

GAC Advice – San Juan Communiqué: Actions and Updates (30 May 2018)

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
<p>§1.a.I 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 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>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <ul style="list-style-type: none"> i. Ensure the proposed interim model maintains current WHOIS requirements to the fullest extent possible; <p>The Board understands that the GAC emphasizes that the WHOIS system helps achieve many public policy interests, including enhancing trust in the DNS, ensuring consumer protection, protecting intellectual property, combating cyber-crime, piracy and fraud, elements which are highlighted in the GAC’s 2007 WHOIS Principles.</p> <p>The Board understands that the GAC is concerned that ICANN’s new interim proposal suggests significant changes to the WHOIS system, and 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 analysis and supporting rationale.</p> <p>The Board also understands that the GAC is concerned that the proposed system risks hindering the efforts of</p>	<p>The Board accepts this advice. As outlined in section 1.12 of the Advisory Statement accompanying the Temporary Specification for gTLD Registration Data (Temporary Specification), adopted by the Board on 17 May 2018: “To allow ICANN, Registry Operators, and Registrars to comply with the law while ensuring continued availability of Registration Data to the greatest extent possible and avoid fragmentation of the WHOIS system, the Temporary specification will provide a single, uniform framework for ICANN, Registry Operators, and Registrar regarding Registration Data directory services.</p> <p>The Temporary Specification also takes into account ICANN’s Bylaws, which requires that, “Subject to applicable laws, ICANN shall use commercially reasonable efforts to enforce its policies relating to registration directory services and shall work with Supporting Organizations and Advisory Committees to explore structural changes to improve accuracy and access to generic top-level domain registration data, as well as consider</p>

	<p>i. Ensure that the proposed interim model maintains current WHOIS requirements to the fullest extent possible;</p> <p><u>RATIONALE</u> The core mission of ICANN is to “ensure the stable and secure operation of the internet’s unique identifier systems.” 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.” ICANN’s commitments and required reviews emphasize that it must “adequately address” issues related to “consumer protection, security, stability, resiliency and malicious abuse.”</p> <p>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.</p> <p>The GDPR 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.</p>	<p>law enforcement, intellectual property and other actors in combatting illicit activities and mitigating DNS abuse.</p>	<p>safeguards for protecting such data.” Also, this balancing acknowledges that it is either expressed or implied in all of ICANN org’s agreements that the contracted party must comply with all applicable laws.</p> <p>Additionally, section 4 of the Advisory Statement also outlines additional steps ICANN has taken and modifications made to the Temporary Specification to ensure the changes are as narrowly tailored as possible to meet the requirements of the GDPR, while maintaining the WHOIS services to the greatest extent possible.</p>
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	<p>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.” 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.</p> <p>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 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.</p> <p>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,</p>		
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	<p>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 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>§1.a.II GDPR and WHOIS</p>	<p>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>i. Provide a detailed rationale for the choices made in the interim model, explaining their necessity and proportionality in relation to the legitimate purposes identified;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>ii. Provide rationale for the choices made in the interim model, explaining their necessity and proportionality in relation to the legitimate purposes identified;</p>	<p>The Board accepts this advice. The Advisory Statement and the rationale to the Board’s resolution adopting the Temporary Specification provides a detailed rationale for the choices made in the Temporary Specification should elicit the support of the Internet community.</p>
<p>§1.a.III GDPR and WHOIS</p>	<p>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>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;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>iii. 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;</p>	<p>The Board accepts this advice. ICANN org has considered the many competing viewpoints on this matter, as expressed in paragraphs 5.5.10 – 5.5.11 of the Cookbook. ICANN org also requested additional guidance from the Article 29 Working Party on this issue. The guidance received from the Article 29 Working Party on 11 April 2018 makes clear that masking email addresses is a step toward compliance with the GDPR.</p>

			<p>In her letter to CEO Göran Marby, WP29 Chairperson Andrea Jelinek notes that WP29, “welcomes the proposal to introduce alternative methods to contact registrants or administrative and technical contacts, without public disclosure of registrants’ personal email addresses (referred to as “anonymized email, web form, or other technical means”).”</p> <p>The approach in the Temporary Specification is designed to minimize the intrusiveness of data processing, while still providing a means to contact, but not identify, the registrant, administrative, or technical contacts.</p>
<p>§1.a.IV GDPR and WHOIS</p>	<p>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>
<p>§1.a.V GDPR and WHOIS</p>	<p>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>

	interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;	interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;	
§1.a.VI GDPR and WHOIS	<p>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>vi. Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory crossreferencing needs;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>vi. Ensure that limitations in terms of query volume envisaged under an accreditation program balance realistic investigatory crossreferencing needs; and</p>	As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.
§1.a.VII GDPR and WHOIS	<p>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p>	As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.
§1.b.I GDPR and WHOIS	<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>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>Complete the interim model as swiftly as possible, taking into account the GAC’s advice above.</p>	The Board accepts this advice. ICANN org considered input from the community, the GAC, and European Data Protection Authorities to refine the Temporary Specification that was ultimately adopted by the Board on 17 May 2018. The Board welcomes the GAC’s continued outreach efforts to the Article 29 Working Party as the Board is required to reaffirm the Temporary Specification every 90 days following adoption.
§1.b.II GDPR and WHOIS	<p>b. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p>	The Board accepts this advice. As noted elsewhere, the Board adopted the Temporary Specification for gTLD Registration Data on 17

	<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>	<p>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>	<p>May 2018 utilizing the process established in the Registrar Accreditation Agreement and Registry Agreement for adopting temporary policies or specifications.</p>
<p>§1.b.III GDPR and WHOIS</p>	<p>b. the GAC advises the ICANN Board to instruct the ICANN Organization to:</p> <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>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>ii. Assist in informing other national governments not represented in the GAC of the opportunity for individual governments to provide information to ICANN on governmental users to ensure continued access to WHOIS.</p>	<p>The Board accepts this advice. ICANN org’s Government Stakeholder and IGO Engagement teams continue to facilitate regular engagement and capacity building activities with governments around the world. As part of their engagement activities, these team members continue to raise awareness about the changes to the WHOIS system related to compliance with the GDPR, and opportunities for inputs from governments.</p>
<p>§2.a.I IGO Reserved Acronyms</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>The Board sent a letter to the GAC requesting clarification regarding this advice. The GAC provided a response on 15 May 2018. Based on the GAC’s response, the Board understands that the GAC wishes for 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>The Board understands that the GAC and IGOs remain engaged on this issue and that the GAC is concerned</p>	<p>The Board thanks the GAC for the clarifications provided on 15 May 2018. The Board has asked the ICANN Organization to review the advice in light of these responses and to assess the feasibility of the request. The Board will defer action on this item at this time, and in due course will engage with the GAC should further clarifications be necessary before taking action on this advice.</p>

	<p>i. Ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible.</p> <p><u>RATIONALE</u> 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 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.</p> <p>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>that a removal of interim protections before a permanent decision on IGO acronym protection is taken could result in irreparable harm to IGOs.</p> <p>The Board also understands that the GAC emphasizes that to ensure this advice is effectively implemented, a focused effort is needed to contact remaining IGOs so their names are protected accurately in the chosen two languages.</p>	
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GAC Advice – San Juan Communiqué: Follow-up on Previous Advice (30 May 2018)

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
<p>1. Applications for dot Amazon and related strings</p>	<p>The GAC received an update from several of its members regarding the proposal submitted by Amazon.com at ICANN 60. The GAC understands that member governments of the Amazon Cooperation Treaty Organization (ACTO) have established a process for analyzing the proposal, and that this analysis is progressing. The GAC was informed that Amazon.com and Board members have made themselves available to assist if requested.</p> <p>The GAC considered Board Resolutions 2017.10.29.02 and 2017.10.29.03. The GAC decided, in a spirit of good cooperation, to reply to the Board’s request for any additional information the GAC wishes to provide regarding the .amazon case. The GAC’s letter to the Board is attached to this Communiqué.</p>	<p>The Board understands that the GAC received an update from several of its members regarding the proposal submitted by Amazon.com at ICANN60 and that the Amazon Cooperation Treaty Organization (ACTO) member governments have established a process for analyzing the proposal.</p> <p>The Board also understands that the GAC has included with the San Juan Communiqué a reply to Dr. Steve Crocker’s 29 October 2017 letter regarding Board resolutions 2017.10.29.02 and 2017.10.29.03.</p>	<p>The Board appreciates the update on the review by Amazon Cooperation Treaty Organization (ACTO) member governments of the Amazon.com proposal submitted at ICANN60 in Abu Dhabi. The Board acknowledges that the GAC has in its letter included in the San Juan Communiqué referred the Board to the Advice regarding this topic in the GAC Abu Dhabi Communiqué (see the Board’s reply to the letter here: https://www.icann.org/en/system/files/correspondence/chalaby-to-ismail-03apr18-en.pdf).</p> <p>The Board stands ready to move this issue forward at the conclusion of these discussions in accordance with the related Board resolution. Meanwhile, the Board will assess the progress made in the discussions and will consider how to move this process forward.</p>
<p>2. 2-Character Country/Territory Codes at the 2nd Level</p>	<p>Some GAC members note that important concerns regarding the release of 2-Character Country/Territory codes at the 2nd Level, as expressed in previous GAC advice, still remain.</p> <p>The GAC also notes the availability of certain measures to mitigate governments concerns</p>	<p>The Board understands that some GAC members note concerns regarding the release of 2-Character Country/Territory codes at the 2nd level, as expressed in previous advice.</p> <p>The Board also understands that the GAC notes the availability of certain measures</p>	<p>The Board notes the GAC’s concerns regarding this topic. The Board stands ready to continue to engage with the concerned governments on this issue and looks forward to further updates on this topic.</p>

	<p>with regard to the release of 2 letter codes at the second level.</p> <p>Some GAC members noted that the current measures have not been used. Some GAC members considered that these measures are insufficient.</p> <p>The GAC intends to follow up on implementation of the proposed initiative at ICANN62, bearing in mind that all previous GAC advice on the matter stands.</p>	<p>to mitigate governments concerns with regard to the release of 2 letter codes at the second level but that some GAC members noted that current measures have not been used or considered the measures insufficient.</p> <p>The Board understands that the GAC plans to follow up on the implementation of the proposed initiative at ICANN62.</p>	
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