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Governmental Advisory Committee

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Governmental Advisory Committee Early Input to Expedited Policy Development Process (EPDP) on gTLD Registration Data

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1. Background

1.1. Purpose of GAC Early Input into the EPDP on gTLD Registration Data

The Expedited Policy Development Process (EPDP) on gTLD Registration Data was [launched](#) on 19 July 2018, with meetings of its [team](#) organized twice weekly since 1 August 2018. The GAC has nominated 3 representatives and 3 alternates to the EPDP Team, representing the North America, Europe and Asia Pacific regions.

Consistent with its [charter](#), the EPDP Team has started working on its first deliverable: a triage document of ICANN's [Temporary Specification](#) for gTLD Registration Data, assessing the level of support in the EPDP team for each section of this document. In this context, and as part of GNSO PDP requirements regarding outreach to ICANN constituencies, the EPDP Chair has requested formal [Early Input](#) from the GAC Chair.

The purpose of this document is to present the preliminary views of the GAC on ICANN's Temporary Specification in response to the EPDP request for formal Early Input. We present these views without prejudice to future revisions if deemed necessary.

1.2. GAC Responses to EPDP Triage Surveys

This document builds on the answers provided by the GAC's representatives in the EPDP, on behalf of the GAC, to the four EPDP [Triage Surveys](#). These GAC Members have reached consensus on the answers provided in the surveys in coordination with the GAC Leadership.

This document reflect this input (Section 3) and highlights a selection of overarching issues the GAC has identified in the Temporary Specification (Section 2).

1.3. Relevant GAC Advice

GAC contributions to the EPDP, including in this document, are informed by GAC Advice provided to the ICANN Board as part of the [2007 GAC Principles Regarding gTLD WHOIS Services](#) and in the [ICANN60](#), [ICANN61](#) and [ICANN62](#) GAC Communiqués.

2. Overarching and Selected Issues Identified regarding the Temporary Specification

The GAC wishes to highlight several overarching concerns that should be part of the EPDP Team's deliberation towards its first Initial Report.

2.1. Compliance with other National and Regional Data Protection frameworks

The GAC recognizes that the temporary specification was designed to address the requirements of the EU General Data Protection Regulation (GDPR). However ICANN Community policy makers, GNSO Council and ICANN Board should take into account the fact that policy recommendations will eventually need to either be adapted, now or in the future, for compliance with other national or regional data protection frameworks. It should be noted that a number of non-european countries are in the process of adopting, or have already adopted their own national data protection legislations.

2.2. Territorial Scope of applicability of the Temporary Specification

When considering territorial scope and applicability of its policy recommendations, the EPDP Team should aim to maximize consistency and predictability of gTLD Registration data processing while duly considering potential conflicts with a variety of applicable laws worldwide.

2.3. Purposes for processing personal data do not adequately reflect Public Interests needs

While the GAC is not yet in a position to provide complete alternative language (due to the short time frames afforded in the EPDP's triage effort) several concerns of GAC Members should be noted for eventual deliberation of the EPDP Team¹:

- Further consideration should be given to ensure that the list of legitimate purposes currently included in the Temp Spec is made sufficiently

¹ It should be noted that GAC representation in the EPDP Team (3 seats) places it in a minority position compared to other stakeholders, among which GNSO Stakeholder Groups and Constituencies (afforded between 2 and 6 seats each) have a total of 18 seats per the [EPDP Team Charter](#). Although the GAC raised concerns about this lack of parity, the structure set forth in the EPDP Charter nevertheless appears to disfavor the GAC and other similarly situated constituencies.

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comprehensive in Policy Recommendations, consistent with the full scope of ICANN's mission and mandates per its bylaws

- It is not clear whether Appendix A section 4.4.8 ("Supporting a framework to address issues involving domain name registrations, including but not limited to: consumer protection and DNS abuse") and section 4.4.9 ("Providing a framework to address appropriate law enforcement needs") are formulated as defining a legitimate purpose in a way that is consistent with the GDPR. The GAC intends to review this language and provide alternative text (if necessary) to ensure that these purpose statements are constructed in a way that provides lawful basis for the processing of information.

More generally, as per article 6(1) of the GDPR, the EPDP Team should further consider whether other means/bases to process gTLD registration data need to be added to "Legitimate interest". Other means/bases could include consent, performance of a contract, legal obligation, vital interests, public interest, and processing carried out by public authorities in the performance of their tasks.

2.4. "Reasonable Access" to personal data for third parties need to be defined

The GAC welcomes recent efforts in the EPDP Team to request appropriate clarification from the ICANN Org on Appendix A section 4 of the Temporary Specification. The GAC would like "reasonable access" to be clearly defined. As currently drafted, "reasonable access" can be interpreted in a variety of ways and does not offer a sufficient level of predictability for registry operators, registrars, or the users of the data. Additionally, the GAC would like these sections to be clarified to make clear that Registrar and Registry Operators must respond within a specified timeframe yet to be defined and that any refusal to provide access should be accompanied with a rationale.

The GAC believes that the issue of "reasonable access," articulated in section 4 of Appendix A of the Temporary Specification, is a central component of the Temporary Specification, and must be addressed in the initial EPDP report. Consideration of section 4 of Appendix A should not be confused with the consideration of a "standardized access model" and other items listed in the Annex of the Temporary Specification dealing with "Important Issues for Further Community Action", which are set to be addressed at a later stage of the group's work, per relevant section of the EPDP [Charter](#).

2.5. Lack of clarity on outcome of the definition of an RDAP Profile by ICANN Org and Community

Several sections of the Temporary Specification cannot appropriately be considered or agreed upon as they depend on the definition of a Registration Data Access Protocol (RDAP) Profile by a deadline that is now passed (31 July 2018).

2.6. Applicability of Temporary Specification to Resellers

In its current form, and due to the lack of contractual relationship between ICANN and Resellers², it appears that none of the provisions of the Temporary Specification would apply to Resellers of ICANN-accredited Registrars. The EPDP Team should consider this issue when drafting its policy recommendations.

2.7. Some descriptive words used in the Temporary Specification are either unclear or unnecessary

The GAC requests that to the extent possible, the use of descriptive words should be limited and unambiguous. Several such terms may currently be problematic in the Temporary Specification. One example is the use of 'reliable' in section 4.4.3: it may need clarification on its scope of application, and this clarification may deserve to be replicated to subsequent sections for consistency (from 4.4.4 to 4.4.6). Another example is the use of the word 'reasonable' in para 5.7 regarding access to be provided for use of ICANN Contractual Compliance. In the subsequent paragraph there is a reference to 'periodic' access in the context of Bulk Registration Data Access to ICANN.

2.8. Annex: Important Issues for Further Community Action

The GAC notes that several of the issues identified in the Annex reflect issues that raise important public policy concerns that have been the topic of GAC Advice in its recent Communiqués (Abu Dhabi, San Juan and Panama). Many if not all of these issues relate to aspects of the Temporary Specification and therefore should be included in the EPDP's deliberations.

² A reseller is a third-party company that offers domain name registration services through a registrar but not all resellers are parties to contracts with ICANN (i.e., ICANN-accredited registrars).

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3. GAC Assessment of ICANN's Temporary Specification for gTLD Registration Data (EPDP Triage Surveys)

Below is the list of sections of the Temporary Specification that the GAC does not support "as is" (exclusive of the terms of the "Annex: Important Issues for Further Community Action" which is not yet part of the EPDP Team work).

Note: the table below is to be read in conjunction with ICANN's [Temporary Specification for gTLD Registration Data](#). It reflects exactly the input provided by the GAC's EPDP Representatives in response to the four EPDP [Triage Surveys](#). In these responses (as reproduced below), alternative language was provided for the related section of the Temporary Specification, where possible. In several instances, sections of the Temporary Specification have been flagged as not supported while they require further consideration by the GAC.

Section of Temporary Specification not supported as is by the GAC	GAC Comment, rationale and alternative language where possible
Section 4.4 (and related subsections)	Edit: In section 4.4, the second and last sentence "Accordingly, Personal Data included in Registration Data may be Processed on the basis of a legitimate interest not overridden by the fundamental rights and freedoms of individuals whose Personal Data is included in Registration Data, and only for the following legitimate purposes:" Should read: "Accordingly, Personal Data included in Registration Data may be Processed on the basis of a legitimate interest not overridden by the fundamental rights and freedoms of individuals whose Personal Data is included in Registration Data. Accepted legitimate purposes include:" Rationale: current wording suggests an exhaustive list, for a policy for access to Registration data that will last XX years. It can't foresee all legitimate purposes. Additionally, GAC Representatives would like to flag that references to GDPR only in section 4.4 and related subsections may be problematic in regard to other national or regional data protection frameworks. Reference was made to national data protection legislations.
Section 4.4.8	GAC Representatives to the EPDP would like to flag this item as not supported but will need more time to propose

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Section of Temporary Specification not supported as is by the GAC	GAC Comment, rationale and alternative language where possible
	appropriate language. It is not clear it is formulated as defining a purpose in a way that is consistent with the GDPR.
Section 4.4.9	GAC Representatives to the EPDP would like to flag this item as not supported but will need more time to propose appropriate language. It is not clear it is formulated in a way that defines a purpose in a way that is consistent with the GDPR. The use of the term "Law enforcement" may also need to be modified.
Section 6.1	At this point in time, GAC Representatives are not in a position to either support or oppose these sections until more information is made available. Section 6.1: Need to know more regarding what is periodic access and to what extent it is absolutely necessary and whether ICANN has some standards/ guidelines for deciding how often is periodic.
Section 6.2	At this point in time, GAC Representatives are not in a position to either support or oppose these sections until more information is made available. Section 6.2: more information on outcome of negotiations and the scope of the term "reporting requirements" and more notably also the scope of the term "additional reporting requirements" is provided.
Section 6.3	At this point in time, GAC Representatives are not in a position to either support or oppose these sections until more information is made available. Additionally, regarding Section 6.3, language needs some modification to, "incorporate data processing terms and conditions (which itself contains EU Model clauses to govern international transfers or similar clauses developed by other countries as part of relevant National legislation frameworks while also ensuring compliance to all applicable national laws, where applicable between the respective parties)"
Section 7.1.5	Could be modified to read as "...local representative in the jurisdiction such as the European Economic Area, other countries and regions as maybe applicable"

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Section of Temporary Specification not supported as is by the GAC	GAC Comment, rationale and alternative language where possible
Section 7.1.7	Lack of clarity around the use of the term “legitimate interest”
Section 7.2.1	GAC Representatives request Ry/Rars to provide an actual time frame for providing “the opportunity for the Registered Name Holder to provide its Consent to publish the additional contact information”
Section 7.2.2	MAY should read MUST. Rationale: such requirement should apply consistently across all RDS Data (generally subject to MUST).
Appendix A Section 1 (and related subsections)	GAC Representatives to the EPDP would like to flag that consideration of 1.1 to 1.2.1 is contingent on whether the 31 July 2018 deadline has been met or not.
Appendix A Section 2.1	GAC Representatives to the EPDP would like to flag that consideration of this section is still ongoing, however it would not be out of order to state that some members have voiced serious concerns about this section.

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Section of Temporary Specification not supported as is by the GAC	GAC Comment, rationale and alternative language where possible
Appendix A Section 2.2	<p>Section 2.2: "For fields that section 2.3 and 2.4 of this Appendix requires to be "redacted", Registrar and Registry Operator MUST provide in the value section of the redacted field text substantially similar to the following "REDACTED FOR PRIVACY". Prior to the required date of implementation of RDAP, Registrar and Registry Operator MAY: (i) provide no information in the value section of the redacted field; or (ii) not publish the redacted field."</p> <p>Should read as: "For fields that section 2.3 and 2.4 of this Appendix requires to be "redacted", Registrar and Registry Operator MUST provide in the value section of the redacted field text stating "REDACTED FOR DATA PROTECTION".</p> <p>Rationale: for the sake of greater consistency, the Registrar and Registry Operator should provide the same text in the value fields. Also, "REDACTED FOR DATA PROTECTION" more accurately reflects the reason for redacting (vs "privacy").</p> <p>Additionally, the GAC would like section 2.2 to include new text that directs WHOIS users to details on how/where to request the non-public (redacted) information.</p>
Appendix A Section 2.5.1	Section 2.5.1: GAC Representatives are seeking a unique anonymized email address to identify and reach a given contact across domains and gTLDs, consistent with GAC Advice.
Appendix A Section 3	GAC Representatives to the EPDP would like to flag that consideration of this section is still ongoing.
Appendix A Section 4	<p>Section 4 and related subsections: The GAC would like "reasonable access" defined.</p> <p>The GAC would also like these sections to be clarified to make clear that Registrar and Registry Operator responses to access requests are time bound and that any refusal to provide access be accompanied with a rationale for why.</p>

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Section of Temporary Specification not supported as is by the GAC	GAC Comment, rationale and alternative language where possible
Appendix C Introduction	Suggested edit: add 'performance of a contract' as a legal justification for Public RDDS/WHOIS gTLD processing activity (for all Registrar/Registry/ICANN roles) Rationale: The public RDDS/WHOIS is a contractual provision and needs to be articulated as such.
Appendix C Section 2	Paragraph does not mention legal basis for processing in addition to legitimate interest (Performance of a Contract, Public Task including maintenance of public order, protection of life). Balancing test in this section (as reflected from Art. 6.1 of the GDPR) does not apply to "processing carried out by public authorities in the performance of their tasks." Art. 6.1 (f)
Appendix C Section 3.5	Section 3.5: before the GAC can confirm whether to support this sections or not, it remains to be clarified whether this section is intended to cover disclosure of actual law enforcement requests for personal data.

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For sections of the Temporary Specification listed below, GAC Representatives in the EPDP indicated **support in principle**, provided that clarifications be made to the current language.

Section of Temporary Specification supported in principle by the GAC	GAC Comment
Appendix D Section 1	Despite support in principle, these sections need the following clarifications: it is not clear what “participate in another mechanism to provide the full Registration Data to the Provider as specified by ICANN” mean.
Appendix D Section 2	Despite support in principle, these sections need the following clarification: what are the safeguards built in to ensure that this provision of “Doe” complaint is not be abused to get the contact details of the Registered Name Holder.
Appendix E Section 1.1	Despite support in principle, these sections need the following clarification: It is not clear what “participate in another mechanism to provide the full Registration Data to the Provider as specified by ICANN” mean.
Appendix E Section 1.2	Despite support in principle, these sections need the following clarification: what are the safeguards built in to ensure that this provision of “Doe” complaint is not be abused to get the contact details of the Registered Name Holder.