

BC Comments

Small Team #1 – Legal vs. Natural Person (Status 25 October 2018)

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. Some of us believe that the policy should require the contracted parties to make the distinction, after exploration of an appropriate mechanism, and identification of a reasonable timeframe to account for transitioning the existing registration base.

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, as recommended below. [

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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 country data protection laws.
 - However, the EPDP Team recognizes that there are 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 where the administrative or technical contacts include 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. Some of the EPDP Team believe that it is practical to design a registration

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user experience which makes explicitly clear to a RNH that self-selecting as a legal person provides fewer privacy protections.

- Moreover, ICANN should explore the possibility of obtaining guidance from the EDPB which could allow for greater legal certainty regarding the distinction between natural and legal persons which could support the CPs ability to reasonably rely upon a “self-certification” system by registrants without undue legal exposure. The BC believes that it is practical to design a registration user experience which makes explicitly clear to a RNH that self-selecting as a legal person provides fewer privacy protections.
 - Such notifications can easily be added to the main registration flow and may be further reinforced through the use of the optional Organization field (i.e. entering a value into this field will expose additional notification of reduced privacy protections for legal persons).

- The EPDP Team further agrees that: the distinction between legal and persons will initially need to be made initially to new domain name registrations and then a second phase would need to address the potential implementation of any new functionality 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 registries (ccTLDs and gTLDs) and registrars currently distinguish between natural and legal persons to inform the EPDP Team. Some believe that this analysis could inform identifying mechanisms to make the distinction that are currently in operation to minimize the implementation costs associated with this recommendation. At a minimum GDD staff should research the following TLDs:

- .AT ccTLD which provides differentiated Whois output based upon Natural/Legal distinction
- .BE ccTLD which appears to make a Natural/Legal person distinction based upon public Whois output;
- .DK ccTLD which appears to make a distinction between Natural/Legal persons based upon the credentials required to be produced by Registrants;
- .EE ccTLD which appears to make a distinction between Natural/Legal persons based upon the credentials required to be produced by Registrants;
- .NYC which requires Registrants to identify themselves as either a Individual or an Organization;
- .CAT permits Registrant to identify themselves as either a Natural or Legal person, and makes a further distinction based on whether the entity is engaged in commercial activity¹

- ¹ This distinction is based in part potential conflicting legal requirements between the GDPR rights of Natural Person registrants versus EU and other

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- The EPDP Team recommends that GDD staff should engaged in outreach to any Registries (gTLD/ccTLD) or Registrars that currently use operational/business practices to notify Registrants how some information about natural person employees may be disclosed via RDDS. By way of example, fTLD has implemented a Verification Application process where applicants are permitted the option of inputting a Role Name (via check box) to be publicly displayed in the RDDS, see <https://www.register.bank/get-started/>

With research inputs including the above Registration Authorities information, the EPDP Team will provide recommendations regarding 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, particularly until the Consensus Policy is put into effect, to address immediate needs, that contracted parties be obligated to provide educational information to registrants during the registration process. In addition, as a best practice, registries, registrars and ICANN each develop (educational) resources available that could be used to satisfy this requirement and 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.

- The EPDP further recommends that the policy allow for the optional contacts (Tech Contact and/or Admin Contact) to be published unredacted, contingent on obtaining consent collected during post-collection verification.

national requirements that require businesses to post contact information on their website when engaged in commercial activity. This distinction in the .CAT TLD was previously approved by the Spanish DPA and the ICANN Board.

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