

EPDP Phase I - Recommendation 7

Report to the GNSO Council by the Council Liaison to the IRT for Registration Data Policy Implementation

Following the ICANN Board's letter to the GNSO Council of 11 March 2020 regarding the "Potential Impasse Concerning Implementation of EPDP Phase 1 – Recommendation 7", the GNSO Council responded on 29 May 2020 with a series of "Next Steps on EPDP Phase 1 Recommendation 7 Implementation and Thick WHOIS Transition Policy" including a request to the GNSO Council Liaison to the IRT to identify and attempt to resolve any disagreement on Recommendation 7. This response was acknowledged by the ICANN Board on 7 July.

(All GNSO Council correspondence here: <https://gnso.icann.org/en/council/correspondence>)

For the purpose of resolving the matter of Recommendation 7 the GNSO Liaison (Sebastien Ducos) engaged the IRT and invited participants who wanted to contact him and present their position on the recommendation.

The Liaison was asked by the Registries and Registrars to include 2 pre-existing documents:

- Marc Anderson's 20 Dec 2019 paper : <https://mm.icann.org/pipermail/irt.regdatapolicy/2019-December/000387.html> and corresponding comments
- The letter sent by the CPH sent to the GNSO on 18 May 2020 : <https://gnso.icann.org/sites/default/files/file/field-file-attach/cph-to-gnso-council-18may20-en.pdf>

The IPC and BC propose a joint paper:

- Alex Deacon's submission of 17 Jun 2020 : <https://mm.icann.org/pipermail/irt.regdatapolicy/2020-June/000498.html>

The IPT (ICANN Staff) offered input in the "One Doc" – the IRT working document not publicly available but quoted as:

8. Transfer of Registration Data from Registrar to Registry Operator

Registrar MUST transfer to Registry Operator data elements collected or generated pursuant to Section 7, with the exception that the Registrar MAY transfer to Registry Operator the Reseller data element.

[Followed by the list of Recommendation 7 data elements listing all elements as MUST be transferred, but for "Registrar Registration Expiration Date" and "Reseller" which MAY be transferred].

The Board offered guidance

- EPDP Phase 1 Final Report Scorecard: <https://www.icann.org/en/system/files/files/epdp-scorecard-15may19-en.pdf>¹
- During a 22 Apr 2020 IRT Call joined by Becky Burr, Chris Disspain and Maarten Botterman. <https://community.icann.org/display/RDPIRT/2020-04-22+Registration+Data+Policy+Implementation+IRT+Meeting>

Further, the Liaison had conversations with Marc Anderson (at the beginning and end of the inquiry), with Alex Deacon and Dean Marks (at the beginning and end of the inquiry), with Dennis Chang (at the beginning and end of the inquiry), with Pam Little and Rafik Dammak as GNSO Council ExCom (on several occasions), with Beth Bacon on the progress of the Data Protection Agreement (at the end of the inquiry).

¹ The scorecard states: "The Board requests that the EPDP Phase 2 Team consider whether the suggested corrections contained in the Registry Stakeholder Group's comments and the accompanying chart in Appendix G more accurately reflect the Phase 1 consensus and should be adopted." However, it appears the Board's request was never communicated to the EPDP Phase 2 Team nor did the Phase 2 Team consider such request.

Context

Recommendation 7 pertains to the transfer of data from Registrars to Registries. It reads:
The EPDP Team recommends that the specifically-identified data elements under “[t]ransmission of registration data from Registrar to Registry”, as illustrated in the aggregate data elements workbooks, must be transferred from registrar to registry provided an appropriate legal basis exists and data processing agreement is in place. In the aggregate, these data elements are:

[followed by the list of data points that may be transferred, some marked as Mandatory (The domain name, fields pertaining to the Registrar and Domain Statuses), others as Optional (contact fields, name servers, Registrar expiry date and Reseller)]

Ref: <https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf>

Positions (as per the Liaison’s understanding)

- **A point of contention exists on the fact that “an appropriate legal basis” may or may not exist in particular with regards to the transfer of contact fields.**
 - RrSG & RySG – favour transcribing the Recommendation wording as is with the understanding that legal basis is not established in all cases.
 - IPC & BC – have no objection to the Recommendation wording as is with the understanding that legal basis is established in all cases, in particular with respect to the Thick WHOIS Transition Policy.
 - Other members of the IRT – did not choose to submit comments to this issue beyond Amr Elsadr’s approval of Marc Anderson’s 20 Dec 2019 paper referenced above.
 - IPT (ICANN Staff) – is of the view that legal basis is established in all cases and suggests removing “provided an appropriate legal basis exists and data processing agreement is in place” in favour of the “One Doc” wording quoted above.
 - The ICANN Board – reminded the IRT (via the Scorecard and 22 Apr 2020 call) that Rec 7 could not “repeal or overturn existing Consensus Policy including, in this case, the Thick WHOIS Policy”, at least not without GNSO Council oversight and approval. On the 22 Apr 2020 call the ICANN Board (Becky Burr) did underline that in its view, even if Rec 7 lists distinguishes Mandatory and Optional fields, for “all of the data elements, including the green data elements, registries should have a policy that requires transfer, unless and until the thick WHOIS policy changes that”.

Liaison Report

- These positions were by and large confirmed by the IRT during the last call directly preceding the 24 June 2020 GNSO Council Meeting, and were so reported to the Council verbally.
- Ahead of the 23 July 2020 GNSO Council Meeting, the Liaison attempted to obtain a consensus in writing by presenting a “Path Forward” document, essentially proposing to maintain in the policy implementation a wording that would match Recommendation 7 including the crucial “provided an appropriate legal basis exists and data processing agreement is in place” text. The document acknowledged that it left room for interpretation on the existence or not of a legal basis in all cases but left that interpretation to later work following Recommendation 27 on the alignment of this policy with other existing policies. Believing this document to be acceptable to the group the Liaison reported once more verbally to the Council that a resolution was agreed amongst the IRT. The IPT (ICANN Staff) shared with the Liaison its disagreement with the document immediately after the GNSO Council Meeting and the Liaison’s verbal report.
- Ahead of the 20 August 2020 GNSO Council Meeting, the Liaison attempted to obtain from the IPT and IRT an agreed position to report to the Council. The “Path Forward” document was put aside as the group decided that it would not be able to agree to a resolution, without first resolving the all-important question of the existence or not of a legal basis for the transfer of data in all cases. As the group was not able to agree on this question on its own, it resolved to ask the Liaison to seek Council advice on the matter. The liaison reported as much verbally to the Council during the 20 August meeting. In the days

following and as the Liaison was preparing its question to the Council in writing, the Liaison was asked by the group to withdraw the question.

- In preparation for the present report the Liaison advised the IRT & IPT that he would no longer report on behalf of the group without a prior fully agreed written statement from the group. In spite of genuine efforts from all sides a consensus was not reached, nevertheless the Liaison will report the following in his own name:

While all members of the IRT participate in their own capacity as individuals (contrary to how the EPDP was organised), there remains a strong cleavage between the members originating from the RrSG, RySG and NSCG on one hand, and members originating from the IPC and BC on the other. While remaining careful not to side with any party, the IPT (ICANN Staff) holds views that in this context tend to align with those of the IPC and BC.

In their latest respective positions:

- The former remains of the view that the reference to “provided an appropriate legal basis exists and data processing agreement is in place” is of essence and must be included in the final policy wording as in their view this prior condition is not met in all cases.

To ensure clarity, they propose that data fields be listed in policy following the recommendation (see Table 1 in Annex).

They seek from the GNSO Council the following clarifications:

- **if the Council believes there is no conflict** between Rec 7 and the Thick WHOIS Policy then the recommendation language is correctly added back in as stated in the recommendation, and;
- **if the Council believes there is a conflict** between Rec 7 and the Thick WHOIS Policy then Council should provide direction on how to resolve the perceived conflict.
- The later remains of the view that the reference to “provided an appropriate legal basis exists and data processing agreement is in place” brings confusion as in their view a legal basis exists in all cases. They would want either the reference removed or clarified in policy and confirmed in the common data processing agreement currently negotiated between ICANN Org and members of the CPH.

In their view:

- Either the IRT agrees that -
A legal basis exists for the transfer of Thick WHOIS data from registrars to registries in all cases to satisfy the "provided an appropriate legal basis exists" condition, and
A data processing agreement is drafted that supports and details this transfer to satisfy the "data process agreement is in place" condition, and
The policy details which elements MUST be transferred:
Recommendation 7 is satisfied per policy and the Thick WHOIS consensus policy stands.
- Or that -
A legal basis does not exist for the transfer of Thick WHOIS data from registrars to registries in all cases – the "provided an appropriate legal basis exists" condition is not met in all cases; in which case the IRT renders the Thick WHOIS consensus policy obsolete.

By opposition with the above, they seek from the GNSO Council the following clarifications:

- **if the Council believes there is no conflict** between Rec 7 and the Thick WHOIS Policy then the “recommendation” language is correct as is currently proposed by ICANN Staff, and;
- **if the Council believes there is a conflict** between Rec 7 and the Thick WHOIS Policy then Council should provide suggestions on how to resolve the perceived conflict.

Annex

Table 1 – Data field clarifications a suggested by members originating from the CPH and NCSG:

MUST be transferred: Domain Name Registrar Whois Server Registrar URL Registrar Registrar IANA ID Registrar Abuse Contact Email Registrar Abuse Contact Phone Domain Status(es)
MUST be transferred, if collected or generated: Name Server(s) Name Server IP Address(es)
MUST be transferred provided an appropriate legal basis exists and data processing agreement is in place: Registrant Name Registrant Street Registrant City Registrant Country Registrant Phone Registrant Email
MUST be transferred provided an appropriate legal basis exists and data processing agreement is in place, if collected or generated: Registrant Organization Registrant State/province Registrant Postal code Registrant Phone ext Registrant Fax Registrant Fax ext Tech Name Tech Phone Tech Email
MAY be transferred: Registrar Registration Expiration Date Reseller