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## Governmental Advisory Committee<sup>1</sup> Input on the Draft Final Report of the Expedited Policy Development Process (EPDP) on gTLD Registration Data

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### 1. General Concern that Draft Final Report does not Sufficiently Recognize the Benefits of the Whois database

The GAC commends the considerable efforts put forth by the EPDP members, observers, leadership and support staff to produce this Draft Final report. The complex subject matter and swift timeframes challenged all those involved to determine the best path forward to comply with the EU's General Data Protection Regulation (GDPR) and take into account the sometimes competing interests of the public, including intellectual property protection, cybersecurity, and those public authorities charged with protecting against deceptive or malicious conduct involving the domain name system (DNS). Nevertheless, the draft final report does not sufficiently recognize or incorporate recommendations in the public interest.

As set forth by the GAC in its 2007 Principles regarding gTLD WHOIS Services, as the Internet evolved, the WHOIS became a tool relied upon by various stakeholders for a number of legitimate activities, including *inter alia*, 1) supporting the security and stability of the Internet; 2) assisting law enforcement authorities in their national and international investigations; 3) assisting businesses, organizations and users in combatting fraud and 4) contributing to user confidence in the Internet.<sup>2</sup> The GAC also highlighted the importance of "sufficient and accurate data" about domain name registrations and registrants, subject to privacy safeguards. The GAC also recognized the legitimate concerns about misuse of WHOIS data and conflicts with applicable privacy and data protection laws. Hence the GAC concluded that operation of gTLD WHOIS services should take into account and respect these different interests. The 2007 GAC Principles therefore urge not only compliance with applicable laws but also WHOIS services that support "the stability, reliability, security, and global interoperability of the Internet from both a technical and public trust perspective." The current draft Final Report lacks this recognition and hence risks creating a new registration directory service that does not collect, publish, nor allow for lawful disclosure of sufficient information and provide adequate procedures necessary for promoting 1) the security and stability of the DNS, 2) user confidence in the Internet, and 3) quick and efficient mitigation of malicious conduct. The GAC concerns regarding specific recommendations, the importance of starting and concluding Phase 2 discussions as soon as possible, and suggestions to improve procedures for the next phase of the EPDP are set forth below.

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<sup>1</sup> Submitted by GAC members of the EPDP, based on previous input of the GAC, which could not be consulted in the time allowed for submission.

<sup>2</sup> These interests are also reflected in ICANN's current Bylaws which commit to "[p]reserve and enhance the administration of the DNS and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet." The Bylaws also mandate specified reviews to assess the effectiveness of *inter alia*, "the security efforts to deal with actual and potential challenges and threats to the security and stability of the DNS"; the effectiveness of the then current gTLD registry directory service and whether its implementation meets the legitimate needs of law enforcement, promoting consumer trust and safeguarding registrant data" and address issues of "consumer protection..., malicious abuse issues ..., and rights protection." See ICANN Bylaws Section 1.2 (a) Commitments and Section 4.6 (c)(d) and (e) Required Reviews.

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## Input on Specific Recommendations

**Recommendation 1, paragraph 2** in the EPDP Initial Report, which states:

*2. Contributing to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission through enabling responses to lawful data disclosure requests.*

The GAC believes that this purpose would be strengthened by referencing ICANN's *Commitments* and *Core Values* which are also integral to ICANN's Bylaws.

**Recommendation 2** which states:

*The EPDP Team commits to considering in Phase 2 of its work whether additional purposes should be considered to facilitate ICANN's Office of the Chief Technology Officer (OCTO) to carry out its mission (see <https://www.icann.org/octo>). This consideration should be informed by legal guidance on if/how provisions in the GDPR concerning research apply to ICANN Org and the expression for the need of such pseudonymized data by ICANN*

The GAC supports the intent of this Recommendation and urges its continued consideration in Phase 2. The GAC believes that the final version of this purpose should include ICANN's purpose to process information associated with its registration data Accuracy Reporting System.

**Recommendation 4** which states:

*The EPDP Team recommends that requirements related to the accuracy of registration data under the current ICANN contracts and consensus policies shall not be affected by this policy.*

Consistent with Article 5.1.d of the GDPR, every reasonable step must be taken to ensure the accuracy of personal data, in this case, including data provided by registrants. Article 5 of the GDPR also extends beyond the right of a data subject, "having regard to the purposes for which [the data] are processed". Current ICANN contracts (in particular in the 2013 [Registrar Accreditation Agreement](#), Sections 3.2.2, 3.7.7.2 and 3.7.8) are consistent with this aspect of the GDPR and obligate registrars to take steps to respond to and correct reports of inaccurate WHOIS data.

Therefore, the GAC believes that Recommendation 4 should more explicitly recognize the importance of ensuring information accuracy consistent with GDPR article 5.1(d). This recognition would underscore the data subjects (registrants) rights to the accuracy of their data while also addressing concerns of those who rely on WHOIS information for legitimate purposes (such as maintaining the security and stability of the DNS).

## **Recommendations 5 and 7 (data elements required to be collected)**

The GAC remains concerned that the "technical contact" field is currently considered optional to be collected by the registrar. A primary purpose for WHOIS is to provide contact points for network operators, computer incident response teams, and others who need to contact those responsible for a domain and its associated web sites in the event of a problem. Often a registrant has specific/distinct contacts responsible for acquiring/maintaining registration and other contacts responsible for ensuring the security of the

domain. Being able to reach the informed technical contact responsible for security issues directly and quickly to respond to issues such as the domain being under control of a botnet, may be a matter of urgency. Making collection of this information optional for registrars eliminates this important safety net. Moreover, the GAC does not think it is appropriate for registrars to unilaterally decide for registrants that they do not need to identify a technical contact. Registrants may see value in providing a technical contact to resolve issues with their domain in a timely and most direct manner, among other reasons. The provision (and therefore collection) of a technical contact should remain an option for the registrant.

Further, the GAC is concerned that language in the recommendation leaves it completely optional for the registrant to decide whether or not to provide information in the “organization” field. The basis of this concern is that those registrants who are in fact organizations may not enter their organization’s name into this field if they are not required that they do so. The GAC is of the view that it is vital for members of the public to know if a domain is registered by an organization and if so, the name of that organization so that they may conduct due diligence as they decide what websites to trust with their communications and transactions or what entity to contact to seek resolution of complaints. Hence, the GAC is of the strong view that the organizational field should be required to be provided by a registrant that is in fact an organization and would recommend that this matter be considered during Phase II and/or implementation.

### **Recommendations 10 and 11 (redaction of data elements).**

#### *Organization*

The Organization field should not be redacted as this is clearly a field whereby any personal data contained within the entry would fall under that of a legal person as defined within GDPR Recital 14A. If registrants incorrectly provide personal information, this could be rectified by a number of means, including first, by providing registrants with clear guidance on what this field is for and the implications of entering data into the field. Second, by providing the registrant with the ability to rectify this field if it is not correctly filled out and by confirmation at renewal point.

It should be noted that in GAC’s previous input, there are many European countries who publicly publish business details (including organization name) and even a network of these national registers (European Business Registrar). Also the European Directive 2000/31/EC states “Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information:

- (a) the name of the service provider;
- (b) the geographic address at which the service provider is established;
- (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner;”

#### *City*

The City field should not be redacted as an individual is unlikely to be identified either directly or indirectly from this identifier or with all the identifiers otherwise non-redacted.

### **Recommendation 12 (Publication of Organization field).**

The GAC is pleased that the EPDP was able to reach agreement in recommending that the Organization field be published under the conditions outlined in the report. That being said, the GAC is of the view that

there should be more accountability to be applied to the Contracted Parties in implementing this. Specifically, the time frame for registrars to develop procedures to deal with existing registrations. The GAC would like this time frame to be time bound and correspond with the first renewal period after implementation of the new policy.

**Recommendation 13 (email address and web form to facilitate email communication).**

- 1) *The EPDP Team recommends that the Registrar MUST provide an email address or a web form to facilitate email communication with the relevant contact, but MUST NOT identify the contact email address or the contact itself, unless as per Recommendation X, the Registered Name Holder has provided consent for the publication of its email address.*
- 2) *The EPDP Team recommends Registrars MUST maintain Log Files, which shall not contain any Personal Information, and which shall contain confirmation that a relay of the communication between the requestor and the Registered Name Holder has occurred, not including the origin, recipient, or content of the message. Such records will be available to ICANN for compliance purposes, upon request. Nothing in this recommendation should be construed to prevent the registrar from taking reasonable and appropriate action to prevent the abuse of the registrar contact process.*

The GAC is concerned that this recommendation does not provide sufficient accountability with regard to instances if emails bounce back or are ignored (for example: providing notification to the sender that the email has been received and read).

**Recommendation 17 (Differentiation of Legal and Natural Persons)**

- 1) *The EPDP Team recommends that the policy recommendations in this Final Report apply to all gTLD registrations, without requiring Registrars or registries to differentiate between registrations of legal and natural persons, although registrars and registries are permitted to make this distinction.*
- 2) *The EPDP Team recommends that as soon as possible ICANN Org undertakes a study, for which the terms of reference are developed in consultation with the community, that considers:*
  - *The feasibility and costs including both implementation and potential liability costs of differentiating between legal and natural persons;*
  - *Examples of industries or other organizations that have successfully differentiated between legal and natural persons;*
  - *Privacy risks to registered name holders of differentiating between legal and natural persons; and*
  - *Other potential risks (if any) to registrars and registries of not differentiating.*
- 3) *The EPDP Team will discuss the Legal vs. Natural issue in Phase 2. Depending on the timing of the research, its discussions may inform the scope of research and/or use its findings.*

The GAC would recommend that the temporary specification require contracted parties to treat legal and natural persons differently because, the GDPR “does not cover processing of personal data which concerns legal persons.” (Recital 14). Hence, as the GAC recognized in its San Juan Communique advice, the personal information of legal persons should be part of the publicly available WHOIS data. Hence, the GAC support this recommendation in that it provides for further study of this topic in Phase II. However, the GAC notes that the Recommendation discusses only the risks and costs of this differentiation but does not mention the benefits of this distinction.

Hence the GAC recommends that the study include an examination of the benefits of providing this information to the public.

### **Recommendation 18 (reasonable requests for Lawful Disclosure of Nonpublic Data)**

The GAC believes the recommendation provides much greater clarity around the matter of requesting disclosure of redacted information, for both the requester of the information and the contracted parties. The GAC looks forward to progressing this discussion to a unified access model in Phase II.

### **European Data Protection Board Guidance**

The GAC recognizes the considerable effort and time taken by the EPDP in developing the Phase I Final Report. The GAC asks that a legal review be undertaken to ensure that the purposes referenced in the Phase 1 Final Report take into account previous guidance provided by the European Data Protection Board (EDPB) and Article 29 Working Group (WP29). Specifically, that ICANN:

- explicitly define legitimate purposes in a way which comports with the requirements of GDPR<sup>3</sup>
- take care in defining purposes in a manner which corresponds to its own organizational mission and mandate / do not conflate purpose<sup>4</sup>
- that purposes be detailed enough<sup>5</sup>

### **Importance of Quickly Starting Phase 2 Deliberations**

The GAC urges the prompt start to Phase 2 deliberations which contains a number of crucial issues including the procedures, criteria, and parameters of how to access non-public registration directory information.

### **Improvements for Future Work**

While the GAC appreciates the work of the first ever EPDP, nevertheless certain changes would improve the efficiency of future work. First, there should be sufficient time to review and consider proposed text and edits prior to consensus calls. Second, there should be deadlines for changes to avoid “re-litigating” previously agreed upon positions. Third, when necessary, interventions should be limited to an agreed upon amount of time. Finally, the GNSO is urged to permit EPDP working group observers to have access to the fully functioning adobe connect room so that they can scroll through comments in the chat and confer with their counterparts in real-time. The current separate room does not permit any scrolling to review past remarks or permit private chats.

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<sup>3</sup> In its [11 April 2018 letter](#), WP29 stressed: “the importance of explicitly defining legitimate purposes in a way which comports with the requirements of the GDPR. It therefore urges ICANN to revisit its current definition of “purposes” in light of these requirements. Use of the word “include” suggests that not all purposes are made explicit, which would also be incompatible with article 5(1)b GDPR.”

<sup>4</sup> In its [11 April 2018 letter](#), WP29 stated: “ICANN should take care in defining purposes in a manner which corresponds to its own organisational mission and mandate, which is to coordinate the stable operation of the Internet’s unique identifier systems. Purposes pursued by other interested third parties should not determine the purposes pursued by ICANN. The WP29 cautions ICANN not to conflate its own purposes with the interests of third parties, nor with the lawful grounds of processing which may be applicable in a particular case.” In its [5 July 2018 letter](#), the EDPB stated: “the EDPB considers it essential that a clear distinction be maintained between the different processing activities that take place in the context of WHOIS and the respective purposes pursued by the various stakeholders involved.”

<sup>5</sup> In its [11 April 2018 letter](#), WP29 clarified: “that purposes specified by the controller must be detailed enough to determine what kind of processing is and is not included within the specified purpose, and to allow that compliance with the law can be assessed and data protection safeguards applied.”