**Small Team #2 Geographic Basis**

Charter question h1) Should Registry Operators and Registrars (“Contracted Parties”) be

permitted or required to differentiate between registrants on a geographic basis?

The EPDP Team agrees that contracted parties should be (and are) permitted to differentiate

between registrants on a geographic basis; however, the EPDP Team does not agree that

differentiation on a geographic basis should be required. Specifically, members of the BC, IPC

and GAC [add others as appropriate] have expressed the view that contracted parties should be

required to differentiate between registrants on a geographic basis.

The Members expressing support for requiring differentiation between registrants on a

geographic basis noted the following:

1. GDPR should not be over-applied. GDPR only applies to EU and EEA countries.

2. The global nature of DNS data and the application and fulfillment of the Purposes, as stated herein, necessitate the application of the laws as they exist within each relevant jurisdiction.

3. Applying GDPR to all registrants would undermine the ability of sovereign states to

enforce their own laws and regulations within their respective jurisdictions.

4. Businesses are generally required to take into account local laws when choosing to do

business with various countries; therefore, cost is not a persuasive argument

to not require differentiation.

The Members opposing requiring differentiation between registrants on a geographic basis

noted the following:

1. The actual location of the registrant is not alone dispositive of whether GDPR applies

especially because of the widespread industry use of additional processors (e.g.,

backend registry service providers for registry operators and backend registrar service

providers and resellers). For example, if a registry operator that is not subject to GDPR is using

a European registry service provider as a data processor, that registry service provider has to

comply with GDPR. If a registrar that is not subject to GDPR has a reseller that is subject to

GDPR, either because it is located in Europe or offers services to European data subjects, that

registrar would need to comply with GDPR. If a registrar uses another registrar as a service

provider to run the technical operations of its registrar business, the same complexity exists.

2. The actual location of the registrant is not alone dispositive of whether GDPR applies

especially because of the widespread industry use of additional processors (e.g.,

backend registry service providers for registry operators and backend registrar service

providers and resellers).

3. Data subjects need to be informed at the time of collection about how their personal data

is being processed, i.e., what data is collected, to whom it is transferred, how long it is

stored, etc. Not having a common approach for all registrants could lead to two classes

of registrants, which may result in competitive advantages to certain registrars/registries

(due to their establishment in jurisdictions with privacy protection), fragmentation in the

marketplace and interoperability issues.

4. It is often difficult to identify a registrant’s applicable jurisdiction with sufficient certainty to

apply appropriate data protection rules. A differentiated treatment based on geographic

location has a high likelihood of an adverse effect on the data subject’s data privacy

rights through publication.

5. There are significant liability implications for Contracted Parties if they are incorrect in

applying the appropriate data protection rules. Contracted parties should be free to

choose whether or not to take that risk as a business decision rather than a contractual

requirement.”

6. Any consensus policy needs to be commercially reasonable and implementable, and in

the current market place, differentiation based on geographic location will be difficult to

scale, costly, and, accordingly, neither commercially reasonable nor implementable.

Charter question h2) Is there a legal basis for Contracted Parties to differentiate b/w

registrants on a geographic basis?

Yes, there is a legal basis for contracted parties to differentiate b/w registrants on a geographic

basis. However, the location of the registrant alone is not a dispositive indicator if the GDPR

applies. If the controller or any processor is within the EU, the GDPR will also apply.

Members of the BC and IPC have requested ICANN, in conjunction with

interested community members, explore the feasibility of a mechanism allowing geographic

differentiation (such as, the EWG rules engine which is presently available and applied in other law-based systems where geographic location is a factor of contractual law application. Specifically, a rules engine, similar to what was proposed by ICANN’s [Expert Working Group on gTLD Directory Services (EWG)](https://protect-us.mimecast.com/s/q1PLCL9DwzTw5n9IBi-GG?domain=community.icann.org) in 2014, at pages 87-89 of the [EWG Final Report](https://protect-us.mimecast.com/s/0BETCM8gxACkG43hkMEyo?domain=icann.org).

[Other members of Small Team #2 did not agree

to this request – to be updated, as appropriate.]

Although the law does distinguish between EEA and non-EEA data, any policy must be feasible

and implementable. Given the current system and taking into account current technology and

policy expectations, the inability to differentiate such data to any level of certainty, and

prohibitively high implementation costs, liability risk remains too high, rendering a forced

differentiation unenforceable and unimplementable.