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

Proposed updated language for inclusion in the Initial Report (7 November 2018)

*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?*

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

*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 EPDP Team discussed these questions extensively (see [include link to this document which includes the different proposals]) and although the EPDP Team agrees that Contracted Parties should be allowed to treat legal and natural persons differently, the EPDP Team did not agree on whether this should be required and/or what further steps could or should be undertaken to determine what mechanism is needed to ensure reliable determination of status. Specifically, Contracted Parties, supported by the NCSG, stated that they “oppose/reject any recommendations for new contractual requirements in the EPDP Draft Initial Report, and will remain opposed to these recommendations as we move towards final recommendations”.

The EPDP Team further agrees under GDPR there is a legal basis to treat legal and natural persons differently, but does not agree on whether that means Contracted Parties should be required to do so, or whether the challenges and legal risks involved in doing so result in leaving this optional. Similarly, the EPDP Team discussed the implication of other data protection regimes which could have different requirements that impact both natural and/or legal persons that would need to be factored in.

The EPDP Team identified a number of risks, including:

* 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 enjoying rights and protections under GDPR. Some noted that this risk may be minimized through clear explanatory language beneath each field when filling in data fields within domain name registrations.
* There may be situations in which it can be difficult to separate the data of natural persons from that of legal persons. This can be the case, for example, if the legal person is a sole proprietorship, if the name of a person appears in the company’s name, if the business address is a natural person’s residence, or if an email address is assigned to a single individual (“john.doe@company.example.com” as opposed to “info@company.example.com.
* 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.

The EPDP has discussed whether this risk may be somewhat mitigated through educational resources. Some in the EPDP Team expressed caution, as a stated necessity to rely on educational resources may not be considered to be compatible with the concepts of privacy by default or privacy by design i.e. where additional ‘educational resources’ are deemed necessary, the process itself is likely not established or presented in a sufficiently clear manner.

Some members of the EPDP Team suggested that to help further inform the EPDP Team’s deliberations on this topic it might be helpful if research would be commenced immediately by investigating how ccTLDs and contracted parties currently distinguish between natural and legal persons to inform the EPDP Team, but this was not supported by Contracted Parties and NCSG at this point in time who consider a potential change in how natural and legal persons are treated outside the scope of the EPDP, and possibly the “picket fence” of Registrar and Registry contracts.

The EPDP Team would like to request input on the following questions in relation to this topic to help inform any further deliberations on this topic:

* Are there examples from other industries or areas, e.g. ccTLDs, where a mechanism has been successfully developed and implemented to distinguish between natural and legal person, factoring in some of the challenges identified above?
* Should the EPDP Team decide to recommend requiring distinguishing between natural and legal persons, how should implementation be carried out, especially considering legacy registrations?
* Should the EPDP Team decide to recommend that further research is undertaken, what and how should this research be carried out?
* (For the EDPB) If registrars allow registrants to self-identify at the time as a natural or legal person, who will be held liable if the registrant incorrectly self-identifies and personal information is publicly displayed? Apart from self-identification, are there any other ways in which risk of liability could be mitigated by registrars?

The input on these charter questions will help the EPDP Team further analyze if it is possible and desirable to make this distinction in the context of domain name registrations, in a manner that is commercially reasonable, implementable and does not result in unreasonable liability for contracted parties.

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. |

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| **GAC** |
| 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. The GAC would go further and recommend that the temporary specification require contracted parties to treat legal and natural persons differently because, consistent with prior GAC advice and comments on interim models, the GDPR does not cover processing of personal data which concerns legal persons. Hence, the personal information of legal persons should be part of the publicly available WHOIS data. We recommend that contracted parties develop mechanisms that ensure a reliable determination of natural or legal person status for registrants going forward (post- implementation of new contract specifications) and for their legacy registrants and recognize that these procedures will likely require a phased approach that allows more time for contracted parties to deal with their legacy customers.    *h4) Is there a legal basis for Contracted Parties to treat legal and natural persons differently?*    Recital 14 of the GDPR provides that the GPR “does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person.” Hence, 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 admin or technical contact) are still natural persons with rights/protection under GDPR. This risk may be minimized through educational resources as recommended below.  **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 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 highlight that the name and contact information of legal persons will be disclosed in the public WHOIS and therefore encourage legal persons to provide non-personal information for their email address and other contact information. |

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| **CPH** |
| 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?***    The EPDP Team agrees that Contracted Parties should be allowed to treat legal and natural persons differently, but also recommends the mechanism by which this could be done should be further explored.  ***does not agree*** that Contracted Parties should be ***required*** to treat legal and natural persons differently.    ***h4) Is there a legal basis for Contracted Parties to treat legal and natural persons differently?***  The EPDP Team agreed that the GDPR extends protections to natural persons data and therefore would allow for Contracted Parties to treat legal persons data differently.  It should be strongly noted, however, with due regard to the communications of the EDPB, this is not a straightforward delineation, and the EPDP team should be exceptionally cautious so as not to engage in broad and invalid assumptions that in any way enhance the risk of a personal data breach occurring. Such an increased risk is not in the interests of any party. Additionally, while the focus of this EPDP is GDPR compliance, the EPDP Team noted that not all jurisdictions distinguish between legal and natural persons therefore any policy recommendations must remain 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).***    One important risk is 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 full rights and protections under GDPR.  The EPDP team recognises that registration data would not necessarily be subject to data protection requirements law, should such data relate purely to a legal person. It, should be noted, however, that there are many situations where it can be difficult to separate the data of natural persons from that of legal persons. This can be the case, for example, if the legal person is a sole proprietorship, if the name of a person appears in the company’s name, if the business address is a natural person’s residence, or if an email address is assigned to a single individual ( “john.doe@company.example.com” as opposed to “info@company.example.com”). The tendency to consider much company-related data as having an impact on the data protection rights of individuals can be seen in judgments of the Court of Justice of the EU (the “CJEU”) (e.g., the Bavarian Lager case, Case C-28/08 P, concerning the names of participants in a business meeting; and the Bara case, Case C201/14, concerning the processing of tax data of an individual by a public administrative body). Thus, it could be difficult in practice for ICANN to implement a policy that clearly separates the data of legal entities from personal data.  The EPDP has discussed whether this risk may be somewhat mitigated through educational resources (see recommendations). Caution has been advised, as a stated necessity to rely on educational resources may not be considered to be compatible with the concepts of privacy by default or privacy by design i.e. where additional ‘educational resources’ are deemed necessary, the process itself is likely not established or presented in a sufficiently clear manner.  The EPDP should also avoid making recommendations where it is perceived that the issue of the data subject rights can be addressed by further contractual language to be enforced against the Contracted Parties. The EPDP should focus on vindicating the rights of the data subjects and not contriving a legal mechanism to maintain a flawed delineation, where it remains clear that certainty, both legal and technological, simply doesn’t currently exist.  It is furthermore wrong to suggest that such an approach is considered to be ‘over-compliance’. It submitted that current expert opinion (i.e. the opinion of the contracted parties who are objectively the best placed to appreciate the inbuilt limitations of the current system which they themselves maintain) is that in order to ensure minimum compliance with the GDPR, we must ensure adequate controls are in place to prevent breaches (such as accidental and inadvertent publication of personal data under the false assumption that it is data of a ‘legal person’ ). It is the opinion of the contracted parties that this can currently only be achieved by applying protections to all registrants, until such a time as there are substantial advancements in the state of the art, and even then, such an imposition would only be acceptable with a full and due regard to the cost and feasibility of implementation.  It is, in the interim, acceptable were the minimum ICANN policy to make the implementation of such a delineation optional (as is currently allowed by the temporary specification); however, such a choice should rest with individual Contracted Party, and should be based on all the factors that they themselves may discern as applicable to their business model, to voluntarily assume such risk.  Additionally, the team continues to discuss what data elements are required to be collected. If data elements are required to be collected only solely to make a distinction between natural and legal persons, that represents a higher risk as that determination isn’t necessary to effect and manage a domain name registration and does not adhere to the principle of data minimization.  **Proposed Preliminary Policy Recommendation for inclusion in the Initial Report**    The EPDP Team recommends that:   * Subject to any substantial and material conclusions as a result of research as recommended below, the current temp spec wording should be generally retained. * Although noting a distinction exists between legal and natural persons under GDPR (and other data protection laws):   + The EPDP Team recognizes that there are technical and financial challenges in effectively making this distinction in the context of domain name registration and in the ongoing maintenance of such domains, as well as the potential implementation of any such new functionality to pre-existing registrations.   + Additionally, other jurisdictions may protect categories of groups in a manner similar to natural persons, and the associated requirements may warrant further consideration. * The EPDP Team recommends that GDD staff who will design the implementation of these policy recommendations should commence research by investigating how ccTLDs and contracted parties currently distinguish between natural and legal persons to inform the EPDP Team. The EPDP however cautions that such research should not be seen as an indicator as to the actual legality of such implementations, but is merely indicative as to the technology available, and the related means and methods used by such operators in making such a delineation.      * After receiving and analyzing this research, the EPDP Team will explore in a timely manner if this distinction can, or should, be made in the context of domain name registrations in a commercially reasonable and implementable way that does not result in increased liability for contracted parties.   + If the EPDP Team concludes that the distinction can be made in such a way, it should also consider two implementation considerations, namely, if a phased approach is helpful and   + 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. It should be noted that additional or supplemental educational resources alone should not be seen as an adequate remedy for a process that that does not clearly or adequately support the basic protect the privacy rights of a registrant. * The EPDP team further recommends the future technical and policy creation with due regard to the preceding recommendations. |