

Shared 10/11/2018

Charter Question

#### h) **Applicability of Data Processing Requirements**

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.**

**Commented [1]:** We still need to address the second part of this question regarding the mechanism.

**Commented [MK2R1]:** Proposed language added.

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.**

**Commented [3]:** This risk is addressed/minimized via the recommendation to "make (educational) resources available..."

**Commented [MK4R3]:** Proposed language added.

The EPDP Team recommends that:

Version A1 (proposed by Laureen):

- Contracted parties should be required to distinguish between legal and natural persons. This distinction is necessary under the GDPR and useful. Hence, non-personal data relating to legal persons or entities should be made available by default in the public part of the Whois database

Version A2 (proposed by Alex):

- Contracted parties should be required to distinguish between legal and natural persons through a phased approach and implementation timeline that takes into account the difficulties associated with transitioning the hundreds of millions of pre-existing registrations. The phased approach could start by prioritizing and addressing new registrations first, followed by renewals of pre-existing registrations."

Version A3 (proposed by staff):

- The distinction between legal and natural persons is useful and necessary for GDPR and other data protection laws. However, the EPDP Team recognizes that there are challenges of making this distinction in the context of domain name registrations as well as the potential implementation of any kind of mechanism that would apply to hundreds of millions of pre-existing registrations. As such, the EPDP Team recommends that an Implementation Review Team explore in a timely manner how this can be done in a satisfactory way. Once the Implementation Review Team has completed its work and has a satisfactory manner in which

contracted parties are able to distinguish between legal and natural persons, contracted parties will be required to distinguish between legal and natural persons.

- [The ability to distinguish between legal and natural persons is useful and necessary for GDPR and other data protection laws.] **Already captured in versions 1 and 3.**

Version B1 (proposed by Laureen):

- Given the additional resources necessary to implement this requirement, **the EPDP Team** recommends that the contracted parties have additional time to implement this requirement; namely a **brief** time period to implement this requirement for current registrants (i.e., new registrants as of the effective date of this contract specification) and a longer time period to implement this requirement for legacy registrants)

Version B2 (proposed by staff):

- The Implementation Review Team should also consider the timeline needed to implement this requirement 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.

Version C1 (original)

- Contracted parties, in consultation with others interested parties, will recommend which data fields (if any) must be added to accomplish this distinction.

Version C2 (proposed by staff):

- The Implementation Review Team will also recommend 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 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. (educational resources). [These resources and communications should also encourage legal persons to provide non-personal information for their email address and other contact information.](#)

- [Follow-on work to this EPDP will determine the specific timing of implementation phases.] [Already covered through version B2]

Version D1 (original)

- Noting that some ccTLDs currently distinguish between natural and legal persons, there may be some value in reaching out to them. Consultation with ccTLDs during the ePDP could provide

**Commented [5]:** By "brief" do we mean "several years"? Because I thought we thoroughly covered these challenges during our call on Wednesday.

**Commented [MK6R5]:** See version 2 whereby timeline is linked to completion of further work and agreement on mechanism for distinguishing between natural and legal person.

**Commented [7]:** On the call we discussed specifying a phased approach. e.g. new registrations starting on X, renewed registrations starting on Y (where X could equal Y i suppose). I understood at least that registrations that expire in 10 years (for example) may be an edge case we need to consider.

**Commented [MK8R7]:** See version 2 which tries to incorporate that concept.

**Commented [9]:** This is aspiration but not really a policy recommendation - is this an implementation team - a GNSO charter groups - something to be accomplished within the IETF?

**Commented [MK10R9]:** See version 2 which aims to address this comment.

**Commented [11]:** I think we as a PDP can define what field (or fields) we require and what the semantics of the field indicates, but the IETF would need to define how that field is defined in the RDAP spec. The line between "us and them" seems clear to me.

**Commented [MK12R11]:** See version 2 which aims to address this comment.

**Commented [13]:** see my comment above on phasing. I suspect the EPDP team could suggest a phased approach for the implementation team.

**Commented [14]:** I thought we agreed to begin the consultation now to understand whether/how it is done in practice so that we can craft the policy recommendation to be consistent with practices that registrars may already be doing if they register domain names in ccTLDs.

**Commented [MK15R14]:** See version D2 which aims to address this comment.

**Commented [16]:** Do we hope to gain knowledge that will be helpful to our policy recommendations or that might help with subsequent technical implementation or both?

**Commented [MK17R16]:** See version D2 which aims to address this comment.

**Commented [18]:** both

insights in how to craft policy recommendations that have already been put into practice by ccTLDs related to the legal/natural person distinction.

Version D2 (proposed by staff)

- The EPDP Team recommends that GDD staff who will be tasked with the implementation of these policy recommendations already commence research by investigating how ccTLDs currently distinguish between natural and legal persons so that this information can serve as a starting point for the Implementation Review Team.

Notes/rationale: The GDPR lays down rules relating to the protection of natural persons and their data. It does not apply to legal persons or entities. Pending amendment to other pending legislation (ePrivacy) also makes this distinction. Hence, non-personal data relating to legal persons or entities should be made available by default in the public part of the Whois database. In order for that to happen, there must be procedures in place that identify legal persons and distinguish them from natural persons. Other than the distinction between legal and natural person, nothing in these recommendations is implied to create "classes" or "categories" of Registrants, with dissimilar rights and responsibilities.

Additional risks are involved when the information associated with covered Natural Persons is included in the contact records associated with (uncovered) legal persons. This must be considered by any future policy development.

We noted that while it is desirable to be able to differentiate between legal and natural persons, the legacy implementations of RDS don't include a way to do that.

**Commented [19]:** I'd recommend not referencing legislation that hasn't been enacted yet. The policy can be updated later upon adoption.

**Commented [20]:** Also note I.1.1a in May draft

**Commented [21]:** which begin to make the distinction between natural and legal persons

**Commented [22]:** I'd like to understand this addition better.

**Commented [23]:** I'd like to understand this addition better.

**Commented [MK24]:** Isn't rationale already captured through the responses to the charter questions? Is this needed for the Initial Report?

**Draft Recommendation:**

- The distinction between legal and natural persons is useful and necessary for GDPR and other data protection laws. However, the EPDP Team recognizes that there are challenges of making this distinction in the context of domain name registrations as well as the potential implementation of any kind of mechanism that would apply to hundreds of millions of pre-existing registrations. As such, the EPDP Team recommends that an Implementation Review Team explores in a timely manner how this can be done in a satisfactory way. Once the Implementation Review Team has completed its work and has a satisfactory manner in which contracted parties are able to distinguish between legal and natural persons, contracted parties will be required to distinguish between legal and natural persons.
- The Implementation Review Team should also consider the timeline needed to implement this requirement 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.
- The Implementation Review Team will also recommend 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 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. (educational resources). These resources and communications should also encourage legal persons to provide non-personal information for their email address and other contact information.
- The EPDP Team recommends that GDD staff who will be tasked with the implementation of these policy recommendations already commence research by investigating how ccTLDs currently distinguish between natural and legal persons so that this information can serve as a starting point for the Implementation Review Team.