GDPR Overview Discussion

25 June 2018

ICANN | GAC
Governmental Advisory Committee

ICANN

ICANN62 GAC Plenary Meeting
Agenda Item 3

Session Objectives

- Bring all GAC members up to speed on relevant GDPR-related developments

- Compile questions for GAC meetings with:
  - ICANN Board - Wednesday 10:00-11:00
  - Generic Names Supporting Organization - Tuesday 11:30-12:30

- Identify GAC consensus views / agreed messages, to be shared:
  - With the ICANN Board
  - During GAC Bilateral meetings (ALAC, ccNSO, GNSO)
  - During Cross Community Sessions - Tuesday 15:15-18:30

- Support drafting of GAC advice as appropriate

- Maintaining WHOIS to the greatest extent possible, while complying with GDPR

- Effective access to non public data for legitimate purposes:
    - Law enforcement
    - Consumer protection
    - Cybersecurity professionals
    - IP Rights holders

- Publication of minimum contact data (email address in particular) to enable contactability and cross-referencing of registrations by registrants

- Availability of contact information for legal entities

- Addressing specific needs of law enforcement (such as confidentiality & query volume)

Key Developments

Three New Developments will require continued GAC attention and participation:

1. ICANN's Contractual Temporary Specification (Temp. Spec)

2. Unified Access Model for Continued Access to Full WHOIS Data (ICANN draft for discussion)

3. New GNSO Expedited Policy Development Process (EPDP) to replace the Temp. Spec. within 1 year

Temporary Specification

1) Temporary Specification

Recent Developments

- **ICANN Board**
  - adopted the Temporary Specification for gTLD Registration Data (17 May 2018)
  - resolved to defer taking action on several pieces of GAC Advice in the San Juan Communiqué (15 March 2018)
  - Must reaffirm its adoption of the Temporary Specification every 90 days, for 1 year max. until it has become a Consensus Policy (otherwise unenforceable)

- **Temporary Specification** (effective since 25 May 2018)
  - Reflects ICANN's Proposed Interim Compliance Model (8 March 2018)
  - New contractual requirements on Registries and Registrars
  - Identifies Important Issues for Further Community Action still to be resolved:
    - Access model for non-public data
    - Distinguishing between legal and natural persons
    - Addressing specific law enforcement needs (confidentiality and query volumes)

- **Public interests have been affected**:

  - Access to non-public data is now subject to decision of the relevant Registry or Registrar on a case by case basis ("*reasonable access*" requirement)

  - Law enforcement investigations may be impaired by access challenges, limitation of query volumes and compromised confidentiality of WHOIS queries

1) Temporary Specification

For GAC Discussion

- **GAC Advice**
  1) Accepted Advice: are the actions taken by the ICANN Board consistent with the letter and intent of the San Juan Advice?
  2) Deferred Advice: what steps can the GAC take to ensure implementation of the Advice?
  3) Question to ICANN Board: When does the ICANN Board intend to consider again the deferred Advice?

- **Temporary Specification**
  1) To what extent should the GAC rely on additional advice during the coming months in relation to the ICANN Board reaffirmation and potential evolution of the Temporary Specification every 90 days ?
  2) Question to ICANN Board: Does the ICANN Board plan to make adjustments to the Temporary Specification? (Based on experience to date, DPA input, Legal developments, consideration of GAC Advice, APWG's Proposal for publishing encrypted personal data, etc.)
  3) Question to GNSO: what is the GNSO's assessment of/and experience with the Temporary Specification?

Unified Access Model

2) Unified Access Model

Recent Development

- **ICANN Community** is active developing models or advice regarding access:
  - BC/IPC Accreditation and Access Model v1.6 (18 June 2018)
  - SSAC Advisory Regarding Access to Registration Data (14 June 2018)

- **ICANN Org** published a draft High-Level Framework for a Unified Access Model for Continued Access to Full WHOIS Data (18 June 2018)
  - Lays out a series of central questions to frame discussions
  - Includes a comparison with community models

- Unified Access Model to provide access for:
  - Law enforcement and other governmental authorities
  - Defined categories of private third parties, bound by Codes of Conduct

- Unified Access Model includes discussion of:
  - Authentication requirements
  - Process and technical details for authenticating users and providing access
  - Scope of data available to authenticated users
  - Transparency/Logging and Compliance with Codes of Conduct

- Proposed phased development:
  1) Community discussion   2) EDPB to build legal certainty   3) Finalization

2) Unified Access Model

Proposed Role for Governments

- Identify <u>broad categories</u> of Eligible User Groups (EEA GAC Governments)

- Identify <u>specific</u> Eligible User Groups (ICANN Org & Governments through GAC)

- Determine Law enforcement authentication requirements in national jurisdictions (Individual Governments)

- Determine global authentication requirements for Law Enforcement in accordance with *applicable legal frameworks* (Interpol and Europol ?)

- Identifying relevant Authenticating Bodies to develop criteria and authenticate users within an Eligible User Group (ICANN in consultation with the GAC)

  - If GAC unable, ICANN works with community

- For third party with legitimate interest, develop common safeguards across all Codes of Conducts (ICANN in consultation with GAC and EDPB)

2) Unified Access Model

For GAC Discussion

- **Key Elements of ICANN's proposal**
  - Role of governments and GAC?
  - Query-based access to data is inconsistent with GAC Advice
  - Logging requirements may compromise confidentiality of LEA queries

- **Process to develop the Model**
  1) <u>Questions to ICANN Board:</u> What procedural means will be used to develop and deliver and implement the model? Calzone-type of Process? Temporary Specification? EPDP? Another Process?
  2) <u>Question to GNSO:</u> what are the GNSO's views on where the Unified Access Models fits with Temp. Spec. and EPDP ?
  3) What would be the most effective way to communicate GAC views?

- **Key Messages for Cross Community Session on Tuesday ?**

Expedited PDP

3) Expedited PDP To Replace the Temp. Spec.

ICANN | GAC
Governmental Advisory Committee

Recent Developments

- **GNSO** is discussing initiation an Expedited Policy Development Process (EPDP) to replace the Temporary Specification within 1 year
    - An EPDP is similar to a regular PDP, but faster to initiate
    - Many details still to be determined: Scope, Composition, Timeline

- **GAC** has formed a small group of Members to ensure effective participation and timely GAC input into future policy processes:
    - **European Commission** (Cathrin Bauer-Bulst, Georgios Tselentis)
    - **India** (Rahul Gosain)
    - **United Kingdom** (Chris Lewis-Evans)
    - **United States** (Ashley Heineman, Laureen Kapin)

3) Expedited PDP To Replace the Temp. Spec.

ICANN | GAC
Governmental Advisory Committee

For GAC Discussion

1) What should be the GAC's participation in and EPDP ?
    - Active contributor in EPDP or GAC Advice at key junctures?
    - Representation on par with GNSO Stakeholders?
    - Process to draft and convey GAC Advice?
    - Need for specific process to ensure timely GAC input in relevant Policy and Community processes that will emerge

2) GAC input on definition of the scope of any initiative that may be started, including one (or more) Expedited PDP(s) ?

3) Questions to GNSO: Current thinking on Scope? Expected timeline for definition of scope? Consideration of GAC Input into the Scope?

4) Questions to Board & GNSO:
    - What respective roles of Board and GNSO in defining scope of the EPDP?
    - Who is in charge of coordination of the overall processes (Temp Spec 90-days reaffirmation, EPDP, Unified Access Model, Community Models, SSAC Advisory)?

Key GAC Messages for Input Session on EPDP and Cross Community Session ?

GAC Input in Cross-Community Sessions

ICANN|GAC
Governmental Advisory Committee

ICANN

GAC Input in Cross Community Sessions

Cross Community Session to discuss Temporary Specification & EPDP
(Tuesday 26 June 15:15-16:45)

1) What is the current environment a month after GDPR has gone into effect?
    a) What have we experienced and what have we learned?
    b) What are the benefits to GDPR that we've observed?
    c) What are some of the challenges?

2) Temporary Specification - What are the thoughts and experiences of the community so far?
    a) How are Registrars implementing the Temp Spec?
    b) What concerns remain about the Temp Spec? What needs to be "fixed"?
    c) What practical issues have you encountered as a result of the Temp Spec?
    d) What does an "ultimate model" of compliance with GDPR look like, how to get there?
    e) How can we best engage with European Authorities to ensure the proper application of GDPR to WHOIS? How do we ensure that all legitimate interests will be taken into account?

3) EPDP – How should the community move forward?
    a) What is the proper scope and timing of the EPDP?
    b) What are the key issues that the community will discuss during the EPDP?
    c) How can we properly address community concerns about the Temporary Specification, Access, and overall impact of GDPR through the EPDP?

GAC Input in Cross Community Sessions

Cross Community Session to discuss Accreditation & Access Models
(Tuesday 26 June 17:00-18:30)

1. What are the most important characteristics we need in an Accredited Access model?

2. What is your assessment of ICANN Org's proposed Unified Access Model, and how could that model be improved?

3. What is your preferred way to implement this model? Should ICANN Org do another Temp Spec, or let GNSO Council develop one via an expedited PDP, or find a way for Org and GNSO to work together?

4. Conclusory remarks from each panelist, on key concerns or considerations in implementing an Accredited Access model

Reference:
GAC San Juan Advice

ICANN | GAC
Governmental Advisory Committee

ICANN

1.a. ICANN Board Decision on GAC Advice

GAC San Juan Communiqué, Section V. (15 March 2018):

1. GDPR and WHOIS

[...]

a. the GAC advises the ICANN Board to instruct the ICANN Organization to:

Accepted

i. Ensure that the **proposed interim model maintains current WHOIS requirements to the fullest extent possible**;

ii. Provide a **detailed rationale for the choices made** in the interim model, explaining their necessity and proportionality in relation to the legitimate purposes identified;

iii. In particular, **reconsider the proposal to hide the registrant email address** as this may not be proportionate in view of the significant negative impact on law enforcement, cybersecurity and rights protection;

Deferred

iv. **Distinguish between legal and natural persons**, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;

v. **Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose**, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;

vi. Ensure that **limitations in terms of query volume** envisaged under an accreditation program balance realistic investigatory cross-referencing needs; and

vii. Ensure **confidentiality of WHOIS queries by law enforcement** agencies.

1.a. ICANN Board Decision on GAC Advice

GAC [San Juan Communiqué](), Section V. (15 March 2018):

[...] Furthermore,

b. the GAC advises the ICANN Board to instruct the ICANN Organization to:

Accepted

   i.   **Complete the interim model as swiftly as possible**, taking into account the advice above. Once the model is finalized, the GAC will complement ICANN's outreach to the Article 29 Working Party, inviting them to provide their views;

  ii.   **Consider the use of Temporary Policies and/or Special Amendments** to ICANN's standard Registry and Registrar contracts to mandate implementation of an interim model and a temporary access mechanism; and

 iii.   **Assist in informing other national governments not represented in the GAC** of the opportunity for individual governments, if they wish to do so, to provide information to ICANN on governmental users to ensure continued access to WHOIS.

Reference: Documentation for GAC Members

ICANN | **GAC**
Governmental Advisory Committee

ICANN

Whois Compliance with GDPR

- Mapping of Temporary Specification to GAC Advice: (requires login) https://gac.icann.org/file-asset/private/gdpr-mapping-advice-temporary-spec-final-27may18.pdf
- GAC Website: https://gac.icann.org/activity/whois-compliance-with-gdpr-reference
- ICANN Website: https://www.icann.org/dataprotectionprivacy

ICANN 62 Schedule

- GAC Briefing on GDPR: (requires login) https://gac.icann.org/sessions/icann62-agenda-item-3-gdpr-overview-discussion
- GAC Agenda: https://gac.icann.org/agendas/icann62-panama-city-agenda
- ICANN Schedule: https://62.schedule.icann.org

Schedule of GDPR Sessions During ICANN62

ICANN | **GAC**
Governmental Advisory Committee

ICANN

Schedule of GDPR Sessions @ ICANN62

Session GAC | GNSO | Cross-community		Area of GAC deliberation					
		1. GAC Advice	2. Temp Spec Impl. & Evolution	3. LEA Access under Temp Spec	4. 3rd Party Access under Temp Spec	5. Replacing the Temp Spec	6. ICANN's Unified Access Model
Monday 25							
11:00	GDPR Overview (60 min)	Overview of each area of discussion (substantive/procedural)					
15:15	PSWG Informal (90 min)	Likely to discuss all aspects in details					
17:00	Community Input on Expedited PDP (90 min)		May be discussed			Goal, Scope, Participation, etc.	May be discussed
Tuesday 26							
08:45	GDPR Discussion (60 min)	Starting Point			Discussion w/ IPC	Focus of rest of session	
09:00	EPDP Initiation/Charter		May be discussed			Likely focus	May be discussed
09:45	GAC/Board Prep	Any relevant aspect to be discussed with Board					
11:30	GAC/GNSO Meeting		Any relevant aspect to be discussed with GNSO				
13:30	EPDP Initiation/Charter		May be discussed			Likely focus	May be discussed
15:15	Cross Community Session on Policy Process		Likely focus			Likely focus	
17:00	Cross Community Session on Access Models						Likely focus
Wednesday 27							
09:15	GDPR Discussion (60 min)	Taking stock of community discussions on the previous day					
10:30	GAC/Board Meeting	Addressing issues/questions identified for Board discussion					
13:00	GNSO Council					Likely focus	
13:30	GAC Communiqué	Any relevant aspect to be inserted in Communiqué					

Schedule of GDPR Sessions @ ICANN62

Session GAC | GNSO | Cross-community		Area of GAC deliberation					
		1. GAC Advice	2. Temp Spec Impl. & Evolution	3. LEA Access under Temp Spec	4. 3rd Party Access under Temp Spec	5. Replacing the Temp Spec	6. ICANN's Unified Access Model
Monday 25							
11:00	GDPR Overview (60 min)	Overview of each area of discussion (substantive/procedural)					
15:15	PSWG Informal (90 min)	Likely to discuss all aspects in details					
17:00	Community Input on Expedited PDP (90 min)		May be discussed			Goal, Scope, Participation, etc.	May be discussed
Tuesday 26							
08:45	GDPR Discussion (60 min)	Sta...			...C	Focus of rest of session	
09:00	EPDP Initiation/Charter					Likely focus	May be discussed
09:45	GAC/Board Prep				...oard		
11:30	GAC/GNSO Meeting	Any relevant aspect to be discussed with GNSO					
13:30	EPDP Initiation/Charter		May be discussed			Likely focus	May be discussed
15:15	Cross Community Session on Policy Process		Likely focus			Likely focus	
17:00	Cross Community Session on Access Models						Likely focus
Wednesday 27							
09:15	GDPR Discussion (60 min)	Taking stock of community discussions on the previous day					
10:30	GAC/Board Meeting	Addressing issues/questions identified for Board discussion					
13:00	GNSO Council					Likely focus	
13:30	GAC Communiqué	Any relevant aspect to be inserted in Communiqué					

Government and GAC Input Expected during Cross-Community Sessions