

# GAC Discussion with ICANN CEO: WHOIS/GDPR Policy and Implementation Matters

28 May 2020 - 1800 UTC

## Summary Notes

*In the spirit of issue spotting and candid information exchange, these high-level summary notes are intended to reflect the general nature of the discussions. Certain specific aspects of the meeting discussions are provided to enable understanding of the flow and context of the discussions.*

---

### **I. Introduction**

The GAC Chair, Manal Ismail, welcomed this dialogue between the GAC and ICANN's CEO and Executive Team. She recalled previous such interactive exchanges, and noted them being constructive and informative discussions.

The ICANN CEO, Göran Marby, shared the positive sentiment about these calls. He noted they constitute an opportunity for the ICANN leadership to learn more about the priorities and current thinking of the GAC. He suggested they could be more regular, and address any topic of interest to the GAC.

He recognized the ongoing work of ICANN Community and its SSAD proposal being finalized in the GNSO's Expedited Policy Development Process (EPDP). In his view, the SSAD represents the extent of what can be achieved at the moment in the absence of further legal guidance from Data Protection Authorities. He noted that this is despite ICANN's requests to date, and - in particular - as it relates to the ability of ICANN to take on more responsibility in the disclosure of registration data to legitimate requests from authorized third parties.

### **II. Discussion**

#### **(1) Meeting current needs of stakeholders until EPDP policy is implemented.**

The GAC Chair shared concerns among some in the GAC about ICANN's ability to enforce the Interim Registration Data Policy (including the terms of the Temporary Specification). She noted these concerns are illustrated by the recent [ICANN CEO letter to the Chair of the European Data Protection Board](#) (22 May 2020) asking for guidance "*on how to balance legitimate interests in access to data with the interests of the data subject concerned*", "*to ensure that entities with a legitimate interest in obtaining access to non-public gTLD registration data are able to do so*". The letter also noted that "[a]bsent such guidance, [...] ICANN org and the other relevant stakeholders of the ICANN community will continue to face difficulties in ensuring that data protection authorities and others with legitimate interests in this data can obtain consistent access to the data needed to protect their legitimate interests and the public interest."

Laureen Kapin, representative of the US Federal Trade Commission and GAC representative on the EPDP Team, noted reports and evidence of third parties being wrongfully denied access to non-public registration data. While acknowledging the complexity of balancing tests in disclosure decisions by Contracted Parties, and for ICANN to challenge these decisions, she suggested that specific criteria be considered when assessing Contracted Parties decisions in the absence of further legal guidance. She explained, In particular, that it could be assessed whether or not a party is engaged in patterns of systematic denial, or whether or

not requests from certain parties, such as public authorities performing their legal duties, actually require a balancing test. It was further noted that the inability for ICANN to challenge wrongful denial of access leave requestors with no other recourse than costly and impractical legal challenges against Contracted Parties.

The ICANN CEO confirmed the importance and centrality of this issue as ICANN works to enforce the Interim Registration Data Policy (which entails necessary balancing tests by Contracted Parties), and to ease the submission of complaints to Contractual Compliance following [Advice](#) on this matter in the [GAC Montréal Communiqué](#) (6 November 2019). He noted that the lack of legal clarity to enable ICANN org to either take on disclosure responsibility or review disclosure decisions made by Contracted Parties is the reason why ICANN has [sought guidance from the EDPB](#) on the basis of a [Unified Access Model](#) (25 October 2019) and more recently [following complaints from a Data Protection Authority](#) (22 May 2020).

He further stressed the challenges with distributed responsibility, which is inherent in the law, and risk in decisions to disclose domain registration data, as ICANN contracts cannot supersede national laws. He noted, for instance, that while ICANN seeks to shift responsibility away from contracted parties through the centralization of disclosure decision making in the Unified Access Model, this is not possible without legal guidance from competent authorities. Unless it is provided for in the law or there is legal guidance from competent authorities, he noted it is unlikely that Contracted Parties would agree to sharing disclosure responsibility with ICANN or that ICANN could take over the responsibility on behalf of the Contracted Parties.

## **(2) ICANN comparison of SSAD v. UAM;**

The ICANN CEO presented a [comparison of the ICANN-proposed UAM and the SSAD](#) (GAC website login required) which was compiled to assist the ICANN Executive Team and ICANN Board in understanding the key differences between the two models. The ICANN Board gave the CEO a goal to [“Continue to work toward obtaining legal guidance from the Data Protection Authorities as to whether a Unified Access Model is permissible and compliant with the European Union’s General Data Protection Regulation \(GDPR\).”](#) The SSAD is understood to be the extent of what is currently possible without further legal guidance and differs from ICANN’s originally [proposed UAM](#) in key areas, including:

- The SSAD is akin to a ticketing system which makes it easier for requestors to get their requests processed and obtain a potential answer from Contracted Parties; but
- The SSAD does not afford more responsibility to ICANN for data disclosure decisions, despite the organization’s willingness and that of the ICANN Board to take on such responsibility as in the UAM.

In this context, the ICANN CEO stressed that the role of ICANN Compliance would be limited to ensuring that the Contracted Parties follow the SSAD process as opposed to ensuring that appropriate consideration is given to disclosure requests when it comes to accessing non-public registration data.

Georgios Tselentis, representative of the European Commission and GAC representative in the EPDP Team remarked that the proposed SSAD goes beyond a mere ticketing system in that it includes policy rules on disclosure decisions. He wondered whether ICANN thought such SSAD policy rules could evolve over time towards more centralization of decision making (in the hands of the SSAD’s Central Gateway function). Additionally, Laureen Kapin inquired as to how ICANN org saw the interplay with the EPDP policy process should further legal guidance be provided supporting the original UAM proposal.

Göran Marby reiterated the role of ICANN org as the implementer of community-developed policy as adopted by the ICANN Board. He noted that the EPDP Team has not yet agreed on an evolution mechanism for the SSAD and that more work is still needed on decision making and responsibilities regarding various data processing activities. Further, he noted that ultimately a UAM must be based on policy as developed by the ICANN Community and that several elements of the current SSAD policy can be beneficial, in particular from a processes perspective.

### **(3) Practicalities and Pending Issues with role of ICANN as Central Gateway Manager**

With respect to the Central Gateway Manager (CGM) function, the ICANN CEO re-emphasized that the ICANN org's role in this work is to implement any policies recommended to and approved by the Board. He noted that ICANN org has played an information role - providing facts, data and cost estimates - but pending final community decisions, does not yet have a definitive understanding of what the ultimate implementation duties of the CGM will be. In the same context, whether there is a need for further safeguards in terms of future responsibility for ICANN, given the evolution mechanism currently discussed in the EPDP, is a question that could potentially be addressed to the ICANN Board.

Regarding the timeline for implementation of the SSAD and its Central Gateway function Göran Marby indicated that he could not provide a definitive timeline at this point, although he predicted that it would likely not be fast. He indicated that much will depend on the specific recommendations that are ultimately developed.

Regarding pending issues that remain to be addressed, Göran Marby confirmed that these include the consideration of international data transfers and the need to drill down into all possible data processing activities to determine controller responsibility between ICANN and Contracted Parties for each one of them. He reiterated that ICANN is willing to take on more responsibility, but that Contracted Parties and the law may determine otherwise.

### **(4) Coordination of accreditation of governmental entities with ICANN org;**

Göran Marby noted the importance for ICANN org to work with the GAC and governments during the implementation phase to ensure that public authority requestors from each country are properly identified in the system, and accreditation arrangements at the national level taken into account.

He stressed that in its role as Central Gateway Manager in the context of the SSAD, whatever ICANN's efforts to make public authority requests easier, it would not necessarily translate into more certain disclosure of registration data under the policy regime currently being considered in the EPDP.

## **III. Conclusion**

In closing the call, Göran Marby re-emphasized that ICANN org continues to work toward finding a way to take on more responsibility to facilitate disclosure of registration data to third parties where appropriate in the public interest. Reference was made to COVID-19-related abuse of the DNS to emphasize the need to ensure access to registration data, including for ICANN org which currently does not have access to such data.

He expressed that in its continued efforts to seek legal guidance from Data Protection Authorities, ICANN org would welcome any assistance European Union Member States and the European Commission may provide or continue to provide to encourage that advice.

Both the ICANN CEO and the GAC Chair noted their appreciation for the joint efforts to conduct the call and a strong desire to explore future dialogue calls on other topics of interest to the GAC.

#### **IV. Meeting Participants**

##### GAC

Manal Ismail, GAC Chair  
Danilo Teófilo Costa (Brazil)  
Suada Hadzovic (Bosnia and Herzegovina)  
Olivier Francis Cubahiro (Burundi)  
Tshoganetso Kapaletswe (Botswana)  
Luisa Paez (Canada)  
Taylor Bentley (Canada)  
Rida Tahir (Canada)  
Pua Hunter (Cook Islands)  
Finn Petersen (Denmark)  
Noha Gaafar (Egypt)  
Georgios Tselentis (European Commission)  
Vincent Gouillart (France)  
Domenico Alfieri (Italy)  
Toks (Nigeria)  
Frode Sorensen (Norway)  
Sasa Kovacevic (Serbia)  
Jorge Cancio (Switzerland)  
Thongchai Sangsiri (Thailand)  
Vernita Harris (US)  
Ryan Carroll (US)  
Mactar Seck / Economic Commission for Africa  
Cri Monti  
Hamza Salami  
Valentina Scialpi  
Andrés Julián Hernández Valencia

##### GAC-PSWG

Laureen Kapin, PSWG Co-Chair  
Per-Aka Wecksell  
Chris Lewis-Evans  
Andrew Masterson

##### ICANN Org:

Göran Marby, ICANN CEO  
Amy Bivins  
Caitlin Tubergen  
Daniel Halloran  
David Olive  
David Conrad  
Eleeza Agopian  
Elena Plexida  
Jamie Hedlund  
John Jeffrey  
Karen Lentz  
Mandy Carver  
Russ Weinstein  
Sally Newell Cohen  
Susanna Bennett  
Theresa Swinehart  
Xavier Calvez

##### GAC Support Staff :

Rob Hoggarth  
Fabien Betremieux  
Julia Charvolen  
Benedetta Rossi  
Gulten Tepe

# # #

Notes prepared by GAC Support Staff  
29 May 2020