

11 April 2018

Submission of GNSO Council Review of the San Juan GAC Communiqué

From:

Heather Forrest, GNSO Chair
Donna Austin, GNSO Council Vice-Chair
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To:

Cherine Chalaby, Chair
ICANN Board

Dear Members of the ICANN Board,

On behalf of the GNSO Council, we are hereby transmitting to you a draft of the GNSO Council's response to the GAC San Juan Communiqué.

Due to time constraints, the GNSO Council was not able to formally adopt this response during a conference call since our next meeting is scheduled for the 26 April. To date only support (and no opposition) has been expressed on the Council list and recognizing that the Board has a call with the GAC in Wednesday 11 April to discuss the San Juan Communiqué, we wanted to take the opportunity to share this draft with you now

The GNSO Council's response is an effort to provide feedback to you, in your capacity as members of the ICANN Board, as you consider issues referenced in the GAC Communiqué that we believe relate to generic top-level domains. Our intent is to inform you and the broader community of gTLD policy activities, either existing or planned, that may directly or indirectly relate to advice provided by the GAC.

The GNSO Council hopes that the input provided through its review of the GAC Communiqué will enhance the coordination and promote the sharing of information on gTLD related policy activities between the GAC, Board and the GNSO. We expect to share the formally adopted version with you shortly after our upcoming meeting.

Heather Forrest
Chair, GNSO
Donna Austin
Vice-Chair, GNSO Council
Rafik Dammak
Vice-Chair, GNSO Council

GNSO REVIEW OF THE [SAN JUAN GAC COMMUNIQUE](#) - (Only of “Section V of the Communiqué: GAC Advice to the ICANN Board”)

GAC Advice - Topic	GAC Advice Details	Does the advice concern an issue that can be considered within the remit ¹ of the GNSO (yes/no)	<i>If yes, is it subject to existing policy recommendations, implementation action or ongoing GNSO policy development work?</i>	<i>How has this issue been/is being/will be dealt with by the GNSO</i>
<p>1. GDPR and WHOIS</p>	<p>The GAC highlights the importance of complying with the European General Data Protection Regulation (GDPR), which protects the privacy of natural persons and allows for the processing of and access to data for legitimate purposes. The GAC encourages ICANN to continue its efforts to ensure full and timely compliance with GDPR while involving the multi-stakeholder community and European data protection authorities. The GAC reiterates its previous advice, including the Abu Dhabi Communiqué, to maintain, to the greatest extent possible, the current structure of the WHOIS, while ensuring full and timely compliance with GDPR. The GAC does not envision an operational role in designing and implementing the proposed accreditation programs but reiterates its willingness to</p>	<p>Yes</p>	<p>Yes. The RDS PDP working group is currently active, however in light of GDPR the PDP WG is currently reviewing its options both with the GNSO Council and the ICANN Board.</p>	

¹ As per the ICANN Bylaws: ‘There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.

	<p>advise the Board and engage with ICANN Org and the community on the development of codes of conduct from a public policy perspective. The GAC notes 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. Regarding the proposed draft interim model, consistent with the GAC’s comments to ICANN filed on March 8, 2018,</p> <p>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <ul style="list-style-type: none"> i. Ensure that the proposed interim model maintains current WHOIS requirements to the fullest extent possible; ii. Provide a detailed rationale for the choices made in the interim model, explaining their necessity and proportionality in relation to the legitimate purposes identified; iii. 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; iv. Distinguish between legal and natural 			
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	<p>persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p> <p>v. 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;</p> <p>vi. Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory crossreferencing needs; and</p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p> <p>Furthermore,</p> <p>b. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>i. 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;</p> <p>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</p>			
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	<p>iii. 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> <p>RATIONALE The core mission of ICANN is to “ensure the stable and secure operation of the internet’s unique identifier systems.”³ Accordingly, ICANN’s Bylaws include a commitment to preserve and enhance “the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.”⁴ ICANN’s commitments and required reviews emphasize that it must “adequately address” issues related to “consumer protection, security, stability, resiliency and malicious abuse.”⁵ The current WHOIS system helps achieve many such public policy interests, including enhancing trust in the DNS, ensuring consumer protection, protecting intellectual property, combating cyber-crime, piracy and fraud, to cite but a few of the elements highlighted already in the GAC’s 2007 WHOIS Principles. The GDPR</p>			
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	<p>provides for mechanisms to balance the various legitimate public and private interests at stake, including privacy and accountability. We note that the legitimate interests reflected in ICANN’s Bylaws are consistent with the recitals to the GDPR, which provide examples such as “preventing fraud”; “ensuring network and information security,” including the ability to resist “unlawful or malicious actions” and reporting possible “criminal acts or threats to public security” to authorities.⁶ Regarding registration data specifically, ICANN’s Bylaws recognize that WHOIS data is essential for “the legitimate needs of law enforcement” and for “promoting consumer trust.”⁷ These rules reflect the nature of the Internet as a public resource whose governance not only serves the interests of the private parties operating the DNS but also serves a number of important public policy interests. ICANN’s new interim proposal suggests significant changes to the WHOIS system, including masking several categories of previously public information. The GAC is concerned that the interim model may not maintain the current WHOIS system to the fullest extent possible and that these changes are not supported by the necessary</p>			
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	<p>analysis and supporting rationale which poses the question whether the choices reflected in the current proposal are required by the law. As it stands, the proposed system risks hindering the efforts of law enforcement, intellectual property and other actors in combatting illicit activities and mitigating DNS abuse. A rationale is required for the decision to hide certain WHOIS data elements from the public database. Firstly, there is no need to hide non-personal information (including information related to legal entities), such as the name (to the extent they are legal entities, e.g., companies or organizations) or the Administrative and Technical contact’s state/province and country. Secondly, when it comes to personal data, the GDPR permits its processing, including publication, under certain circumstances. As clarified by the Article 29 Working Party, publication of some personal data is not excluded, as long as this is justified in light of the legitimate purposes pursued with the WHOIS directory and is based on a legal ground, such as performance of a contract or the legitimate interests pursued by the controller or by a third party. In particular, publication of the registrant’s email address should be</p>			
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	<p>considered in light of the important role of this data element in the pursuit of a number of legitimate purposes and the possibility for registrants to provide an email address that does not contain personal data. Finally, legal entities are explicitly excluded from the remit of GDPR.</p>			
<p>2. IGO Reserved Names</p>	<p>Noting ongoing developments in the PDP on IGO access to curative rights protection mechanisms, which the GAC is monitoring closely, the GAC affirms its advice from previous Communiqués concerning preventative protection of IGO identifiers, recalls the importance of maintaining temporary protections until a permanent resolution on IGO identifiers is reached in order prevent irreparable harm to IGOs and</p> <p>a. advises the ICANN Board to:</p> <p>i. Ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible.</p> <p>RATIONALE Despite indications to the contrary, the GNSO has still not concluded its PDP on curative rights protection mechanisms. The GAC and IGOs remain fully engaged on this issue and emphasize that a</p>	<p>Yes</p>	<p>While the rationale and background on this topic directly relate to the IGO-INGO Access to Curative Rights Protection Mechanisms PDP, it appears that the advice itself is addressing an issue associated with the list of IGOs developed as part of the implementation of the Protection of IGO and INGO Identifiers in All gTLDs Policy.</p>	<p>If the GNSO Council assumption is correct, we believe that contracted parties were recently made aware of the requirements for compliance with the Protection of IGO and INGO Identifiers in All gTLDs consensus policy.</p> <p>In relation to the Access to Curative Rights Protection Mechanisms PDP, it is anticipated that the Council will discuss the status of this effort during its forthcoming meeting.</p>

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	<p>removal of interim protections before a permanent decision on IGO acronym protection is taken could result in irreparable harm to IGOs. In the interim, ICANN has moved forward to implement GAC advice related to protection of IGO full names at the second level. These protections will be based on a list of IGOs that fulfil previously agreed-upon criteria. To ensure this advice is effectively implemented, following significant work undertaken by IGOs resulting in significant progress on compiling this list, a focused effort is needed to contact remaining IGOs, so their names are protected accurately in the chosen two languages. ICANN has been in contact with the OECD and WIPO on this initiative, which the GAC supports.</p>			
<p>Other Issues</p>	<p>In 2. New gTLD Policies: General it is stated “The GAC met with one of the Co-Chairs of the GNSO PDP on New gTLD Subsequent Procedures. It was noted that while existing GAC advice has been considered, the PDP would benefit from more detailed GAC views and information on issues with public policy implications, for example support for developing countries and community-based applications. GAC members suggested</p>			<p>Identifying whether an issue has public policy implications is not the role of the PDP WG. This is generally because its members are not assumed to have this particular expertise. The introduction of the quick look mechanism, a recommendation of the</p>

	<p>that it would be helpful for the PDP Working Group to indicate to the GAC where specific developing issues have public policy implications, and where they may diverge from GAC advice and provide relevant supporting information.”</p>			<p>GAC-GNSO Consultation Group, is an important mechanism that provides the GAC an opportunity to identify public policy issues early in the PDP lifecycle. We acknowledge that the GAC-GNSO Consultation Group also encouraged PDP Working Groups to communicate to the GAC about how its input has been considered and addressed; and also encourages the GAC to strengthen its participation in the latter stages of the PDP.</p> <p>The Council acknowledges the challenges associated with GAC members being able to participate in PDP efforts and in that regard, we greatly appreciate the manner in which GAC members are participating in WT5 of the Subsequent</p>
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				Procedures PDP WG, particularly with regard to identifying public policy issues.
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