation that the Operation Design Phase would be helpful in this area and the GAC would follow-up accordingly in due time.

Goran Marby noted that this issue presents somewhat of a "Catch-22" situation in that fundamental legal requirements of the law prevent ICANN from fixing certain policy decisions during implementation. He noted that the Board could further clarify the issue if needed.

Kavouss Arasteh stated that the GAC's intention is that these issues be taken into account as part of implementation.

Olivier Bringer agreed, on the matter of controllership, that clarity should be reached at the end of the policy development and implementation process. However, he stated that he did not see why such clarity could not be achieved during policy development, as opposed to as part of policy implementation.

Goran Marby noted that the law dictates that Contracted Parties have a legal responsibility for conducting the balancing test (in the context of disclosure decisions) and that EPDP had done what it could during policy development, that is recommending the creation of a ticketing system. He noted that GAC input seemed to agree with the outcome while asking for something else, thus making consideration of the matter harder.

Becky Burr indicated that there will be roles and responsibilities assigned as part of implementation as it is clear under the GDPR that the distinction between controller and processor is a matter of fact, and not a matter of agreements in contracts. She expressed hope that the Operational Design Phase (ODP) effort might provide some help in this area, but that a solution on the issue of sole controller vs. joint controller was not assured.

III. Clarifying Questions regarding the GAC Follow-up on Previous Advice regarding CCT Review and Subsequent Rounds of New gTLDs

GAC Follow-up on Previous Advice

1. CCT Review and Subsequent Rounds of New gTLDs

The GAC is seeking a coordinated approach on the implementation of the specified Recommendations from the CCT Review ahead of the potential launch of a new round of gTLDs.

Pursuant to GAC advice issued in Montréal (ICANN66), related correspondence with the ICANN Board and subsequent discussions, the latest on 23rd March during ICANN70, the GAC looks forward to be periodically updated on the ongoing consideration of the above mentioned advice, and, in particular, the Recommendations marked as "prerequisite" or "high priority", namely: 1, 5, 7, 9, 11, 12, 14, 15, 16, 17, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35; for example through a tracking tool that identifies the status of each Recommendation in terms of who is taking it forward, how it will be implemented and when it is expected to be completed, particularly in regard to Recommendations attributed to the Organisation and the ICANN Community (in addition to the Board).

Discussion of Board Clarifying Questions

Board Question 1: Can the GAC confirm that its Consensus Advice remains that the Board should not proceed with a new round of gTLDs “until after the complete implementation of the recommendations in the Competition, Consumer Trust and Consumer Choice Review that were identified as ‘prerequisites’ or as ‘high priority’”, given: (i) the GAC’s belief (as stated in its 22 January 2020 [letter](#) responding to the CEO’s 19 December 2019 [letter](#)) that the distinction between “prerequisites” and “high priority” recommendations has lost some importance; and (ii) the GAC’s acknowledgment, in that same letter, that certain CCT recommendations cannot be implemented until after a new round of gTLDs is launched?

Board Question 2: If the answer to Question (1) is Yes:

- Can the GAC also confirm that “complete implementation” includes the two remaining CCT recommendations relating to DNS abuse that remain in pending status, i.e., Recommendations #14 & #15 (negotiating and amending ICANN’s contracts with registries and registrars to include anti-abuse measures and to prevent systemic use of Contracted Parties for DNS security abuse)?
- If so, what does the GAC believe amounts to “complete implementation” of these two recommendations, in light of the GAC’s view that DNS abuse should be tackled in collaboration with the community and the GAC’s encouragement of community efforts to cooperatively tackle DNS abuse in a holistic manner?

Board Question 3: If the answer to Question (1) is Yes:

- Can the GAC confirm whether “complete implementation” also includes those CCT recommendations that the Board passed through to community groups, given the GAC’s recognition in its 22 January 2020 [letter](#) that: (i) the Board had requested the respective groups to consider and act on the recommendations; and (ii) in the case of the SubPro PDP, the Board cannot compel the GNSO to adopt the CCT recommendations?

- If so, can the GAC clarify how it believes the Board can accept the GAC advice in a manner that maintains and respects the appropriate roles of the Board and the community in developing consensus-based policy? In this regard, the Board notes the GAC's reiteration that, while the Board's general reliance on and deferral in certain situations to community consensus is a positive role to adopt, the Board should nevertheless remain respectful of the advice it receives from its advisory committees.

Maarten Botterman introduced the Board's intention behind the questions, based on the expectation in the GAC Montreal Advice, as confirming whether everything highlighted in relevant CCT recommendations needs to be solved before the launch of the next round of New gTLDs. He stated that the ICANN Board would have a hard time accepting the advice if it were so. Therefore, and while noting that the ICANN70 Communiqué does not refer to the follow-up correspondence on the GAC Montreal Advice, he asked what exactly is encapsulated in this GAC Advice.

Manal Ismail responded that the GAC asks for everything to be started before a new round is launched and noted that depending on the nature of each topic: if a solution can be completed; it should; if a solution can't be completed by nature, then it should not be, which would be expected for measures that would require implementation during the next rounds. She stressed that there should be an understanding that everything is on the right track, if not complete.

Nigel Hickson (United Kingdom) reflected on the constructive exchange between the GAC and the Board during ICANN70, particularly regarding the concept of ICANN org developing and sharing a roadmap for the CCT Review Recommendations that would show the status of each recommendation in terms of consideration and implementation. He noted that answering the Board's questions would be facilitated via such a roadmap document/spreadsheet. Regarding CCT Recommendation 15, he confirmed that the GAC is generally in favor of its implementation before the next round of New gTLDs, in particular in light of the SSR2 Review recommendations.

Jorge Cancio further stressed that a dashboard of some type would support community monitoring of the implementation of the CCT RT recommendations and allow for focused discussion of specific matters, as needed. He proposed that since the ICANN Board has passed some recommendations to community groups, it is natural that those groups inform the Board on how they addressed those recommendations, and that the dashboard ideally include all this information.

Manal Ismail, referring to the topic of pre-requisite vs. high priority recommendations, recalled that high priority recommendations were meant to be implemented by a certain date that has now passed. Therefore she stated that both types of recommendations are now due and this is why the GAC considers them as a single category. With respect to recommendations that were forwarded to other groups, she confirmed that the GAC is not asking for the ICANN Board to change the normal process, but that recommendations being addressed by other groups should be subject to Board follow-up and reporting with a view to making sure that those recommendations are not being forgotten.

Goran Marby reminded the GAC that the ICANN Board cannot interfere in policy development nor change policy recommendations and stressed that the ICANN Board is careful to not act in contravention of the ICANN Bylaws. He noted that Contracted Parties can only accept changes in their contracts if they are adopted as a consequence of GNSO policy development. He noted that while the Board went through a

precise process to consider and address the CCT Review Recommendations, the GAC provided advice to the ICANN Board without taking into account the Board's action, thus creating challenges.

III. Discussion of the GAC Follow-up on Previous Advice regarding IGO Identifiers

GAC Follow-up on Previous Advice

2. IGO Identifiers

While the GAC welcomes the new GNSO Work Track on Curative Rights, the GAC recalls prior GAC Advice (e.g., from Johannesburg and Panama) and ICANN agreement on a moratorium for new registrations of IGO acronyms ahead of a final resolution of this issue.

Discussion of Board Clarifying Question

Leon Sanchez (ICANN Board Vice Chair) indicated that the Board is looking forward to working with the GAC and GNSO to ensure that previous GAC advice is adequately taken into account when considering recommendation of the GNSO's Curative Rights Protection Mechanisms PDP, as well as the ongoing work in the IGO Work Track of the Review of All Rights Mechanism PDP.

Maarten Botteman shared that ICANN org is also expecting legal advice on IGO and IP rights protection matters.

IV. Conclusion

In their final remarks the **GAC Chair** noted the need for following-up on this substantial discussion, which the **ICANN Board Chairman** thought were fruitful and provided some clarity. He concluded the meeting with appreciation of the GAC for its input in general and during the clarification call in particular. He noted that the ICANN Board is looking forward to the notes of the meeting with the understanding that the GAC may provide additional input in response to the Board's questions.

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V. Meeting Participants

GAC

Manal Ismail
Suada Hadzovic, Bosnia and Herzegovina
Nelly Stoyanova, Bulgaria
Luisa Paez, Canada
Rida Tahir, Canada
Taylor Bentley, Canada
Zdravko Jukić, Croatia
Finn Petersen, Denmark
Rolla Hamza, Egypt
Olivier Bringer, European Commission
Juuso Moisander, Finland
Davide Coluccini, Holy See - Vatican City State
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Kenneth Merrill, USA
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