

18 May 2020

Dear GNSO Councillors,

This letter follows the discussion from EPDP Phase 1 IRT team meeting on [22 April 2020](#), which was attended by Maarten Botterman, Becky Burr, and Chris Disspain, during which we discussed the [11 March 2020 letter](#) from Mr. Botterman to Keith Drazek. As the Council prepares to discuss the contents of and its response to that letter, we are writing to provide additional context from our experience serving on the IRT and to urge you to take the necessary actions to prevent a subversion of ICANN's key processes and the multistakeholder model.

The discussion on the 22 April call centered around the conflict between the [Thick Whois Transition Policy](#) and the EPDP Phase 1 Policy: specifically, that the Thick Whois Transition Policy requiring registrars to transfer *all* registration data fields to the registry is in conflict with EPDP Phase 1 Recommendation #7, which states that the transfer of registrant contact data fields is optional, based on the terms, conditions, and policies¹ of the Registry Operator and provided an appropriate legal basis exists and data processing agreement is in place. We note specifically that the intent of Phase 1 Recommendation #7 was to make this transfer of registration data dependant on the presence of those factors which were outlined in the Recommendation.

In accordance with the EPDP Charter, the EPDP Phase 1 Team diligently established purposes for processing registration data which should be governed by ICANN Org via a Consensus Policy. It also identified the related processing activities, the corresponding legal basis for each processing activity, and the responsible parties involved in each processing activity for each of those purposes. The EPDP Team undertook this painstaking work with clear direction from the Charter that pre-existing ICANN contractual requirements, including Consensus and Temporary Policies, do not in themselves constitute a legal basis to process personal data under the GDPR and other relevant data protection laws. Instead, the Phase 1 policy recommendations establish the legal bases for all processing activities associated with domain name registration data, including the collection of that data and the transfer of that data between parties.

The Board acknowledged the conflict between Recommendation #7 and the Thick Whois Transition Policy in its resolution approving the EPDP Phase 1 Recommendations, and the members attending the IRT meeting reiterated their position that the EPDP Phase 1 Recommendations and resulting Policy do not in themselves repeal or overturn existing Consensus Policy; rather, any alterations must occur within the existing context of the GNSO Policy Development Process.

¹ The Data Elements Workbooks (pp. 92-147 of the Phase 1 Final Report) identify the Registrant Fields as "O-CP," meaning "Optional for contracted parties subject to terms and conditions." This designation informed the "Transfer Logic" in the table included in Recommendation #7.

The Final Report of the Thick Whois Policy Development Process was published on 21 October 2013 and adopted by the Board on 7 February 2014, years prior to the GDPR coming into full effect and well before the EPDP's work on modifying existing requirements to adhere to this complex regulation began. Recommendation #3 of the Thick Whois Transition Policy acknowledges that data privacy law would need to be considered before the Policy is implemented. A review of relevant law has since been conducted within the context of the EPDP Phase 1, which was specifically chartered to consider the compliance of the Temporary Specification "with the GDPR and other relevant privacy and data protection law" and which resulted in several Recommendations that contradict the requirements of the Thick Whois Transition Policy:

- Recommendation #7, transfer of data from registrar to registry
- Recommendation #27, update of existing consensus policies
- Recommendations #5 and #29, deprecation of the Administrative Contact
- Recommendation #5, minimization of the Technical contact

The Board was explicitly clear about the actions it expected the IRT to take in light of these conflicts. In its resolution, the Board instructed the IRT "to examine and transparently report on the extent to which these Recommendations require modification of existing Consensus Policies, including the Thick WHOIS Transition Policy." The IRT's role is not to try and resolve the conflicts between Consensus Policies, but to implement the EPDP Phase 1 recommendations, including Recommendation #7, as developed and adopted by the ICANN community. Nothing in the Board's resolution, nor in its later statements in the 11 March letter or on the 22 April IRT call, gives ICANN Org or the IRT the latitude to disregard the consensus of the ICANN Community by revising or disregarding a recommendation that was developed through the bottom-up, multistakeholder policy development process and then approved by the Council.

Similarly, the role of the GNSO Council here is also clear: to initiate a process to review the Consensus Policies impacted by the EPDP Phase 1 Recommendations. Based on our experience participating in Phase 1 of the EPDP and the IRT, we believe these EPDP Phase 1 Recommendations were clearly intended to update current Policies, including the Thick WHOIS Transition Policy; this is additionally supported by the EPDP Recommendation #27 [Wave 1 Report](#), section 3.10, where ICANN Org concluded "if the goal is to define a standard minimum data set across all gTLDs, this may be accomplished via the new Registration Data Policy or other means. If this can be achieved, there may not be a need for a policy aimed at specific registries." That said, we respect the need to follow a proper community process to review existing Consensus Policy.

We ask that the GNSO Council now promptly commence that process to re-evaluate the appropriateness of the Thick Whois Transition Policy in light of the enhanced data privacy environment and EPDP Phase 1 Recommendations. We suggest that in the interim the EPDP Phase 1 Recommendations should be implemented in the new gTLD Registration Data Policy,

including transfer of registration data from registrar to registry only when required and grounded in a legal basis². As such, we ask that the Council direct the IRT to implement Recommendation #7 as written in the Phase 1 Final Report and as it was intended by the EPDP Team and approved by the ICANN community. Additionally, deferral of compliance enforcement of the Thick Whois Transition Policy should be maintained until the new Policy is defined.

We strongly believe that the failure of the IRT to faithfully implement Recommendation #7—and any other EPDP Phase 1 Recommendations—would represent a disturbing subversion of the bottom-up policy development process on the part of both the IRT and the ICANN Board. We urge the Council to take the necessary steps to preserve this process that is so essential to ICANN's multistakeholder model.

Thank you,

The CPH IRT Team

² Registration data to be transferred in this reference includes registrant name, organization, street, state, country, postal code, phone number, phone number extension, fax number, fax number extension and email as well as technical contact name, phone and email.