

Staff Report of Public Comment Proceeding

GNSO Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data Policy Recommendations for ICANN Board Consideration

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Public Comment Proceeding

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Section I: General Overview and Next Steps

This public comment proceeding sought to obtain community input on the final recommendations from the GNSO’s Expedited Policy Development Process (EPDP) Team on the Temporary Specification for gTLD Registration Data. The GNSO Council adopted all the final recommendations from the EPDP Team in March 2019

(<https://gnso.icann.org/en/council/resolutions#201903>), and approved a Recommendations Report to the ICANN Board on the topic during its April 2019 meeting (to be added when available). In accordance with the ICANN Bylaws, a public comment period was opened on the adopted recommendations, prior to their review and action by the ICANN Board, to provide the community with a reasonable opportunity to comment on “any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges” (see Bylaws Article III, Section 6.1).

All the EPDP Team’s final recommendations, as adopted by the GNSO Council, are described in detail in the group’s Final Report, which can be viewed at <https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf>. Seventeen (17) comments were received by the close of this public comment period and have been summarized below in Section II. Of these, two (2) comments seem unrelated to the EPDP’s Final Report and appear to be spam. The rest of the comments have been summarized below.

Next Steps

ICANN org will submit this Report of Public Comments, the link to the Public Comment forum, the GNSO Council’s Recommendations Report and the PDP Working Group’s Final Report to the ICANN Board for its review and necessary action.

Section II: Contributors

At the time this report was prepared, a total of seventeen (17) community submissions had been posted to the forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
Internet Governance Project	Milton Mueller	IGP
World Intellectual Property Organization	Brian Beckham	WIPO
i2Coalition	Monica Sanders	i2C
International Trademark Association	Lori Schulman	INTA
Intellectual Property Constituency	Brian King	IPC
European Commission	Pearse O'Donohue	EC
Registries Stakeholder Group	Samantha Demetriou	RySG
Registrars Stakeholder Group	Zoe Bonython	RrSG
Coalition for Online Accountability	Dean Marks	COA
At-Large Advisory Committee	ALAC Support Staff	ALAC
Non-Commercial Stakeholders Group	Rafik Dammak	NCSG
Business Constituency	Steve DelBianco	BC

Individuals:

Name	Affiliation (if provided)	Initials
Mark Perkins		MP
Chokri Ben Romdhane	ALAC	CR
John Poole		JP

Section III: Summary of Comments

General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

Of the fifteen (15) comments submitted, five (5) comments were submitted by GNSO Stakeholder Groups / Constituencies, one (1) comment was submitted by an ICANN advisory committee, six (6) comments were submitted by organizations or groups, and three (3) comments were submitted by individuals.

The commenters noted a variety of concerns with the EPDP's Final Report. Broadly speaking, commenters identified the following issues and observations:

Recognition of the Multi-stakeholder Model

- The Final Report represents the work and careful compromise of a representative team of diverse interests and associations within the ICANN community; as such, rejecting any portion of the recommendations could risk undermining the multi-stakeholder model. (IGP, i2C, RySG, RrSG)

Divergent Recommendations

- The Board should carefully consider if it should adopt divergent recommendations (Recommendations 2 and 16) as consensus policy. (INTA)
- The different groups representing the EPDP Team compromised a great deal on the content/language in the recommendations in order to attempt to reach consensus and were still unable to do so. The GNSO Council subsequently voted to approve the recommendations, and the GAC did not object to them. Although there was divergence within the EPDP Team, this should not deter the ICANN Board from adopting the entire Final Report. (NCSG)

Purposes for Processing gTLD Registration Data

- The EPDP Team's Final Report proposes reforms to WHOIS that are important steps forward by clearly defining the limited purposes of WHOIS as well as minimizing the data collected to what is needed to fulfill the limited purposes. (IGP)
- Purpose 2 (and the Final Report) fails to specifically acknowledge important interests such as law enforcement, consumer protection, intellectual property, and cybersecurity as legitimate bases and purposes for processing gTLD registration data. (INTA, IPC, COA, BC).
- The Final Report and work in Phase 1 should not preclude a finding in Phase 2 that law enforcement, intellectual property, and cybersecurity are legitimate purposes for data collection, processing and access. (INTA)
- The purposes for processing WHOIS data by ICANN and/or the contracted parties should not include enabling access by third parties; further to previously-received advice from the European Data Protection Board, the current wording of Purpose 2 conflates ICANN's purposes with third party interests in collecting data. (EC)
- Purpose 2 should be deleted as it is unrelated to what data elements should be collected with respect to registering domain names. (MP)
- Purpose 2 is inconsistent with principles set out in Art. 5 of GDPR, such as data minimization and proportionality of use. (NCSG)
- The EPDP team lacked both a methodology and legal guidance when it developed the purposes for processing gTLD registration data. (JP)
- Further work is necessary to establish the link between purposes for processing personal data in Recommendation 1 and the associated processing activity(ies). (EC)
- The following should be added as a primary purpose: "As subject to Registry and Registrar terms, conditions, and policies, and ICANN Consensus Policies: To record and maintain records of the names and contact information of domain name registrants." Without this purpose, it may be difficult to respond to a GDPR complaint or DPA inquiry. (JP)
- If the processing activities associated with WHOIS data involve an international transfer of data, it is necessary to identify an appropriate legal ground for the international transfer. (EC)

Responsible Parties

- Phase 1 failed to address who the responsible parties are, i.e., "who are the controllers and processors". (JP)

- The success and viability of a uniform access/disclosure model is predicated on a clearly-defined role for ICANN Org. (RrSG)
- As acknowledged by the EDPB, ICANN and the contracted parties are considered joint-controllers, which is consistent with Recommendation #19, suggesting the negotiation of a Joint Controllership Agreement between ICANN and the contracted parties. (EC)
- In order to facilitate the provision of standardized access to registration data, ICANN will be required to accept its role as a data controller or sole data controller for some registration data processing purposes. Any data processing and/or data protection agreements will need sufficient clarity around roles, responsibilities, and liabilities in order to establish a legal framework under which contracted parties can support a truly standardized access model. (IPC)

Overapplication of GDPR

- The Final Report represents an overapplication of the GDPR and allows ICANN's contracted parties to apply GDPR principles on a global scale, e.g., to legal persons and entities outside of the EU's jurisdiction. (IPC, COA)

Data Redaction

- The Final Report provides for the over-redaction of WHOIS information; for example, the Organization field should not be a redacted field. (INTA)
- The City field in WHOIS may contain identifiable data; accordingly, there is no legitimate reason to publish it. The City field should be afforded the same protection as other WHOIS fields containing personal data. (RrSG)

Data Accuracy

- The EPDP Team failed to require explicit measures to ensure the accuracy of registration data in its Final Report. (INTA)
- With respect to data accuracy and Recommendation #4, the NCSG has raised concerns on the lack of specification of the interpretation and definition of the term accuracy under the GDPR. (NCSG)
- One commenter asks if the eventual Unified Access Model will provide mechanisms to avoid the inaccuracy of data. (CR)

Legal vs. Natural

- While legal persons are not protected under the GDPR, the data provided by a legal person may contain or reveal private data of a natural person and should be protected. Additionally, the feasibility of requiring differentiation between legal and natural persons for the over 150 million legacy registered domain names is something that needs to be considered. (RrSG)
- ICANN has never limited registration of domain names to just "natural persons" or just "legal persons". There may be unincorporated organizations and associations that are not strictly classified as "legal persons". (JP)

- The issue of legal/natural differentiation should be discussed during Phase 2, particularly considering the competing needs of entities using the data for cybersecurity and other legitimate purposes. (ALAC)
- GDPR does not distinguish between legal and natural persons; however, it does distinguish between the personal information of natural persons and the personal information of legal persons. In many cases, a domain name registration by a legal person may include personal information of a natural person, which adds to the complexity and legal uncertainty of making distinctions based on the type of Registrant. (NCSG)
- Phase 2 work should fully resolve the differentiation between legal and natural persons. (BC)

Geographic Differentiation

- Phase 2 should include further study on determining an appropriate framework for geographic differentiation. (INTA, ALAC)
- Differentiation based on geographic location is a flawed concept and does not warrant further consideration given to how it may be achieved. (RrSG)
- The Board should initiate the studies on geographic differentiation and legal vs. natural or request that the EPDP Phase 2 commission these studies. The Board should ensure there is adequate funding for such work. (ALAC)
- Authorizing contracted parties to differentiate between registrants based on geographic location poses significant challenges to global access and disclosure of data, which could lead to unequal levels of data protection for data subjects depending on their location. (NCSG)
- There is no need to differentiate between gTLD registrants on a geographic basis. (CR)
- The EPDP Team must rely on the proposed study of geographic distinctions as it deliberates on this issue. (BC)

Phase 2

- The Final Report only represents the EPDP Team's work in Phase 1. The work in Phase 2, particularly the task of producing a system for standardized access to non-public registration gTLD data, should be prioritized by the Board in both the proposed timeline for completion and the disbursement of necessary resources. (INTA, IPC, COA, EC, BC)
- The Board should establish a "date certain" for the end of Phase 2. (BC)
- The Board should make resources available for an impartial mediator. (BC)
- The Board should make clear to the EPDP Team that it expects the EPDP Team to produce and deliver a system for standardized access to non-public registration data and should emphasize that the EPDP Team's Phase 2 cannot be completed and adopted absent such a system. (COA)
- Any update from the Review of Rights Protection Mechanisms (RPMs) Working Group to the EPDP Team regarding the effect of GDPR and the EPDP Team's work on RPMs should include a UDRP provider. (WIPO)
- ICANN should not be the sole gateway for disclosure of WHOIS data to third parties. Disclosure should continue through registrars, since registrars hold other personal data on registrants. (JP)

- The work of Phase 2 should be divided into at least two separate work streams. The first work stream should focus on a Uniform Access Model and the associated categories of legitimate third-party interests that will be incorporated into an accreditation system as part of the UAM. The second work stream should address the issues that were left unresolved from Phase 1, e.g., the legal/natural person registrant distinction. (IPC)

Implementation of PPSAI and Thick WHOIS

- The implementation work that was stalled as a result of the EPDP Team’s work, e.g., Thick WHOIS, Privacy/Proxy Accreditation, should resume in an expeditious fashion. (INTA, IPC, COA, BC)
- The issue of Thick WHOIS should be discussed during Phase 2 in light of the new legal opinion. (ALAC)
- Several EPDP recommendations (EPDP Team Recommendations 6, 12, 13, 14 and 16) put registrars in an authoritative position in reference to WHOIS data since registries cannot execute these recommendations within their platforms. If registrars are not authoritative, the above-referenced recommendations cannot be implemented; therefore, thick WHOIS is no longer necessary to achieve the purposes for processing personal data. (RrSG)

Section IV: Analysis of Comments

General Disclaimer: This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

As noted above, the Board received a substantial amount of input on the EPDP Team’s Final Report. Most of the topics noted in the comments were already raised and considered during the EPDP Team’s deliberations and/or flagged in the comments received on the EPDP Team’s Initial Report. In addition, the majority of the noted concerns and issues were the subject of lengthy debates during the EPDP Team’s Phase 1 work and the recommendations on these topics represent carefully-crafted compromises. Specifically, the topics of purposes for processing gTLD registration data, responsible parties, over-application of GDPR, data redaction, data accuracy, legal vs. natural persons, and geographic differentiation were discussed at length by the EPDP Team, and several of these have already been confirmed as requiring further review and consideration during phase 2 of the EPDP Team’s work. For further background and information on the discussions and subsequent compromises within the EPDP Team on the above topics, please refer to the body of the Final Report.

Phase 2

Several commenters pointed out the importance of Phase 2. Both the ICANN Board and the GNSO Council have noted their commitment to supporting the important work of the EPDP Team in Phase 2. The GNSO Council has already sent a request to the Board for immediate Phase 2 resources. The Phase 2 work will require the EPDP Team to answer Charter Questions involving which parties will have access to data and what the specific requirements for access are. In answering these questions, it is anticipated that the uncertainty about

access noted in some of the public comments will be alleviated. Additionally, the Board anticipates all items that were flagged in the Final Report as needing further discussion in Phase 2 will be addressed by the EPDP Team in due course.

The Phase 2 EPDP Team will shortly begin constructing its work plan, including a proposed timeline, associated milestones and deliverables. The suggestions regarding proposed workstreams will be forwarded to the EPDP Team for its consideration. Additionally, the suggestion for a UDRP Provider to be included in the RPM update to the EPDP team will also be forwarded to the EPDP Team.

Outstanding EPDP Implementation Questions

One of the comments flagged an issue that will be further discussed during the implementation of the EPDP Team's policy recommendations. Specifically:

- Further identification of controller/processor relationships in the data processing agreements

This concern will be forwarded to the team of ICANN org and representative Contracted Parties who are currently in discussion about the data processing agreements from Recommendation #26.