

Legal vs Natural – Input Received (Status 12 January 2021)

Clarifying questions in relation to legal memos & ICANN org study (see <https://community.icann.org/x/YIAmCQ>)

General Comments / Questions

1. Given that a registrant is already offered the option to provide consent to publication, wouldn't the self-designation as an Organization (with suitable advance notification of consequences) result in substantially the same issue/risk for the Contracted Party? (Hadia El Miniawi, ALAC, and Lauren Kapin, GAC)
2. How is the EPDP going to create advice consistent with the EU's forthcoming Directive on Security of Network and Information Systems (NIS2 Directive)? For example, the Directive may make it mandatory for registries and registrars to differentiate between natural and legal persons, and to perform additional steps to maintain the accuracy of contact data. (Tara Whalen & Ben Butler - SSAC)

ICANN Org Study

3. The ICANN org study mentions that "contracted parties bear many of the costs and risks" or "face uncertain risks and costs". Are the authors of the study of the opinion that ICANN org does not face any risks associated with the differentiation? If so, what motivated that assumption? (Thomas Rickert, ISPCP – p.5, 63)
4. Please have study authors explain/discuss Differentiation Scenario Model contained at end of study, especially how burden/benefit values calculated. (Lauren Kapin, GAC – p. 58-79)
5. EDPB in 7/5/2018 letter advises that Registrants shouldn't provide PI of others for admin/tech contacts and clarifying this in future Temp Spec updates (Lauren Kapin, GAC – p. 28-29)
6. Data Processing Impact Statement: how could this mitigate risks? Consider scenario where engaged in clear messaging or verification along with explanation of consequences, confirmation and easy right to correct -- when assessed wouldn't that translate to low risk? (Lauren Kapin, GAC – p. 29)
7. Reference to how to design consent messages ("consent engineering"). Any research on how ccTLDs and others do this? No need to reinvent wheel. EU ccTLDs are used to GDPR compliance. Issue of consent analogous to Natural/Legal designation. (Lauren Kapin, GAC – p.30)
8. Any more data gathered from respondents who differentiated about why they perceived differentiation as a low/medium (rather than high) effort? Interesting observations that those who d/n actually differentiate perceive the highest effort for doing so. (Lauren Kapin, GAC – p.42)
9. RIPE NCC which serves EU publishes all contacts details regardless of natural/legal status b/c necessary for performance registry function and smooth operation of internet globally -- identifies this "defensible legal purpose"; why wouldn't publication of least legal registrant contact info fall under these defensible legal purposes too? Perhaps further legal advice?

Also note reference to French ccTLD who publishes data of legal registrants and considers it consistent with GDPR (p.46). (Lauren Kapin, GAC – p.50)

10. SSAC has previously noted important deficiencies in the ICANN study “Differentiation between Legal and Natural Persons in Domain Name Registration Data Directory Services (RDDS)” (https://mm.icann.org/pipermail/gnso-epdp-team/attachments/20200708/5f72ece1/Rec17.2_Legal-Natural_8jul201-0001.pdf) Those deficiencies need to be cured. As stated in SAC112: “The research report did not look at some of the most relevant and obvious examples, such as how and why natural and legal person data is collected and published in real estate registries, company registries, and trademark registries inside the EU; and how such registries outside the EU handle the data of subjects who reside in the EU. While the report stated that ‘most EU ccTLD operators continue to publish some (and sometimes all) contact data fields for domains registered by legal persons,’ the report did not provide the details, such as a list of which ccTLDs publish what data.” <https://www.icann.org/en/system/files/files/sac-112-en.pdf>. (Tara Whalen & Ben Butler - SSAC)

Legal Memos

Natural vs. legal

11. Do the measures required by the Transparency and Fairness Principles (i.e., explaining that if the registrant identifies as a legal person then their data will be published) contribute to mitigating the liability risk of an inaccurate designation? Note advice given in Technical Contacts memo (1/22/19 at ¶ 11 “registrars will need to provide notice to the technical contact within the earlier of one month or first communication with the data subject.” (Lauren Kapin, page 5, paragraph 20-25)
12. Legal Memo 1, #25 implies that it is sufficient to send a confirmation email explaining in clear detail the implication of the Legal/Natural determination that the Registrar has made. There is no mention that this confirmation message needs to be responded to. Phase 2 Memo #18, although on a somewhat different topic, implies a positive response is needed. Please provide clarity as to how lack of response can be interpreted. Does the situation change if paper mail is used? Note that in both cases, the registrant has an obligation to have provided accurate contact details. (Alan Greenberg & Hadia El Miniawi, ALAC, paragraphs 18 & 25)
13. In the legal memo it is mentioned that *‘there would be a risk of liability if the relevant parties did not take further steps to ensure the accuracy of the registrant's designation.’* Wouldn't this risk be mitigated in a cost efficient way if contracted parties comply with the accuracy principle, avoiding thus any compliance costs? Is there enough awareness of the liability risks (including fines) in case of non-compliance with the accuracy principle? It is important to bear in mind that by ensuring data's accuracy, the risk of wrong designation is minimized. (Melina Stroungi – GAC, p3. Paragraph 17).

Proposed new legal questions

14. RIPE-NCC and EURid publish all contact data regardless of Legal/Natural status as it is deemed necessary to the smooth operation of the global Internet. Why does this not apply equally to gTLD registrations? (Alan Greenberg & Hadia El Miniawi, ALAC – ICANN Org study p. 47 (EURID) & 51 (RIPE-NCC))
15. What are the risks associated with making a best-efforts determination of Legal/natural status for registrants self-declare themselves as not being resident in the EU (through designation of their Country in the registration data). (Alan Greenberg & Hadia El Miniawi, ALAC)
16. To what extent can a registrar rely on its information about its actual customer to guide it as to whether the registrant is a natural or legal person? By is “actual customer”, we mean not the registrant of record but the customer in a business sense. (Alan Greenberg & Hadia El Miniawi, ALAC)
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18. How is the advice in the Bird & Bird memos affected should the NIS2 Directive proposal be adopted? (Margie Milam & Mark Svancarek, BC)

Proposals

Following your review of the ICANN org study, legal memos and any other information deemed relevant please provide your input on what guidance can be provided to Registrars and Registries who differentiate or want to differentiate between registrations of legal and natural persons?

Please make sure to provide details on safeguards that would address the risks identified in legal memos & ICANN org study as well as who/how any remaining risk / liability is distributed.

Proposed Guidance

1. Enable legal/natural designation at the same time and/or within the same option flow where CPs already meet the obligation to allow consent for opt-in data publication (Brian King, IPC - source Phase 1 Final Report)
2. Make clear at the time of the selection “the scope and consequences of the processing” (Brian King, IPC – source p.4, section 21)
3. The registration process need not make any distinction between legal and natural persons; if as suggested above registrants are asked for consent to opt-in to data publication the registrants’ status as “legal” or “natural” doesn’t matter, either they consent or they do not. (Milton Mueller, NCSG)
4. Email confirmation to registrant and technical contact, “The suggestion at para. 19 above of sending a confirmation email to the registrant and technical contact will be useful for meeting this requirement if it confirms the selection and explains whether registration data will be disclosed. To further address the rectification element of the Accuracy Principle, such a confirmation could also include instructions for rectifying an erroneous classification.” (Brian King, IPC – source p.5, section 25)
5. For new registrants:
 1. *Before registration*, notify registrants of the option to identify as either a natural person or legal entity and explain in user friendly language what the two terms mean;
 1. consider using focus groups to ensure clarity and that language is easy to understand
 2. could ICANN organize this effort to come up with uniform language?
 2. Send confirmation emails to registrant and technical/admin contact to
 1. verify that info does NOT contain personal info; AND
 2. explain consequences of legal designation (e.g., info will be published)
 3. Verify designation:
 1. by requiring corporate ID #; OR
 2. screening emails for personal info;
 3. engaging third party provider to verify
 4. Provide easy way to correct inaccurate designations (Lauren Kapin, GAC – source pp. 3-4, ¶ 18; p. 4, ¶ 19 p. 4-5 ¶ 20-25)
6. For existing registrations:

When either renewal or obligation to confirm accuracy of registration data takes place (whichever is earlier), follow steps 1-4 above with necessary adjustments. (Lauren Kapin, GAC – source pp. 3-4, ¶ 18; p. 4, ¶ 19; p. 4-5 ¶ 20-25)

7. For all new registration, determine Legal/Natural status (including appropriate verifications and heuristic checks)

For all existing registrations without determination, use heuristics to determine proposed status (could include use of key words in customer name and registrant name (Inc, Ltd, Association, Corp, contents of new Organization field, etc.)

Include status determination in annual contact verification messages along with a way to accept status.

Require positive confirmation at renewal time. With warning that it will happen and implications of not confirming.

In all cases, care should be taken to minimize risk as per item 18 of Natural vs Legal Bird & Bird memo. This should not only include careful wording but testing of the messages using focus groups and similar validations

(Alan Greenberg & Hadia El Miniawi - ALAC)

8. The EPDP should discuss the practices of RIPE-NCC and ARIN, and should obtain specific evaluation from Bird & Bird as to how the manner in which they include the data of natural persons in WHOIS data is or not is compliant with GDPR, and why. RIPE-NCC's approach hinges upon a permission-based grant to publish personal data in a legal person registrant's domains record. That is a different than the self-identification premise that Bird & Bird evaluated in its memo of 25 January 2019, and we would like an answer as to whether RIPE-NCC's approach could be adapted for use by gTLDs.

[https://community.icann.org/download/attachments/102138857/Natural vs. Legal Memo.docx?version=1&modificationDate=1548874825000&api=v2](https://community.icann.org/download/attachments/102138857/Natural%20vs.%20Legal%20Memo.docx?version=1&modificationDate=1548874825000&api=v2) In SAC101v2, SSAC wrote that: "under GDPR, RIPE-NCC continues to publish the contact data of both legal and natural persons in its thick WHOIS database, confident that it is complying with the law. RIPE-NCC has explained its purposes and rationales clearly, and notes that 'Facilitating coordination between network operators (network problem resolution, outage notification etc.) is the one that justifies the publication of personal data in the RIPE-NCC Database.'" (Tara Whalen & Ben Butler - SSAC)

9. We have not discussed any scenarios where a registrant's contact data, Organization name and/or legal/natural status are validated by a 3rd party (such as .DK's use of NEMID, a national electronic identity). Given the rise of electronic identity systems and interest in know-your-customer regulations, we should be considering policies allowing a contracted party to outsource data accuracy and natural/legal obligations to an external identity provider. (Margie Milam & Mark Svancarek - BC)

10. Conduct a more detailed benefit-cost analysis. Currently, in the study it is mentioned that, while differentiating between legal and natural persons will yield a lot of benefits for various stakeholders, the solution of no differentiation will have as main benefit less costs incurred by the contracted parties. In particular, it is mentioned that: '*differentiation may be feasible if* the measures to mitigate these risks and costs are economical and reliable, *and if* the benefits of differentiation make the effort worth the potential risks and costs.'

The report recognises that there are various benefits by differentiating. However, there is no calculation/approximation of how much the anticipated costs would be; there is also no comparison with a potential fine in case of non-compliance (i.e., if costs would be found less than an anticipated fine this might give an extra incentive to contracted parties, aside from other benefits that have already been explained). Moreover, in the legal memo, several solutions are proposed (such as the ones we propose here, e.g., sending a confirmation letter) which also have not been valued to give an estimation of a cost. Last but not least, one of the methods identified in the Study for mitigating the costs is '*Ensuring accuracy*'. The report mentions that while accurate designations would decrease the risks associated with differentiation, the practicalities of ensuring the data are accurate would likely result in increased costs. However the report does not take into account that failing to ensure accuracy would also result in costs (fines in case of non-compliance). Accuracy may fall into a different scoping exercise in the PDP process however it is inextricably linked to solving legal v. natural. Non-compliance with the accuracy principle may result in liability costs. By ensuring accuracy (e.g., proper verification mechanisms), contracted parties could avoid such risks and can also safely secure differentiation between legal and natural persons (via the same improved verification mechanisms), so basically with one investment they have two benefits (two birds with one stone). For all these reasons a more detailed cost-benefit analysis is needed, taking into account also costs of non-compliance. (Melina Stroungi - GAC)