**Natural vs. Legal** - Proposed updated language for inclusion in the Initial Report (14 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; specifically, how to reach consensus on a policy recommendation with the goal of preventing unlawful disclosure or publication of personal data that concerns natural persons. In these discussions, the EPDP Team also considered the EDPB Advice in relation to this topic:

“The GDPR does not apply to 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. While the contact details of a legal person are outside the scope of the GDPR, the contact details concerning natural persons are within the scope of the GDPR, as well as any other information relating to an identified or identifiable natural person. [[1]](#footnote-1)

The mere fact that a registrant is a legal person does not necessarily justify unlimited publication of personal data relating to natural persons who work for or represent that organization, such as natural persons who manage administrative or technical issues on behalf of the registrant.

For example, the publication of the personal email address of a technical contact person consisting of can reveal information regarding their current employer as well as their role within the organization. Together with the address of the registrant, it may also reveal information about his or her place of work.

In light of these considerations, the EDPB considers that personal data identifying individual employees (or third parties) acting on behalf of the registrant should not be made publically, available by default in the context of WHOIS. If the registrant provides (or the registrar ensures) generic contact email information (e.g. admin@domain.com), the EDPB does not consider that the publication of such data in the context of WHOIS would be unlawful as such.”

In answer to question “h3,”

* the EPDP Team agrees that Contracted Parties should be allowed to treat personal data that concerns legal and natural persons differently.
* the EPDP Team did not agree on whether treating personal data that concerns legal and natural persons differently should be required
* the EPDP team did not agree what further steps could or should be undertaken to determine whether consensus could be obtained for this part of the question.

In answer to question “h4,” the EPDP Team agrees that, under GDPR, there is a legal basis to treat personal data that concerns legal and natural persons differently.

In answer to question “h5,” the contracted parties identified substantial legal, liability and cost risks associates with attempting to differentiate personal data that concerns legal or natural persons across multiple jurisdictions with globally dispersed data operating under different privacy regimes. See their comments below.

A small group was convened to discuss the charter questions and (among other items) whether the legal and liability risks described by contracted parties could be ameliorated to an extent so that contracted parties could undertake a distinction between personal data that concerns legal and natural persons.

As a result of the small group recommendation, the EPDP team debated whether additional research should be undertaken to inform the policy debate. The EPDP team is divided on the issue – this division is described in their comments:

* 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”. Stated opposition to retaining the current permissive language of the Temp Spec, are, in the opinion of the CPH and NCSG, based on “refuted assertions or non-implementable options, many of which, even if they were in scope, given the state of the art, the cost of implementation, and the likely impact to the rights of the data subjects, are currently unreasonable”. The Contracted Parties and the NCSG are of the view that the already stated requirements of the Temporary Specification “remain outside the scope of the EPDP and should be a matter for another, more appropriate PDP.”
* The BC, IPC **[**ALAC, and GAC**]** members of the EPDP stated that ICANN’s mission, the public interest and transparency are all better served if the legal vs. national person distinction is required. They noted that certain ccTLDs as well as gTLDs make this distinction[[2]](#footnote-2). Therefore, the BC, IPC ,[ALAC and GAC] are of the view that making the distinction between legal and natural persons is not only in keeping with the law, but also feasible for the Contracted Parties to implement. They further are of the view that this critical issue falls squarely within the scope of the EPDP, as it is already addressed in the Temporary Specification.

Some members of the EPDP Team identified a number of risks, including:

* The difficulty of distinguishing between the two at the point of registration could lead to the unnoticed and unintended publication of the private data of many natural persons.
* While personal data that concerns legal persons doesn’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.

In addition, the EPDP team has discussed whether risks 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.

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:

* Should the EPDP Team recommend that Contracted Parties be allowed or required to treat personal data that concerns legal and natural persons differently? Please provide rationale to your response.
* Are there examples from other industries or areas, e.g. ccTLDs or gTLDs, where a mechanism has been developed and implemented to distinguish between personal data that concerns natural and legal person, factoring in some of the challenges identified above?
* Should the EPDP Team decide to recommend requiring distinguishing between personal data that concerns 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?
* What risks, if any, to natural persons’ privacy would occur if registrars were required to try to segregate personal data that concerns legal and natural persons at the point of registration?
* What additional costs and risks to registrars and registries, if any, would occur if registrars were required to distinguish between personal data that concerns legal and natural persons at the point of registration?
* Given that the process of distinguishing between personal data that concerns legal and natural persons will likely not be perfect or costless, and that some legal persons may self-identify as natural persons and vice-versa, what would be the net benefit of requiring such a distinction?
* (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, and educational materials to inform the registrant, are there any other ways in which risk of liability could be mitigated by registrars?

The input on these questions will help the EPDP Team further analyze if it is possible and desirable to conduct additional research in order to inform the discussion about making this distinction in the context of domain name registrations, in a manner that is commercially reasonable, implementable and does not result in unreasonable liability or cost for contracted parties.

1. Article 4(1) GDPR. [↑](#footnote-ref-1)
2. See for example, CENTR Report - <https://centr.org/library/library/survey-report/centr-report-whois-status-and-impacts-from-gdpr.html as well as .cat> and .nyc. requirements. [↑](#footnote-ref-2)