**Natural vs. Legal – Input received to date (1 November 2018)**

Original Language

h)     **Applicability of Data Processing Requirements – Draft responses**

*h3) Should Contracted Parties be allowed or required to treat legal and natural persons differently, and what mechanism is needed to ensure reliable determination of status?*

We seem to have agreed that yes, contracted parties should be allowed to treat legal and natural persons differently but the mechanism by which this should or can be done should be further explored.

*h4) Is there a legal basis for Contracted Parties to treat legal and natural persons differently?*

We agreed that under GDPR there is a legal basis.  While the focus of this EPDP is GDPR compliance, we did note that not all jurisdictions have this same distinction so we have to make sure our policy recommendations are flexible enough to take this into account.

*h5) What are the risks associated with differentiation of registrant status as legal or natural persons across multiple jurisdictions? (See EDPB letter of 5 July 2018).*

The main risk seems to be that while legal persons don’t have the same protections under GDPR, natural persons employed by a legal person (and who may be designated as the registrant, admin or technical contact) are still natural persons with rights/protection under GDPR. This risk may be minimized through educational resources as recommended below. [further flesh out risks: James Bladel to provide proposed language]

**Proposed Preliminary Policy Recommendation for inclusion in the Initial Report**

The EPDP Team recommends that:

* The distinction between legal and natural persons is useful and necessary for GDPR and some other data protection laws.
  + However, the EPDP Team recognizes that there are challenges in making this distinction in the context of domain name registrations as well as the potential implementation of any new functionality that would apply to pre-existing registrations.
  + Additionally, other jurisdictions may have other categories of protected groups or other requirements that would need to be factored in.
* The EPDP Team recommends that GDD staff who will be tasked with the implementation of these policy recommendations commence research by investigating how ccTLDs and contracted parties currently distinguish between natural and legal persons to inform the EPDP Team.

* Following the receipt of the research, the EPDP Team will explore in a timely manner how this distinction can be made in the context of domain name registrations in a satisfactory way.
  + The EPDP Team should also consider the timeline needed to implement, which could follow a phased approach whereby implementation would start immediately following completion of the further work and agreement on a satisfactory manner to distinguish between legal and natural persons for new registrations while existing registrations would be phased in upon renewal or by other means.
  + The EPDP Team should also consider which data fields (if any) need to be added to accomplish this distinction. This could require further liaising with the IETF if data fields in RDAP need to be added or changed.

* The EPDP Team recommends that, as a best practice, registries, registrars and ICANN each develop (educational) resources available that help registrants understand the distinction between a domain name that is registered by a natural person vs. legal person / entity. These resources and communications should also encourage legal persons to provide non-personal information for their email address and other contact information.

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| **NCSG** |
| **h5)**  The NCSG doesn’t concede that risks involved can be minimized through education. Educational resources may prove helpful, but the extent to which this might be true is not yet evident. Should any contracted parties elect to differentiate between legal and natural persons in how their data is processed, we believe educational resources should be made available to RNHs.  Additionally, the NCSG has proposed some modification to the language under h5, in order to explain the main risk involved with differentiation between legal and natural persons more clearly.  **Proposed Preliminary Policy Recommendations for inclusion in the Initial Report**  Although this is still in the attached document, the NCSG is proposing deletion of the third bullet, as well as the two sub-bullets under it. This section presumes that the EPDP Team will require registrars to distinguish between legal and natural persons, which the NCSG does not believe is going to be a consensus recommendation of the EPDP Team. |
| h)     **Applicability of Data Processing Requirements – Draft responses**    *h3) Should Contracted Parties be allowed or required to treat legal and natural persons differently, and what mechanism is needed to ensure reliable determination of status?*    We seem to have agreed that yes, contracted parties should be allowed to treat legal and natural persons differently but the mechanism by which this should or can be done should be further explored.    *h4) Is there a legal basis for Contracted Parties to treat legal and natural persons differently?*    We agreed that under GDPR there is a legal basis.  While the focus of this EPDP is GDPR compliance, we did note that not all jurisdictions have this same distinction so we have to make sure our policy recommendations are flexible enough to take this into account.    *h5) What are the risks associated with differentiation of registrant status as legal or natural persons across multiple jurisdictions? (See EDPB letter of 5 July 2018).*    While legal persons don’t have the same protections under GDPR, natural persons employed by a legal person (and who may be designated as the registrant, admin or technical contact) are still natural persons with rights/protection under GDPR. Educational resources may prove helpful, as outlined in the preliminary policy recommendations below.  The main risk is that the difficulty of distinguishing between the two at the point of registration could lead to the unintended publication of the private data of many natural persons. Additionally, while legal persons don’t have the same protections under GDPR, natural persons employed by a legal person (and who may be designated as the registrant, admin or technical contact) still have rights/protection under GDPR.    **Proposed Preliminary Policy Recommendation for inclusion in the Initial Report**    The EPDP Team recommends that:   * The distinction between legal and natural persons exists under GDPR and some other data protection laws, but there are challenges in making this distinction in the context of domain name registrations as well as the potential implementation of any new functionality that would apply to pre-existing registrations. * Additionally, some jurisdictions may have other categories of protected groups or other requirements that would need to be factored in. * The EPDP Team recommends that GDD staff who will be tasked with the implementation of these policy recommendations commence research by investigating how ccTLDs and contracted parties currently distinguish between natural and legal persons to inform the EPDP Team.      * Following the receipt of the research, the EPDP Team will explore in a timely manner how this distinction can be made in the context of domain name registrations in a satisfactory way.   + The EPDP Team should also consider the timeline needed to implement, which could follow a phased approach whereby implementation would start immediately following completion of the further work and agreement on a satisfactory manner to distinguish between legal and natural persons for new registrations while existing registrations would be phased in upon renewal or by other means.   + The EPDP Team should also consider which data fields (if any) need to be added to accomplish this distinction. This could require further liaising with the IETF if data fields in RDAP need to be added or changed.      * The EPDP Team recommends that, as a best practice, registries, registrars and ICANN each develop (educational) resources available that help registrants understand the distinction between a domain name that is registered by a natural person vs. legal person / entity. These resources and communications should also encourage legal persons to provide non-personal information for their email address and other contact information. |

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| **IPC** |
| It is the IPC's position that it is important and feasible for contracted parties to differentiate between legal and natural persons. We believe that this distinction is supported and encouraged by the construct of the GDPR and that is valuable for all parties in the practical application of the law as it relates to WHOIS and the DNS framework and ecosystem.  The IPC submits the attached redline with further output and clarification for consideration by the team. |
| h)     **Applicability of Data Processing Requirements – Draft responses**    *h3) Should Contracted Parties be allowed or required to treat legal and natural persons differently, and what mechanism is needed to ensure reliable determination of status?*    We seem to have agreed that yes, contracted parties should be allowed to treat legal and natural persons differently but the mechanism by which this should or can be done should be further explored.    *h4) Is there a legal basis for Contracted Parties to treat legal and natural persons differently?*    We agreed that under GDPR there is a legal basis.  While the focus of this EPDP is GDPR compliance, we did note that not all jurisdictions have this same distinction so we have to make sure our policy recommendations are flexible enough to take this into account.    *h5) What are the risks associated with differentiation of registrant status as legal or natural persons across multiple jurisdictions? (See EDPB letter of 5 July 2018).*    The main risk seems to be that while legal persons don’t have the same protections under GDPR, natural persons employed by a legal person (and who may be designated as the registrant, admin or technical contact) are still natural persons with rights/protection under GDPR. This risk may be minimized through clear explanatory language beneath each field when filling in data fields within domain name registrations, as recommended below. [further flesh out risks: James Bladel to provide proposed language]    **Proposed Preliminary Policy Recommendation for inclusion in the Initial Report**    The EPDP Team recommends that:   * The distinction between legal and natural persons is important and relevant for GDPR and other country data protection laws.   + However, the EPDP Team recognizes that there are liability concerns in making the determination between legal and natural persons in the context of domain name registrations if either inaccurate information is provided by the registrant or if registration data includes both legal and natural person information. The Team is simultaneously within this EPDP making legal recommendations, as requested by ICANN org, for contractual changes to the RAA which can provide for updated contractual provisions around the clear explanatory language for registrants in filling in data fields and the clear attestation provisions within the RAA in relation to providing accurate and up-to-date data.   + Moreover, based upon the recommendation from Thomas Rickert, there could be guidance from the EDPB (coming out of the proposed meeting with this body with members of this team) which could allow for greater legal certainty regarding the distinction between natural and legal persons which could support the CPs to reasonably rely upon a “self-certification” system by registrants without undue legal exposure.   + The EDPDP Team further agrees that: the distinction between legal and persons will need to be made only to domain name registrations going forward upon the implementation of the Consensus Policy and then the potential implementation of any new functionality that would apply and/or provide the support needed to address this distinction within pre-existing registrations.   + Additionally, other jurisdictions may have other categories of protected groups or other requirements that would need to be factored in within the above-described two stage implementation structure. * The EPDP Team recommends that GDD staff who will be tasked with the implementation of these policy recommendations commence research by investigating how ccTLDs and contracted parties currently distinguish between natural and legal persons to inform the EPDP Team.      * With research inputs including the above ccTLD information, the EPDP Team will provide recommendations regarding how this distinction can be made in the context of domain name registrations within the two-stage framework.   + The EPDP Team will base its recommendations taking into account the timelines needed for implementation; which would follow the above-described phased approach whereby implementation would start immediately following completion of the further work and agreement on a satisfactory manner to distinguish between legal and natural persons for new registrations while existing registrations would be phased in upon renewal or by other means.   + The EPDP Team will also make recommendations about which data fields (if any) need to be added to accomplish this distinction. This could require further liaising with the IETF if data fields in RDAP need to be added or changed.      * The EPDP Team recommends that, particularly until the Consensus Policy is put into effect, to address immediate needs, that a best practice, registries, registrars and ICANN each develop (educational) resources available that help registrants understand the distinction between a domain name that is registered by a natural person vs. legal person / entity. These resources and communications should also encourage legal persons to provide non-personal information for their email address and other contact information. |

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| **ALAC** |
| H3 says that the distinction between natural and legal persons should be allowed but does not address whether the distinction should be required. It should say that it will also be required subject to the implementation subject to the details in the Proposed Preliminary Policy Recommendation. |

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| **RrSG** |
| Based on the discussions we had in Barcelona, it was our understanding this language was going to continue to be refined due to the many objections raised to it within the larger group. While we do not object to research being done to get additional insights, it’s not clear what specifics we will be soliciting, what the timing of that research will be or ultimately what we will do once we receive that research. There was discussion about further defining the “organization name” field and we believe that should continue to be developed and discussed amongst the group. We also continue to be concerned about the applicability of this distinction to currently registered domain names and the feasibility of how this would be implemented by registrars. |