

June 17, 2020

Dear Sebastien and EPDP Phase 1 IRT team:

We are writing to share our views concerning the interplay between the Thick Whois Transition Policy and the EPDP Phase 1 Recommendation #7. This issue has been the subject of prior recent correspondence from the ICANN Board to the GNSO Council dated 11 March 2020 ([link](#)), from the Contracted Parties House (“CPH”) EPDP Phase 1 IRT participants to the GNSO Council dated 18 May 2020 ([link](#)) and the GNSO Council reply to the Board dated 29 May 2020 ([link](#)).

We agree with the Board, the Council and the CPH IRT participants that the EPDP Phase 1 Final Report and its adoption by the Council and the Board did not repeal or overturn the Thick WHOIS Transition Policy. We write to express our view that the EPDP Phase 1 Final Report, and specifically Recommendation 7, does not conflict with the Thick WHOIS Transition Policy, which itself was developed through the bottom-up, multi-stakeholder policy development process, adopted by the Board and implemented by the Thick Whois Consensus Policy IRT ([link](#)). Indeed, preserving and reaffirming the Thick Whois Consensus Policy is a crucial, concrete way to demonstrate support for those processes and that model.

As part of the EPDP Phase 1 IRT (“Phase 1 IRT”)’s work in examining whether the EPDP Phase 1 Recommendations require modifications of existing Consensus Policies, including the Thick WHOIS Transition Policy, the Phase 1 IRT sought legal advice from the law firm Bird & Bird as to whether a legal basis exists under the GDPR to justify the transfer of data elements pursuant to ICANN’s Thick WHOIS policy. In response, Bird & Bird produced a memorandum, dated 8 March 2019, entitled “Advice of the legal basis for transferring Thick WHOIS.” ([link](#)) Bird & Bird concluded that a solid legal basis does exist under the GDPR to support and justify the Thick WHOIS policy and the transfer of data by registrars to registries involved in implementing such Thick WHOIS policy. Specifically, Bird & Bird noted the following:

***“The purposes motivating the thick Whois policy are legitimate and the processing is necessary for these purposes***

3.4 The GDPR Recitals provide examples of activities that could be considered legitimate interests, where not outweighed by the rights and interests of data subjects. For example, Recital 48 states, *“Controllers that are part of a group of undertakings or institutions affiliated to a central body may have a legitimate interest in transmitting personal data within the group of undertakings for internal administrative purposes, including the processing of clients’ or employees’ personal data”*.

3.5 This example makes clear that the sharing of personal data among affiliated entities for internal administrative purposes may be considered a legitimate interest. The Recitals also cite security, including preventing denial of service attacks, as a legitimate interest for processing personal data.

3.6 The thick Whois policy is animated by a desire to improve stability, security and reliability of the gTLD registration system. These will be considered legitimate interests under the GDPR.

3.7 The benefits of this policy accrue not only to registries and registrars, but also to third-parties

that rely on being able to access Whois data, such as rights holders and law enforcement

3.8 The fact that the policy serves the interests of third-parties does not undermine the legitimate interests test. Article 6(1)(f) states that personal data may be processed where it is "*necessary for the purposes of the legitimate interests pursued by the controller or by a third party ...*". The CJEU recognised this in the Rīgas case, when it held that "*the interest of a third party in obtaining the personal information of a person who damaged their property in order to sue that person for damages can be qualified as a legitimate interest*".

3.9 Moreover, in Opinion 06/2014 *on the notion of legitimate interests of the controller*, the Article 29 Working Party ("**WP29**") found that, "*[i]n general, the fact that a controller acts not only in its own legitimate (e.g. business) interest, but also in the interests of the wider community, can give more 'weight' to that interest*".

3.10 It is implicit in the Thick Whois Report that the previous system posed certain risks to the security, stability and reliability of gTLD registrations and that there was no less intrusive way of addressing these concerns. Therefore, the shift to a thick Whois policy was considered to be necessary." (emphasis in original)

Given Bird & Bird's analysis and conclusions, the Phase 1 IRT and the broader ICANN community now have clear guidance that Thick WHOIS, including the Thick WHOIS Transition Policy, is compatible with and supported by the GDPR. While we acknowledge that this does not automatically render Thick WHOIS as consistent with Recommendation 7, we believe there is no conflict between Recommendation 7 and the Thick WHOIS Transition policy for the following reasons:

First, the entire purpose of the Temporary Specification followed up by the work of the EPDP was and is to bring ICANN's policies and processes with respect to registrant data into compliance with the GDPR. It was not intended to serve as a mechanism for overturning existing Consensus Policies that already comply with the GDPR.

Second, while Recommendation 7 requires that only a minimal set of public data be transferred from the registrar to the registry "provided an appropriate legal basis exists and data processing agreement is in place," it does not prohibit the transfer of additional data elements in line with the same conditions of appropriate legal basis and the presence of a data processing agreement. This fact is illustrated by Recommendation 5 and Recommendation 7's acknowledgment that data elements identified by a Registry Operator in its registration policy may be transferred. Similarly, the additional data elements that are to be transferred from a registrar to a registry under Thick WHOIS are indicated as optional under Recommendation 7. Therefore, Recommendation 7 neither prohibits nor prevents the transfer of such additional data elements. Furthermore, the use of 'Optional' in Recommendation 7 does not foreclose the enforcement of a pre-existing contract obligation related to data to be transferred from a registrar to a registry, so long as that transfer is consistent with the GDPR.

Third, Thick WHOIS Consensus Policy, including the Thick WHOIS Transition Policy, was the product of the bottom-up, multi-stakeholder policy development process and was approved by the GNSO Council and adopted by the Board. Thick WHOIS was embraced by the ICANN community to serve a variety of purposes related to the stability and security of the DNS. As articulated in the Final Report on the Thick

WHOIS Policy Development Process ([link](#)) these purposes and benefits specifically include: (i) improving stability, (ii) improving response consistency, (iii) improving security by more copies of escrowed data in the event of a failure, and (iv) providing a more level playing field between registry providers. None of these critical purposes and benefits have changed, nor have they been rendered somehow unlawful or illegitimate by the GDPR. As Board Member Becky Burr stated with respect to Recommendation 7 in a recent discussion with the Phase 1 IRT, “what the Board was extremely uncomfortable about and, frankly, unwilling to go along with was a quiet repeal of the Thick WHOIS policy by leaving it up to registries to decide whether or not they wanted to be thick.” ([link](#)) Therefore, we strongly disagree with statements suggesting that assertions concerning the consistency of Recommendation 7 with Thick WHOIS Consensus Policy, and the lack of a conflict between the two, somehow represent a subversion of ICANN’s key processes and the multi-stakeholder model. To the contrary, preserving the Thick Whois Consensus Policy affirms support for those processes and that model.

Fourth, as stated by the Registry Stakeholder Group itself with respect to Recommendation 7 in comments to the Phase 1 Final Report of 21 February 2019 ([link](#)), the Registry Stakeholder Group noted that the data fields that had been indicated as optional should be “REQUIRED to be transferred from Registrar to Registry IF Registry terms/conditions/policies require this data element.” Once again, this appears to indicate that—even in the view of some of the Contracted Parties—the EPDP Phase 1 Final Report was not intended to conflict with, let alone overturn, Thick WHOIS Consensus Policy, including the Thick WHOIS Transition Policy.

Finally, each and every registry has already implemented the Thick WHOIS Consensus Policy for at least one TLD. We are not aware of any actions or even inquiries that have been made by Data Protection Authorities questioning the compatibility of Thick WHOIS with the GDPR despite its widespread implementation. It is understandable that prior to the receipt of the legal guidance from Bird & Bird referred to above, the Phase 1 EPDP team took a narrow approach in its Recommendations with respect to required data transfers. But now with the benefit of the clear Bird & Bird legal advice and two years of DNS operations since the effective date of the GDPR, it has become evident that any perceived or potential conflict between Thick WHOIS Consensus Policy and the requirements of the GDPR simply does not exist.

For all of the foregoing reasons we believe that the EPDP Phase 1 Recommendations are neither inconsistent with nor in conflict with the Thick WHOIS Consensus Policy, including the Thick WHOIS Transition Policy.

Given the above, the EPDP Phase 1 IRT team should faithfully implement Recommendation 7, as written and agreed to in EPDP Phase 1 by ensuring the Phase 1 IRT language (a.k.a. “The OneDoc”) specifies the appropriate legal basis and data processing agreement as follows :

- Specify in the data processing agreement currently under development between the Contracted Parties and ICANN org that the legal basis for the **mandatory** transfer of Thick WHOIS registration data elements from the registrar to the registry be based on the community developed and approved Thick WHOIS Consensus Policy as further supported by the legal analysis provided in the March 8, 2020 Bird & Bird Memo Section 3.4 - 3.18, which confirmed that the Thick WHOIS Consensus Policy complies with and is supported by the GDPR.
- Update Section 8 of the IRT document “Transfer of Registration Data from Registrar to Registry Operator” as follows :

- 8.1. Registrar MUST transfer the following data elements to Registry Operator:
  - 8.1.1. Domain Name
  - 8.1.2. Registrar Whois Server
  - 8.1.3. Registrar URL
  - 8.1.4. Registrar
  - 8.1.5. Registrar IANA ID
  - 8.1.6. Registrar Abuse Contact Email
  - 8.1.7. Registrar Abuse Contact Phone
  - 8.1.8. Domain Status(es)
- 8.2. If collected or generated by the Registrar, the Registrar MUST transfer the following data elements to Registry Operator:
  - 8.2.1. Name Server(s)
  - 8.2.2. Name Server IP Address(es)
- 8.3. Registrar MUST transfer the following data elements to Registry Operator according to the legal basis contained in the data processing terms required by section 5:
  - 8.3.1. Registrant Name
  - 8.3.2. Registrant Street
  - 8.3.3. Registrant City
  - 8.3.4. Registrant Country
  - 8.3.5. Registrant Phone
  - 8.3.6. Registrant Email
  - 8.3.7. Registrant Organization
  - 8.3.8. Registrant State/province
  - 8.3.9. Registrant Postal code
  - 8.3.10. Registrant Phone ext
  - 8.3.11. Registrant Fax
  - 8.3.12. Registrant Fax ext
  - 8.3.13. Tech Name
  - 8.3.14. Tech Phone
  - 8.3.15. Tech Email

- 8.3.16. Additional data elements as identified by Registry Operator in its registration policy, such as (i) status as Registry Operator Affiliate or Trademark Licensee [.MICROSOFT]; (ii) membership in community [.ECO]; (iii) licensing, registration or appropriate permits (.PHARMACY, .LAW) place of domicile [.NYC]; (iv) business entity or activity [.BANK, .BOT]
- 8.4. Registrar MAY transfer the following data elements to Registry Operator:
  - 8.4.1. Registrar Registration Expiration Date
  - 8.4.2. Reseller

Sincerely,

The Business Constituency and Intellectual Property Constituency, including their IRT members