

Statement of opinion regarding the Proposed Interim Models for GDPR Compliance

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This is a statement in support of the proposed compliance **Models 2B and 3** as described by ICANN in its Proposed Interim Models for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation (published on: 12 January 2018).

Disclaimer: this statement is made in a personal capacity and does not represent the position or interests of any particular entity or stakeholder group, although for the purposes of full disclosure the author admits to being formally a NCUC member and a former ICANN Fellow (ICANN 58 and ICANN 60).

Having devoted a significant part of my professional career to the issues of Internet governance and human rights, I welcome the significant shift in ICANN's privacy policy, reflecting the concerns of European privacy advocates expressed over the last decade. I am a strong supporter of a layered approach to WHOIS access as recommended, *inter alia*, by the ARTICLE29 WP in its letter to ICANN dated Dec. 11th 2017¹.

Model 2B offers most ground for further debate, catering to private and corporate needs, while reflecting the layered approach. The novel idea of accredited requestors provokes questions on the authorizing entity, authorization criteria and scope of granted access, yet should be commended for offering an effective and quick avenue to pursue claims against domain name registrants. The proposal follows a current trend of privatized justice (just to refer to the lasting debate on ISP liability and their notice-and-takedown rights and obligations), granting the authority to decide over personal data access to private party (presumably ICANN acting as the authorizing entity). This not only raises concerns of due process, but implies ICANN's consent to taking the role as a joint data controller – an issue still unresolved in the ongoing EU-ICANN debate. While Model 2B seems to best reflect the current needs of the ICANN community, it might raise the abovementioned concerns with regard to the principles of European data protection law (due process, controlled access) and will certainly need enhanced efforts to precise its procedures.

This statement is also to note support for the most restrictive **Model 3**, which while best suited to cater to the needs of data subjects, as described in EU law (both: GDPR and the preceding DP Directive 95/46/EC), might prove too radical for constructive further debate within the versatile ICANN community. This is however to note my strong support for such a radical shift in ICANN policy and express appreciation for putting it forward. Model 3 is the only one to effectively protect personal data of subjects in the era of global data economy, effectively disabling any potential forum shopping efforts by registries and registrants, seeking a data haven to support their business in accordance with the rule of law. It also attends to the well-known issue of WHOIS data inaccuracy, often raised as a significant deficiency of current policy. The notorious "privacy proxies", offering their data as those of the registrant, significantly curtail the original purpose of the WHOIS. They effectively disable both: private and state actors in their efforts to identify the entity behind any illicit or harmful activity performed through a website, making the alleged purpose of WHOIS illusory. A radical shift towards a non-public access to verifiable registrant data would be a most welcome

¹ ec.europa.eu/newsroom/just/document.cfm?doc_id=48839.

change in ICANN privacy policy, yet I am fully aware that the global, multistakeholder ICANN community might not be ready to engage in such a challenging debate at this point, hence **recommend Model 2B as a starting point for further debate.**

submitted by Joanna Kulesza (in private capacity)

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