

ICANN BOARD PAPER NO. 2018.05.03. xx

TITLE: **GAC Advice regarding European Union General Data Protection Regulation (GDPR): San Juan Communiqué (March 2018)**

PROPOSED ACTION: **For Resolution**

EXECUTIVE SUMMARY:

The Governmental Advisory Committee (GAC) delivered advice to the ICANN Board in its [San Juan Communiqué](#) issued 15 March 2018. Among other things, the advice concerns ICANN’s proposed Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union’s General Data Protection Regulation (the “Interim GDPR Compliance Model”). This Board briefing focuses on the GDPR-related advice, and the other elements of GAC advice will be addressed separately.

The San Juan Communiqué was the subject of such an exchange between the Board and the GAC on 11 April 2018. The purpose of the exchange was to ensure common understanding of GAC advice provided in the Communiqué, and to discuss the process for a possible Board-GAC consultation, as required by the ICANN Bylaws, in the event the Board determines to take an action that is not consistent with GAC advice (the “Bylaws Consultation Process”). Notes from the call are available here:

<https://gac.icann.org/sessions/gac-and-icann-board-conference-call-regarding-icann61-communicue>.

Currently, the Board is considering adopting a Temporary Specification (using the provisions in the Registry Agreement and the Registrar Accreditation Agreement for adopting emergency temporary policies) to cause compliance with the Interim GDPR Compliance Model. There are some elements of the current version of the Interim GDPR Compliance Model that are not or could be viewed not to be consistent with the GAC’s advice. Also, there are elements for advice where additional clarification from the GAC during a Bylaws Consultation Process would be useful prior to the Board taking an action on the Temporary Specification. Attached is the briefing paper is a summary chart

comparing elements ICANN’s proposed Interim Compliance Model, GAC advice, input from the Article 29 Working Party, and input from the Berlin Group, and can help inform and focus the proposed consultation with the GAC.

Step 1 of the Bylaws Consultation Process requires the Board to provide a written response to the GAC indicating: (1) whether it has any questions or concerns regarding such advice; (2) whether it would benefit from additional information regarding the basis for the GAC's advice; (3) and a preliminary indication of whether the Board intends to take such advice into account.

To facilitate the first step of the Bylaws Consultation Process, ICANN org has prepared a draft GAC-Board Scorecard (attached to this briefing paper) to identify potential areas where the Board’s proposed approach/response may be inconsistent with the GAC’s advice. The Scorecard categorizes each item of advice in the following categories:

1. Advice that could be accepted immediately (i.e. prior to 25 May 2018);
2. Advice that may remain an open issue for further consideration by the Board as additional information/guidance is available from the European data protection authorities, for example; and
3. Advice that does require or may require the Board to take an action that is not consistent with GAC advice, and thus a subject for discussion during the Board-GAC consultation process.

ICANN ORG RECOMMENDATION:

ICANN org recommends that the Board initiate the Board-GAC Bylaws Consultation Process required by the ICANN Bylaws to discuss elements of the proposed Interim GDPR Compliance Model that are inconsistent with the GAC’s advice in the San Juan Communiqué.

PROPOSED RESOLUTION:

Whereas, the Governmental Advisory Committee (GAC) met during the ICANN61 meeting in San Juan, Puerto Rico and issued advice to the ICANN Board in a [Communiqué](#) on 15 March 2018 (“San Juan Communiqué”).

Whereas, the San Juan Communiqué was the subject of an [exchange](#) between the Board and the GAC on 11 April 2018.

Whereas, the San Juan Communiqué includes advice concerning ICANN’s proposed [Interim Model for Compliance with ICANN Agreements and Policies in Relation to the European Union's General Data Protection Regulation](#) (the “Interim GDPR Compliance Model”).

Whereas, the Board has identified items of GAC advice in the San Juan Communiqué that are or potentially could be inconsistent with proposed actions the Board is considering taking to adopt the Interim GDPR Compliance Model.

Whereas, the Bylaws require that “[i]n the event that the Board determines to take an action that is not consistent with Governmental Advisory Committee advice, it shall so inform the Governmental Advisory Committee and state the reasons why it decided not to follow that advice” and the Board and GAC are required to enter into a Bylaws Consultation process.

Resolved (2018.05.xx.xx), the Board has determined that it may take an action that is not consistent or may not be consistent with the GAC’s advice in the San Juan Communiqué concerning the GDPR and ICANN’s proposed Interim GDPR Compliance Model, and hereby initiates the required Board-GAC Bylaws Consultation Process required in such an event. The Board will provide written notice to the GAC to initiate the process as required by the Bylaws Consultation Process.

PROPOSED RATIONALE:

Article 12, Section 12.2(a)(ix) of the ICANN Bylaws permits the GAC to “put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.” In its

San Juan Communiqué (15 March 2018), the GAC issued advice to the Board on various matters including ICANN's proposed approach to address compliance with ICANN's agreements with registries and registrars in relation to the European Union's General Data Protection Regulation (GDPR).

The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. Any GAC advice approved by a full consensus of the GAC (as defined in the Bylaws) may only be rejected by a vote of no less than 60% of the Board, and the GAC and the Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

At this time, the Board's current thinking and approach to addressing the GDPR in relation to ICANN's agreements with registries and registrars is inconsistent or could be viewed as inconsistent with certain items of the GAC's advice in the San Juan Communiqué. Given this, the Board is taking action at this time to initiate the Bylaws Consultation Process that is required prior to the Board taking an action that is not consistent with the GAC's advice. As part of the process, the Board is required to, and will provide a written response to the GAC indicating: (1) whether it has any questions or concerns regarding such advice; (2) whether it would benefit from additional information regarding the basis for the GAC's advice; (3) and a preliminary indication of whether the Board intends to take such advice into account. Additionally, the Board will provide required written notice to the GAC stating, in reasonable detail the GAC advice the Board determines not to follow, and the reasons why such GAC advice may not be followed.

In taking this action, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- San Juan Communiqué (<https://gac.icann.org/contentMigrated/icann61-gac-communicue>)

- Process for Consultations between the ICANN Board of Directors and the Governmental Advisory Committee
<https://gacweb.icann.org/download/attachments/27132063/2013-04-07-Process%20forConsultations%20between%20ICANN%20and%20GAC.doc?version=1&modificationDate=1376102118000&api=v2>

Taking this action will have a positive impact on the community because it will assist with resolving the advice from the GAC concerning ICANN's proposed approach for enforcing compliance with agreements with registries and registrars in relation to the GDPR. There are no foreseen fiscal impacts associated with the adoption of this resolution as the consultation process is anticipated to be conducted telephonically. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. This is an Organizational Administrative function that does not require public comment. This action is in support of the public interest and ICANN's mission as it will assist in ensuring that public policy considerations are appropriately taken into account in proposed actions by the ICANN Board concerning GDPR compliance.

Signature Block:

Submitted by:

Position:

Date Noted:

Email:

Board-GAC Scorecard – San Juan, Puerto Rico Communiqué
GAC Advice re: European Union General Data Protection Regulation (GDPR)

Superseded by Board-GAC Scorecard - San Juan, Puerto Rico Communiqué (5 May 2018) available here: <https://www.icann.org/en/system/files/correspondence/chalaby-to-ismail-05may18-en.pdf>

Board-GAC Scorecard – San Juan, Puerto Rico Communiqué

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**Working Draft Non-Paper --
Selected Interim GDPR
Compliance Models &
Comments (Berlin Group,
Article 29 Working Party, GAC
& ICANN)**

Orange = More substantial change from status quo

as of 20 April 2018

	Berlin Group
<i>Data Collection, Processing, and Retention</i>	
Collection from Registrant to Registrar	Limit collection to what is necessary in relation to ICANN's narrow remit (e.g., to manage assignment of names and numbers in a manner that assures security and stability of the Internet.) Current practice appears to be excessive, disproportionate, and obtained without the free consent of the individual
Data Transfer from Registrar to Registry	If transferred to registry, must be protected in a manner that ensures continuous protection to the "adequacy" standard, and that registrants are aware of the transfer. (Note: If technology permits the data to remain in the jurisdiction of the registrant or registrar, would recommend limiting dataflows to only those which are absolutely necessary)
Data Transfer to Escrow Agents	Limited to data necessary to ensure continuity in the event of the sudden disappearance of the registrar
Data Retention	Must be reduced to what is necessary for business requirements
<i>Applicability</i>	

	Berlin Group
Must Model be applied globally or only to European Economic Area?	Not clear, but may support global applicability. (Notes that relying on WHOIS Conflicts Procedure to address data protection laws doesn't seem to be a reasonable way to conduct business globally, and ICANN should have a WHOIS policy that's compliant with highest data protection requirements.)
Registrant Types Affected	Registrations of natural and legal persons
Layered/Tiered Access to WHOIS data	No, publish minimum data set necessary for assuring contactability of registrants in the event that there are technical issues related to the domain name
<i>Public WHOIS</i>	
Registrant Name in Public WHOIS?	Likely no. Must only publish data necessary for assuring contactability of registrant in the event of technical issues related to the domain name
Registrant Postal Address in Public WHOIS?	Likely no. Postal address can be used to contact registrant, but may not be strictly necessary and the least intrusive way to achieve this purpose.
Registrant Email in Public WHOIS?	May support creation of anonymized email or a web form to contact registrant as a less intrusive means of contacting registrant in the event of technical issues related to the domain name
Registrant Phone and Fax in Public WHOIS?	Likely no. Phone and fax can be used to contact registrant, but may not be strictly necessary and the least intrusive way to achieve this purpose.
Admin and Tech Contact Names in Public WHOIS?	Likely no. Must only publish data necessary for assuring contactability of registrant in the event of technical issues related to the domain name

	Berlin Group
Admin and Tech Contact Postal Addresses in Public WHOIS?	Likely no. Must only publish data necessary for assuring contactability of registrant in the event of technical issues related to the domain name
Admin and Tech Contact Email Addresses in Public WHOIS?	Likely no. Must only publish data necessary for assuring contactability of registrant in the event of technical issues related to the domain name
Admin and Tech Contact Phone in Public WHOIS?	Likely no. Must only publish data necessary for assuring contactability of registrant in the event of technical issues related to the domain name
Registrar Must Offer Registrant an Opt-in to Publish Additional Data in Public WHOIS?	Not specifically addressed
<i>Non-Public WHOIS</i>	
Self-certification Access to Non-public WHOIS?	No
Accreditation Program for Access to Non-public WHOIS?	Not clear. States that conditions for access have to be determined by law and not by ICANN, but seems to leave open the possibility for ICANN to address solutions that ensure tiered access to accredited entity who can show evidence of legitimate need for the data.

*** What remains of the ICANN Interim Model after applying the Article 29 Working Party letter of 12 April 2018**

**** What remains of the ICANN Interim Model after applying GAC advice in San Juan Communique**

Green = Greater preservation of status quo

Article 29 Working Party*	ICANN Interim Model
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Limit collection to what is necessary in relation to ICANN's narrow remit (Need to confirm understanding with Article 29 Working Party)	Full Thick data
Full transfer of data collected (subject to adequate protection of personal data transferred to third countries or international organisations)	Full transfer of data collected
Full transfer of data collected (subject to adequate protection of personal data transferred to third countries or international organisations)	Full transfer of data collected
Life of registration + 6 months (for resolving disputes and alleged hijacking)	Life of registration + at least 2 years (Note: existing waivers for European registrars would be preserved)

Article 29 Working Party*	ICANN Interim Model
Must be applied to EEA, may be applied globally, subject to a data processing agreement between ICANN and the contracted parties	Must be applied to EEA, may be applied globally, subject to a data processing agreement between ICANN and the contracted parties
Registrations of natural and legal persons (Need to confirm understanding with Article 29 Working Party)	Registrations of natural and legal persons
Yes, layered/tiered access	Yes, layered/tiered access

Only Registrant Organization (if applicable) in public WHOIS (not Registrant Name)	Only Registrant Organization (if applicable) in public WHOIS (not Registrant Name)
Only Registrant State/Province and Country in public WHOIS (not Registrant street, city, postal code)	Only Registrant State/Province and Country in public WHOIS (not Registrant street, city, postal code)
Create anonymized email or a web form to contact registrant	Create anonymized email or a web form to contact registrant
No	No
No	No

Article 29 Working Party*	ICANN Interim Model
No	No
Create anonymized email or a web form to contact Admin and Tech contacts	Create anonymized email or a web form to contact Admin and Tech contacts
No	No
Yes	Yes

No. Create anonymized email address or a web form to contact registrant or due process	No. Create anonymized email address or a web form to contact registrant or due process
Yes	Yes, in consultation with the Governmental Advisory Committee, data protection authorities and contracted parties with full transparency to the ICANN community. User groups with a legitimate interest and who are bound to abide by codes of conduct requiring adequate measures of protection could access non public WHOIS data based on pre defined criteria and limitations under the accreditation program.

GAC**

Full Thick data

Full transfer of data collected

Full transfer of data collected

Life of registration + at least 2 years

GAC**

Must be applied to EEA, may be applied globally, subject to a data processing agreement between ICANN and the contracted parties

Registrations of natural persons only

Yes, layered/tiered access

Yes

Yes

Yes

Yes, except no personal data

Yes, except no personal data

GAC**

Yes, except no personal data

Yes

Yes

Not specifically addressed

No

Yes, accreditation program to be developed in consultation with the GAC and other stakeholders

AGENDA – 3 May 2018 SPECIAL BOARD Meeting

Last Updated 30 April

Time, etc.	Agenda Item	Shepherd
Assembly, Roll Call, Discussion & Decision	1. Main Agenda	
	1.a. Consideration of GAC Feedback on Proposed Interim Model for GDPR Compliance (8 March 2018)	Cherine Chalaby
	1.b. GAC Communiqué, San Juan, PR (15 March 2015)	Cherine Chalaby
	1.c. AOB	

Directors and Liaisons,

Attached below please find Notice of date and time for a Special Meeting of the ICANN Board of Directors.

3 May 2018 – Special Meeting of the ICANN Board of Directors - at 20:00 UTC. This Board meeting is estimated to last approximately 60 minutes.

<https://www.timeanddate.com/worldclock/fixedtime.html?msg=Special+Meeting+of+the+ICANN+Board&iso=20180503T20&p1=1440&ah=1>

Some other time zones:

3 May 2018 – 13:00 PDT Los Angeles

3 May 2018 – 22:00 CEST Brussels

4 May 2018 – 05:00 JST Tokyo

SPECIAL MEETING OF THE ICANN BOARD

Main Agenda

- Consideration of GAC Feedback on Proposed Interim Model for GDPR Compliance (8 March 2018)
- GAC Communiqué, San Juan, PR (15 March 2015)
- Any Other Business

MATERIALS – You can access the Board Meeting materials, when available, in Google Drive here:

Contact Information Redacted

If you have trouble with access, please let us know and we will work with you to assure that you get access to the documents.

If call information is required, it will be distributed separately.

If you have any questions, or we can be of assistance to you, please let us know.

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