

Clarifying Questions

following the 27 November 2017 Joint GAC-ICANN Organization Call
on GDPR Announcements

Introduction

Thank you for the conference call on 27 November 2017. As a follow-up, as agreed, we would like to share a few clarifying questions related to the concerns of the GAC, as set out on the call by the GAC chair, which can be summarized as follows:

- The GAC is concerned that deferment of WHOIS compliance enforcement gives no motivation to stakeholders to find a global solution that is GDPR compliant while offering effective and timely access to WHOIS information for legitimate purposes. A number of GAC members recognise that deferment could be a temporary solution to avoid conflicting obligations, as identified in a number of legal opinions. However, the GAC fears that deferment will lead to a fractured WHOIS by introducing a broad range of WHOIS service models, threatening public policy and safety interests. Therefore, ICANN should provide further guidance to the community and the contracted parties in particular on the "one model" approach that you outlined in the call and that we welcome. This approach was not obvious to us from the announcement, nor from the subsequent guidance.
- The GAC participants were reassured to hear that ICANN is planning to take into account the GAC advice issued at ICANN 60 in Abu Dhabi which recognizes that WHOIS data is used for a number of legitimate purposes and advises ICANN to use best efforts to create a GDPR compliant WHOIS that continues to facilitate timely access to WHOIS data for these legitimate purposes. We support these efforts. The chosen model should furthermore preserve the interoperability of WHOIS databases, including centralised WHOIS lookup portals (such as whois.icann.org).
- As mentioned on the call, the current deferment approach also appears to be overly broad in that it defers enforcement related to all domain name registration data regardless of whether data comprises personal data under the GDPR. This would deprive legitimate users of the most basic information without meeting any countervailing privacy interest. Therefore ICANN should clarify that any deferred WHOIS enforcement would only apply to domain name registration data services that disclose personal data, and specifically excludes data to identify a domain name's sponsoring registrar, status of the registration, creation and expiration dates for registrations, name server data, WHOIS data update times, and the URL for the registrar's WHOIS service.

We would kindly request your responses to the clarifying questions below by 21 December.

This will enable us to obtain the necessary information to continue our assessment of the impending changes to the WHOIS in a timeframe that is compatible with the current pace of developments, in particular as concerns the recently published additional guidance on models, the impending submission of models and further feedback from the Hamilton Law Firm.

In relation to the additional guidance provided in your announcement of 8 December we may have further questions in due course.

Regarding the process for achieving GDPR Compliance

- Can ICANN provide a document clearly outlining the proposed timeline from now to May 2018?
- Can ICANN provide a document clearly articulating the proposed “multi-stakeholder process” that will be used to determine first a set of potential models and then the final model that will be chosen by the CEO?
- Can ICANN provide a focal point on the staff side (and/or a dedicated page or “one stop shop” on ICANN’s website) to which interested stakeholders could provide their input regarding the proposed models, possibly through a detailed questionnaire which would set out clear expectations for input as well as support a structured approach?

Regarding the Scope and effects of the compliance deferment

- Will a suspension of compliance enforcement pertain to only data elements in Whois records that may be deemed personal data, or will it encompass more data elements?
- Would a contracted party benefit from the suspension of enforcement as soon as it submits a proposed model to ICANN or only when ICANN would approve of that model?
- If a contracted party were to benefit from the suspension of enforcement of all or parts of its Whois obligations, when would this suspension end?

Regarding so-called “interim” solutions, before ICANN or the ICANN Community adopts a single unique set of RDS requirements that would ensure compliance with the GDPR

- Will ICANN accept contracted parties implementation of Whois services that are not compliant with current contractual requirements?
- If so, when would ICANN require these contracted parties to come back into compliance with contractual requirements?
- Does ICANN expect to revise Whois contractual requirements to comply with the GDPR independently of ongoing policy development in the RDS Policy Development Process?
- Will ICANN accept contracted parties implementation of Whois Services with diverging features or characteristics?
- If so, how will ICANN ensure interoperability and consistency of these varied flavours of Whois services, including the ability to centralized Whois lookups?

Regarding GDPR-compliant RDS implementation models

- Does ICANN consider Whois implementation models of ccTLDs with restrictive registrations policies as applicable to gTLDs with open registration policies?
- Should ICANN consider a tiered-access model, what challenges and options does it contemplate in relation to the certification, credentialing, and authentication of users authorized to access personal data? What challenges and options does it contemplate in relation to the confidentiality of requests by such authorized users?

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Questions collected from GAC Members and assembled by GAC Support Staff
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