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Governmental Advisory Committee

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GAC Feedback on Proposed Interim Model for GDPR Compliance

I. Introduction

The Governmental Advisory Committee (GAC) welcomes the opportunity to provide feedback on ICANN's Proposed Interim Model for General Data Protection Regulation (GDPR) Compliance.¹ We appreciate the challenges involved in reconciling the many community interests and public policy concerns raised. We were encouraged that "finding a path forward to ensure compliance with the GDPR while maintaining WHOIS to the greatest extent possible [was] a high priority" for ICANN (Nov. 17th Blog², reiterated Dec. 21st Blog³). The GAC is committed to support ICANN and the community in ensuring full compliance with GDPR and discussing the appropriate way forward. The following comments build on prior GAC advice and public comments.⁴

While we recognize that the interim model is a product of balancing the various views of stakeholders, the GAC takes this opportunity to identify where the GAC has concerns, and notes that in many places the model could benefit by taking into account the legal advice provided by ICANN's own selected legal advisors, the Hamilton law firm.⁵ As noted in the GAC's prior public comment on ICANN's three proposed models,⁶ the Hamilton law firm's Part 3 Analysis expressed the view that:

- ICANN's Bylaws support the conclusion that the purposes for WHOIS services should serve the legitimate needs of law enforcement and promote consumer trust;
- the processing of WHOIS data for law enforcement purposes (including investigating and countering serious crime, fraud, consumer deception, intellectual property violations, and other law violations) should constitute legitimate interests for processing of personal data under Article 6.1(f) of the GDPR;

¹ <https://www.icann.org/en/system/files/files/proposed-interim-model-gdpr-compliance-summary-description-28feb18-en.pdf>

² <https://www.icann.org/news/blog/data-protection-privacy-activity-recap>

³ <https://www.icann.org/news/blog/data-protection-and-privacy-update-plans-for-the-new-year>

⁴ See e.g., GAC Principles Regarding gTLD WHOIS Services at https://gacweb.icann.org/download/attachments/28278834/WHOIS_principles.pdf; GAC Advice set forth in Abu Dhabi Communiqué at <https://gac.icann.org/advice/communiques/public/gac-60-abu-dhabi-communique.pdf> at pp. 11-13

⁵ available at <https://www.icann.org/resources/pages/gdpr-legal-analysis-2017-11-17-en>

⁶ GAC Feedback on Proposed Interim Models for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation at <https://www.icann.org/en/system/files/files/gdpr-comments-gac-icann-proposed-compliance-models-29jan18-en.pdf>

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- public access to (limited) WHOIS data (including Registrant name and address) should be maintained to the extent possible, and only complemented by layered access where required; and
- Some EU mandated public registries have considered it to be a public interest, laid down in law, to keep a public record of the owners of EU trademarks, company registers, and domains in EU ccTLDs and hence “implicitly stated that such interests overrides the interests or fundamental rights and freedoms” of the trademark registrants.⁷

In the following submission, we 1) list what we support and have concerns with in the interim model; 2) highlight the potential consequences of altering the current WHOIS model in a way that goes beyond what may be required to ensure compliance with the GDPR; and 3) encourage ICANN to consider further refining its approach to ensure that its model balances the important public policy issues involved to the fullest extent possible.

II. Interim Model Analysis

There are a number of positive elements in the interim model that deserve mention. We support in particular:

- the objective of identifying clear purposes for the processing of WHOIS data which include providing a framework to address law enforcement needs;
- the continued collection of full thick WHOIS registration data;
- the requirement for registrars to transfer all collected WHOIS data to registries and data escrow agents;
- the GAC's role in advising ICANN and the community on potential accreditation systems and codes of conduct for access to non-public WHOIS data by users pursuing legitimate purposes including law enforcement and others (such as cybersecurity researchers, intellectual property rights holders, and consumer protection advocates, among other groups);
- maintaining the current data retention requirements;⁸
- that any future accreditation system will provide for full access by law enforcement agencies;
- that ICANN-approved dispute resolution providers (e.g., under the UDRP or URS) would have full and real-time access to WHOIS data for case administration purposes; and
- that any future accreditation system will maintain anonymized WHOIS queries.

⁷ See <https://www.icann.org/resources/pages/gdpr-legal-analysis-2017-11-17-en>

⁸ Historic WHOIS data is very important for investigating illicit conduct and relied upon by law enforcement and other user groups for legitimate purposes.

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On the other hand, the GAC has a number of concerns:

Although ICANN's proposed interim model takes preliminary steps towards a GDPR analysis, the model does not yet fully assess which data elements are needed, including the proportionality of disclosure to the public, why the masking of certain information is justified, and the details regarding access to gated information based upon the purpose and credentialing of user groups. The absence of these aspects make it difficult to assess the data protection compatibility of the ideas put forward. The GAC understands that ICANN plans to publish a more detailed rationale and would encourage ICANN to share this rationale swiftly to ensure that it can be taken into account by the GAC and the rest of the Community in reviewing the proposed interim model.

The interim model indicates that the data set forth below would not be disclosed to the public but does not include an assessment of proportionality. We also note that the Article 29 Working Party has not excluded publication of some personal data, as long as this is justified in light of the legitimate purposes pursued with the WHOIS directory and is based on the legal ground of performance of a contract or the legitimate interests pursued by the controller or by a third party. Accordingly, the GAC would appreciate further details on the restrictions on disclosing the following data elements set forth here.

Masked Information:

- Registrant's name;
- Registrant's email;⁹
- name (to the extent they are legal entities, *e.g.*, companies or organizations); and
- Administrative and Technical contact's state/province and country (this position is inconsistent with the model's treatment of Registrant information which permits the public display of State/Province and country)

In this context, the GAC has previously advised that public access to (limited) WHOIS data (including Registrant name and address) should be maintained to the extent possible, and only complemented by layered access where required. In particular, for the Registrant's name and email address, community input has shown that these elements are crucial for achieving a number of public interest purposes, which cannot be met by providing an anonymous forwarding mechanism.¹⁰ A minimum amount of accountability should be ensured, allowing individuals to ascertain whom they are dealing with online. When an even greater degree of privacy is required, privacy/proxy services are available to allow for such privacy while ensuring that there is an identifiable contact person.

⁹ For a discussion of why the Registrant email data field is important, *see e.g.*, Coalition for Online Accountability letter to ICANN re: Importance of Public Access to Registrant Email Address at <https://www.icann.org/en/system/files/files/gdpr-comments-coa-icann-proposed-compliance-models-16feb18-en.pdf>

¹⁰ *See e.g.*, GTLD Dataflow Information and Matrix <https://www.icann.org/resources/pages/gtld-registration-dataflow-matrix-2017-07-24-en> and Final Report from the Expert Working Group on gTLD Directory Services at <https://www.icann.org/en/system/files/files/final-report-06jun14-en.pdf>

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The GAC also notes that challenges to access to non-public data may still arise for public authorities due to national laws that may require a legal basis permitting access to non-public WHOIS data. Certain countries may require the use of formal and time-consuming mechanisms such as mutual legal assistance procedures to obtain non-public information. Therefore, it would be preferable to pursue solutions where, based on “important reasons of public interest” and examples that exist already in other contexts (as mentioned in Hamilton Part 3), WHOIS information is kept public to the maximum extent possible.

Pending a more detailed analysis based on the additional elements to be provided, the interim model does not seem to maintain the WHOIS to the greatest extent possible in line with ICANN's own commitment and previous GAC advice. In fact, the new proposal suggests significant changes to the WHOIS system, including masking several categories of previously public information. The GAC is concerned that these changes are not supported by the necessary analysis and supporting rationale. The proposed system risks hindering the efforts of law enforcement and other actors in combatting illicit activities and mitigating DNS abuse.

Further issues of concern include:

- the lack of clarity for the guaranteed full and real-time access by WHOIS users other than law enforcement pursuing legitimate purposes during the interim model and any period preceding a temporary stop-gap accreditation system;
- masking information related to legal persons from the public¹¹ despite the fact that the GDPR does not apply to them, and the example of the .amsterdam registry showing that there is a feasible way to distinguish legal from natural persons;¹²
- the lack of clarity regarding the period between the implementation of the interim model (May 25th) and the finalization of the mechanisms that are to be implemented to enable a layered access to some WHOIS data, such as accreditation programs. In particular, the GAC is concerned that during this period, access to important WHOIS data will be impossible if no “interim” measures are designed and implemented;
- the lack of a *required* temporary system that provides a channel for law enforcement and other third parties to access non-public WHOIS data. This would essentially let crucial WHOIS data “go dark” for an undefined period. As a consequence, these WHOIS data would become unavailable for investigative and mitigation efforts aimed at curbing DNS abuse and combatting illicit conduct. Once a significant portion of WHOIS becomes unavailable to the public, the proposed model does not *require* contracted parties to adhere to a temporary

¹¹ Legal persons are not protected by the GDPR. Not displaying their data hinders the purposes of WHOIS without being required by the GDPR. The GDPR only applies to the personal data of natural persons. This represents a significant overreach in terms of ICANN's stated goals to be in line with GDPR. Regarding ICANN's comment that registrations of legal persons may contain personal data of natural persons, respectfully, this is a determination made by the legal person, and can be avoided on their end.

¹² See nic.amsterdam/whois-privacy/

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system for law enforcement and third-parties. A temporary stop-gap system to access non-public WHOIS information will be necessary because of the inevitable substantial time gap between adoption of the interim model and the creation and implementation of a new system to accredit law enforcement and other third party users. An alternative to a stop-gap solution would be for ICANN to consult with Data Protection Authorities to explore the option of enforcement forbearance pending completion of an accreditation system;

- the lack of clarity on what if any “limitations” in terms of query volume are envisaged under an accreditation program;
- it is not clear whether and/or how port 43 access (interface allowing for automated queries to get bulk access to WHOIS information directly from the WHOIS server) will be implicated in the model and an accreditation system, including whether and how the ability of conducting bulk queries for legitimate purposes will be impacted;
- the apparent absence of any measures or consideration to improve data quality and accuracy; and
- while the GAC looks forward to work with ICANN and the community on designing and implementing the “interim” WHOIS model, especially as an advisory body with expertise on public policy, the GAC expresses caution about a potentially operational role for the GAC for a future accreditation system for law enforcement and third parties. This operational role, which is suggested by the documents published February 28th, seems incompatible with the scant staff and few financial resources of the GAC, which remains an advisory body. However, the GAC expresses interest in the idea of having each government decide which law enforcement authorities have a legitimate interest to access non-public WHOIS data, and providing ICANN org with such information so that ICANN org can manage the accreditation system for law enforcement agencies. Therefore, we would appreciate clarification on the expectations for the GAC role in accreditation and codes of conduct. Regarding codes of conduct, the GAC cannot work without the assistance and support of the broader community and in many cases, it is best left to the specific non-government user groups to organize and accredit themselves so long as they adhere to agreed upon criteria.

III. Consequences

Given the lack of an in-depth analysis for the various elements of the proposal, it may be difficult to ascertain relevant legal aspects including the data protection compliance of the proposed model. In order to make the best possible compliance case, the GAC strongly recommends providing this analysis as soon as possible.

There is an urgent need to identify and implement a *required* temporary system to permit full and real-time access to non-public WHOIS data by law enforcement and other third parties with a legitimate purpose, pending the adoption of a comprehensive accreditation system. Not providing

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such a temporary system would likely cause significant harm to the security and stability of the internet and to the effectiveness of law enforcement, as evidenced by the ample use cases and other documentation provided by the Community throughout this process. This harm would be due to the significant increase in the time and resources it would take to acquire non-public WHOIS information pending the development of a formalized accreditation system. If law enforcement cannot quickly and effectively access WHOIS information to assist in pinpointing who owns or controls a domain, it is the public that will be victimized by conduct that may result in serious, if not life and death, consequences. The EU Council has also recognized the importance of “ensuring swiftly accessible and accurate WHOIS databases of IP-addresses and domain names so that law enforcement capabilities and public interests are safeguarded.”¹³ We also refer to our previous advice and comments, as well as to the input provided during the various ad-hoc exercises run by ICANN in this context, for further illustration of the consequences.¹⁴

IV. Recommendations

Consistent with our prior public comment on ICANN’s three proposed models, we recommend that ICANN consider:

- The GAC advice set forth in the Abu Dhabi Communiqué, including to maintain a WHOIS system that keeps “WHOIS quickly accessible for security and stability purposes, for consumer protection and law enforcement investigations, and for crime prevention efforts, through user-friendly and easy access to comprehensive information to facilitate timely action” and keeps “WHOIS quickly accessible to the public (including businesses and other organizations) for legitimate purposes, including to combat fraud and deceptive conduct, to combat infringement and misuse of intellectual property, and to engage in due diligence for online transactions and communications;”
- Swiftly providing a more detailed rationale underlying the choices made in the model, including an assessment from a data protection perspective on the basis of evidence and expertise gathered over the last few months, to respond to the GDPR requirements;
- keeping data related to legal persons in the WHOIS database available to the public in keeping with existing practice endorsed by DPAs;
- providing clarity on what is expected of the GAC as it pertains to accreditation. The GAC welcomes the opportunity to provide guidance on accreditation and codes of conduct consistent with the GAC’s role as an advisory rather than operational body;

¹³ Council of the European Union, Council Conclusions on the Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defense: Building strong cybersecurity for the EU. Available at <http://www.consilium.europa.eu/media/31666/st14435en17.pdf>

¹⁴ GAC Feedback on Proposed Interim Models for Compliance with ICANN Agreements and Policies in Relation to the European Union’s General Data Protection Regulation <https://www.icann.org/en/system/files/files/gdpr-comments-gac-icann-proposed-compliance-models-29jan18-en.pdf>

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- providing temporary accreditation/certification systems that include not just law enforcement, but all users pursuing a legitimate purpose including cybersecurity researchers, anti-abuse firms, intellectual property rights holders and their authorized representatives, consumer protection enforcers and others involved in investigations, crime prevention efforts, combating fraud and deceptive conduct, and due diligence for online transactions and communications;¹⁵
- participation in the temporary stop-gap accreditation/self-certification system being mandatory unless a contracted party would violate local laws in doing so, in which case it could apply for an exemption using the existing conflicts procedure;
- consulting with DPAs to explore the option of enforcement forbearance for a period of time to permit the development and implementation of a formal accreditation system;
- providing clarity on whether and how Port 43 bulk access will be implicated in the model;
- providing clarity that any “limitations” in terms of query volume envisaged under an accreditation program would balance realistic investigatory cross-referencing needs and avoid resort to assessment by registrars on a case-by-case basis;
- providing clarity on how ICANN will technically guarantee the confidentiality of WHOIS queries; and
- providing more clarity as to what the next steps are from a practical perspective before the necessary changes are introduced, to avoid uncertainty and loss of WHOIS data.

V. Conclusion

The GAC thanks ICANN for continuing its efforts to find a satisfactory WHOIS solution that maintains to the greatest extent possible information that is critically important to legitimate users while also being fully compliant with GDPR. The GAC also recognizes the difficult task of balancing the interests of the interested and impacted stakeholders. While noting that time is of the essence, the GAC urges ICANN to take these recommendations into consideration. We also reiterate our availability to participate and support the process of defining and implementing an interim model that 1) fully conforms with applicable data protection rules; 2) addresses the legitimate needs of WHOIS users for access to the necessary data elements; and 3) responds to the needs of contracted parties to obtain legal certainty as to the way forward.

¹⁵ The GDPR recognizes these user groups may have legitimate purposes. See *e.g.*, GDPR Recitals 47, 49 and 50.