

IPC Comment to the Board on the EPDP Phase 1 Final Report

The Intellectual Property Constituency (IPC) of the GNSO appreciates this opportunity to share our feedback and associated requests to the board prior to its action on the policy recommendations of Phase 1 of the GNSO Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data.

Comments on the Phase 1 Final Report, and Requests of the Board

The policy defined in the EPDP Phase 1 Final Report is a significant step backwards for WHOIS users compared to the Temporary Specification, and it fails to achieve the balance envisioned by GDPR. We would like the board to know, and we respectfully ask that the board act accordingly, as follows: We note five specific shortcomings below, which we respectfully ask the board to address as suggested:

1. The Recommended Purposes for collecting and processing data lack specificity required under GDPR, and do not explicitly take adequate account of the public interest purposes for processing WHOIS data. While the Temporary Specification acknowledges the public interest-related processing for cybersecurity, consumer protection, and intellectual property purposes, the Phase 1 Recommendations omit these specific purposes.

Accordingly, we ask the board to fill in this gap by formally acknowledging these purposes.

2. While Goran Marby often stated that ICANN's goal was "to ensure compliance with the GDPR while maintaining the existing WHOIS system to the greatest extent possible," the Phase 1 Final Report did not share this goal. The Temporary Specification permitted broad misapplication of GDPR (e.g. to legal persons and entities outside the EU's jurisdiction), an outcome that was only palatable as it was practically necessary in light of ICANN's delay in addressing data privacy laws, and because it was supposed to be temporary. However, the EPDP Phase 1 Final Report resulted in an even worse outcome for those with a lawful need to access this data than did the Temporary Specification. See Appendix A below. While the Phase 1 Recommendations address the concerns of the Contracted Parties, without an accompanying access model, they fail those who use this data for lawful and legitimate purposes in the public interest. We are troubled by the Recommendation 3 language asking "whether such a system should be adopted" while the charter says the EPDP "shall" deliver it. The access portion of the EPDP is critical to achieving a balanced approach that protects internet users and serves the global public interest.

Accordingly, we ask the board to state clearly that adopting the Phase 1 Recommendations is merely adoption of a portion of the work required of the EPDP, and that the board expects the EPDP team to deliver a system for standardized access to non-public registration data before the EPDP is deemed complete.

3. Recommendation #14 on domains using a privacy/proxy service was among the least controversial (and shortest) in the Phase 1 Final Report, and has no Phase 2 corollary for further work. The EPDP Phase 1 report should not excuse further delays in implementing consensus policies that have been approved by the GNSO Council and the board, including both the Privacy/Proxy Services Accreditation and Thick WHOIS.

Accordingly, we call on the board to direct ICANN to implement the Privacy and Proxy Service Provider Accreditation Issues Working Group (PPSAI) recommendations without further delay, and we ask the board not to permit further delays in implementing Thick WHOIS.

4. Some members of the community have expressed reluctance to continuing to participate at the same level in Phase 2. We would like to reiterate calls from the GAC¹, ALAC², and specific governments³ to proceed expeditiously toward concluding Phase 2 by delivering a standardized access model.

Accordingly, we request that adequate resourcing from the board is allocated to set up the EPDP for success in Phase 2.

5. Recommendation #19 requires ICANN to enter into data protection agreements with contracted parties, and we understand that completely indemnifying all contracted parties against all potential GDPR fines may not be possible. It is also clear that many contracted parties are unwilling, under the current legal framework, to participate in a standardized access model where they do not control the access. Any access model that would allow 2000+ different contracted parties to control access is not a standardized access model.

Accordingly, we request the board to acknowledge that ICANN has a public interest responsibility in facilitating the provision of standardized access to registration data. This will require ICANN to accept its role as a data controller, if not the sole data controller, for some registration data processing purposes. We further request the board to enter into data processing and/or data protection agreements with sufficient clarity around roles, responsibility, and liability to establish a legal framework under which contracted parties can support a truly standardized access model.

Views on Phase 2

Notwithstanding these concerns about the Phase 1 Final Report (in addition to those expressed in our minority statement), we look forward to participating collaboratively and productively in a Phase 2 of the EPDP focused on timely delivery of a system for standardized access to non-public registration data. We think it would be most productive and efficient to divide the work of Phase 2 into at least two separate work streams.

The first work stream should address the policies around access and a Uniform Access Model and should, as a priority, identify the different 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 those issues that were left unresolved or carried over from Phase 1 to Phase 2, such as the legal/natural person registrant distinction. We believe work can effectively and efficiently be accomplished on these two work streams simultaneously by forming separate work groups within the EPDP Team. This methodology will provide substantive value and efficiency in working towards a goal of execution of a Unified Access Model. For additional details on method, prioritization and dependencies for Phase 2 work, see the email sent by Alex Deacon to the EPDP list on March 29, 2019 (<https://mm.icann.org/pipermail/gnso-epdp-team/2019-March/001826.html>)

¹ <https://gac.icann.org/content-generic-migrated/public/icann64%20gac%20communique%CC%81.pdf>

² https://atlarge.icann.org/en/advice_statements/13255

³ <https://www.icann.org/en/system/files/correspondence/redl-to-chalaby-04apr19-en.pdf>

Appendix A

Public WHOIS	WHOIS Policy	Temporary Specification	Registration Data Policy							
	May 24, 2018 and Prior	May 25, 2018	March 1, 2020							
<table border="1" style="margin: auto;"> <thead> <tr> <th style="text-align: center;">Legend</th> </tr> </thead> <tbody> <tr> <td style="text-align: center;">Published</td> </tr> <tr> <td style="text-align: center;">Redacted by Default, Published at Registrant Option</td> </tr> <tr> <td style="text-align: center;">Registrar Option</td> </tr> <tr> <td style="text-align: center;">Redacted, No Option to Publish</td> </tr> <tr> <td style="text-align: center;">Registry Option; Registrar-Controlled Reconfirmation Required</td> </tr> <tr> <td style="text-align: center;">Deleted</td> </tr> </tbody> </table>	Legend	Published	Redacted by Default, Published at Registrant Option	Registrar Option	Redacted, No Option to Publish	Registry Option; Registrar-Controlled Reconfirmation Required	Deleted	Reg Name	Reg Name	Reg Name
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