

Dear GNSO Council colleagues,

This briefing note follows up on the note provided to the Council list on 11 April 2018 regarding the call that took place earlier that day between members of the ICANN Board (Cherine Chalaby (Chair), Goran Marby (CEO), Chris Disspain (Vice Chair), Becky Burr, Matthew Shears, and Avri Doria), the GNSO Council leadership team and the RDS PDP WG (RDS) leadership team. The call was prompted by Cherine Chalaby's letter of 23 March 2018 (<https://www.icann.org/resources/correspondence/1214411-2018-03-23-en>), and the ICANN Board's letter of 29 March 2018 reaching out to the Council and RDS PDP WG Leadership teams "for an exchange of ideas regarding the potential impact on the RDS PDP of the finalization of an interim model for compliance with the European Union's General Data Protection Regulation" (<https://gns0.icann.org/sites/default/files/file/field-file-attach/chalaby-to-forrest-et-al-23mar18-en.pdf>).

As noted in the update of 11 April 2018, the aim of the Council and RDS participants on that call (namely Chuck Gomes, Marc Anderson, Michele Neylon and David Cake from RDS leadership and Donna, Rafik and I from Council leadership) was to get a sense of the Board's thoughts and intentions and then report this back so it can be decided how best to move forward on next steps. The recording of the Board call can be found here:

<https://mytrials.webex.com/mytrials/ldr.php?RCID=0d1a8602495492f964dcf5d018d05c89>, password Eur3wiEK.

Following the Board call, Council leadership and RDS leadership met to share perspectives, agree upon a response to thank the Board members for their initiative (<https://gns0.icann.org/en/correspondence/forrest-to-chalaby-disspain-13apr18-en.pdf>) and to develop this briefing note to bring the GNSO community up to date as quickly as possible.

The call on 11 April 2018 was opened by Cherine Chalaby and then chaired by Chris Disspain, who reported that the Board is considering a temporary policy/specification as outlined in the RAA Consensus Policies and Temporary Policies Specification (<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#consensus-temporary>) as one possible means of implementing the interim GDPR compliance model (which we note has now been commented upon by the Article 29 Data Protection Working Party, at <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-11apr18-en.pdf>). An equivalent clause is contained in gTLD registry agreements (see for example specification 1 of the new gTLD Registry Agreement - <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf>.) While a temporary policy/specification is not the only option for reflecting GDPR requirements in current contracts, it appears to be the Board's preferred approach, although this has not been firmly decided.

As soon as a temporary policy/specification is adopted by the ICANN Board, the Board 'shall immediately implement the Consensus Policy Development Process set forth in ICANN's Bylaws' (RAA, Temporary Policies, 2.1). Importantly, this would be the first time that a temporary policy/specification is adopted, and an associated PDP initiated.

Recognizing the impact that the adoption of the interim model, if adopted as a temporary policy/specification, can have on the RDS PDP WG and the GNSO workload in general, the RDS leadership team immediately began to consider the various scenarios that might occur. This consideration resulted in a set of questions that were shared with the Council leadership team and were subsequently provided to the ICANN Board in advance of the 11 April 2018 call. The ICANN Board very helpfully provided responses to these questions prior to the call. These are set out below. A link to the recording of the call is also included with this note.

Thoughts and next steps:

The Council and RDS leadership is in agreement that the 11 April 2018 call was constructive. All on the call shared the sentiment that it will be important to keep open lines of communication throughout this process so that everyone is able to plan accordingly and set up for success.

Council and RDS leadership further agree that there are several immediate decisions facing the Council. Those decisions include, but are not limited to:

- 1) Are there other options besides a temporary policy/specification? GNSO Council leadership notes that the RDS leadership has already begun to think constructively about this in developing the insightful list of questions provided to the Board prior to the 11 April 2018 call.
- 2) What action should the GNSO Council take if the Board decides to adopt a temporary policy/specification? There are three options that have been suggested:
 - A Board initiated PDP commences – however, it is doubtful whether the one-year time period could be met (the average timeline for a PDP from start to Board adoption is estimated to be 849 days).
 - The Council agrees to initiate an Expedited Policy Development Process (EPDP), which would require a GNSO Supermajority vote. This would be the first time an EPDP is initiated. As a starting point, an EPDP Initiation Request would need to be prepared. It is estimated that an EPDP could be completed in 360 days if we take advantage of flexibility allowed in GNSO PDP procedures to adjust working methods.
 - The Council repurposes the existing RDS PDP Working Group by modifying its charter to meet the scope of work as envisioned for a PDP resulting from a temporary policy specification as well as considering modifications to the existing working methods to meet the one year time period.
- 3) What alternative working methods and membership structures are needed to ensure that this new or repurposed PDP can complete its work within a one-year time period? Note that both the PDP as well as the EPDP provide significant flexibility in this regard. This discussion usefully dovetails into our current focus on PDP improvements, and provides an opportunity to implement some of the ideas generated in Council's Strategic Planning Session and GNSO community forum in San Juan. This may also require additional resources and/or re-prioritization of activities.

Immediate action is needed because, assuming the Board takes action close to the GDPR enforcement date of 25 May 2018, we have only roughly six weeks to take any preparatory steps. Regardless of which

option is chosen, if preparatory work is carried out, for example by starting work on an EPDP Initiation Request or proposed modifications to the existing RDS Charter, these could result in important time savings that could facilitate the completion of the PDP within the allocated time frame.

Based on the timeline and other factors, the GNSO Council leadership makes the following proposals for Council's consideration:

In relation to 1) above, the **GNSO Council leadership proposes to request that the RDS PDP WG leadership continue to develop its thoughts on this question and to present a set of options to be discussed by the Council at its upcoming 26 April 2018 meeting.** At that meeting that set of options could be added to or otherwise amended by the GNSO community to give full opportunity for expressing and recording views on this subject.

In relation to 2) above, the **GNSO Council leadership proposes that a discussion on the Council list begin to suggest ways to quickly and effectively upskill Councilors on the EPDP Process and get familiarized with it (for example, webinar, guidance sheets, Q&A session) to enable the Council to make an informed decision to 2) above.**

In relation to 3) above, the **GNSO Council leadership proposes that a small team be formed to scope the possible needs and working methods of this PDP, for consideration by the broader Council and to potentially inform the development of a scoping document as required by clause 3 of Annex 4 – Expedited GNSO Policy Development Process Manual, of the GNSO Operating Procedures (<https://gns0.icann.org/sites/default/files/file/field-file-attach/annex-4-epdp-manual-30jan18-en.pdf>).** Note that the RDS PDP WG leadership prepared a list of assumptions along with a problem statement that may be helpful in this regard, which is included at the end of this document.

We note in closing that eventually the Council may also need to consider whether to suspend or terminate the RDS PDP WG, should it be decided that it will not be repurposed as it is not feasible to have two PDPs working in parallel on a similar topic. Following the completion of the EPDP on the temporary policy / specification, there may be a need or desire to commence a new EPDP or restart the current RDS PDP, if it was suspended.

Finally, we would like to note that the discussion with the Board took place before the response from the Article 29 Working Group was available. We acknowledge that the information above may need to be revisited in the event that the Board's thinking changes, but given the need for immediate action we will continue to move forward until we are informed otherwise.

Kind regards,

Heather Forrest, GNSO Council Chair
Donna Austin, GNSO Council Vice Chair
Rafik Dammak, GNSO Council Vice Chair

Questions from RDP PDP Leadership Team and Responses provided by the ICANN Board:

1. *How likely is the Board to adopt a Temporary Policy as the mechanism to implement the GDPR compliance model?*

ICANN organization, in consultation with the Board, is exploring the possibility of a temporary policy or specification as a mechanism to implement the Interim GDPR Compliance Model. ICANN has never enacted a temporary policy or specification and taking this action will be a matter of first impression. The ICANN Board is expected to continue its considerations of the various options for implementing the Interim GDPR Compliance Model during its workshop in Vancouver (11-13 May 2018).

2. *If not a Temporary Policy, what other options are being considered by the ICANN Board or ICANN Org to implement and enforce the GDPR compliance model?*

In addition to a temporary policy, ICANN organization also identified issuing a contract waver, or utilizing a combination of both mechanisms as options to implement whichever compliance model is selected.

Additional implementation mechanism were considered, such as a global contract amendment, but given the required steps and timeline constraints (e.g. 6 -7 months at a minimum to negotiate a global amendment), this approach was not viewed as viable option given the May 2018 implementation deadline for GDPR.

3. *If a Temporary Policy is adopted, per the Temporary Policy specification the Board “shall immediately implement the Consensus Policy development process set forth in ICANN’s Bylaws”. Is it the Board’s understanding that such Consensus Policy development would be limited to simply confirming the temporary policy as a consensus policy (or not), or is there flexibility to recommend modifications to aspects of the Temporary Policy, or could the Temporary Policy be completely replaced with a new Consensus Policy altogether, if developed within the one-year time period?*

The Board’s read of the requirements for adopting a temporary policy/specification is that the Consensus Policy development process triggered by the adoption of the temporary policy/specification is expected to focus on the narrow question of whether or not the temporary policy/specification should be confirmed as a Consensus Policy. However, the Board would like to explore whether as part of the Consensus Policy development process it would or wouldn’t be allowed to make changes to the temporary policy/specification in order to reach consensus on how to move forward and would like to discuss this during the meeting.

4. *If Consensus Policy development confirmed the Temporary Policy with recommended modifications or a new Consensus Policy, could implementation occur after the one-year period, for example, if the policy recommendations would recommend that the Temporary Policy remains in place until such time the Consensus Policy has been implemented?*

As outlined in the Temporary Policy Specification, registries and registrars “shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved.” Should there be a need for changes to the implementation of the temporary policy/specification if/when confirmed as a Consensus Policy, any additional time that may be needed to implement the changes could be factored into the implementation deadline for the temporary policy/specification, while the existing implementation would remain in place.

5. *According to the Expedited Policy Development Process (EPDP) Manual, an EPDP can only be initiated by the GNSO Council. However, an EPDP could be a more timely approach than a PDP. Would the Board consider requesting the GNSO Council to initiate an EPDP and consider this consistent with a Board requested PDP as outlined in the temporary policy specification?*

The requirements for adopting a temporary policy/specification requires the Board to “immediately implement the Consensus Policy development process set forth in ICANN's Bylaws”. The Bylaws establish two processes for developing Consensus Policy: the “standard” Policy Development Process established in [Annex A](#), and the Expedited Policy Development Process established in [Annex A-1](#). The key differences between the two processes are: (1) the Expedited PDP can only be initiated by the GNSO Council whereas the standard PDP may be initiated by the Board without the vote of the GNSO Council, (2) the Expedited PDP can only be initiated in limited circumstances, and (3) the Expedited PDP does not require the publication of Preliminary and Final Issue Reports, and thus could be developed in a shorter time period.

The Board recognizes that there are likely certain advantages, especially from a timing perspective, to following the EPDP path vs. a standard PDP, but it also conscious that an Expedited PDP needs to be initiated by the GNSO Council. As part of the joint discussion, the Board would like to better understand the position of the GNSO Council on these issues.

6. *The current Next Generation Registration Directory Services to replace WHOIS PDP is the result of a Board initiated PDP. Would the Board consider requesting the GNSO Council to modify the charter of this existing PDP to take up consideration of the Temporary Policy? This would in effect repurpose the existing PDP to fulfil the requirements of the Board requested PDP as foreseen in the Temporary Policy specification. Would this be considered consistent with the Temporary Policy specification requirements?*

Section 8 of the PDP Manual provides that, “...once approved, modification of any PDP Charter is discouraged, absent special circumstances.” The adoption of a temporary policy/specification would seem to meet the bar of “special circumstances” that could justify amending the existing charter for the Next Generation Registration Directory Services to replace WHOIS PDP.

Instead of rewriting the whole charter, the Council could also consider, in consultation with the ICANN Board who initiated the PDP originally, to park the current charter questions and process framework to

first focus on the question of whether the temporary policy/specification should become a Consensus Policy, following which the PDP could continue to the original questions or a modified version thereof.

The Board does recognize that additional changes may need to be made to the PDP working methods, such as the model by which deliberations are carried out, to be able to meet the one-year deadline for this specific part of the charter. The Board is aware that the PDP manual provides for such flexibility which should facilitate the development of the work plan and timeline to meet the one-year target.

- 7. *In relation to the one year time period referenced in the Temporary Policy Specification, can the Board confirm that the one year time period ends with the approval by the ICANN Board of the GNSO policy recommendations (if any)?*

Yes, that is the Board’s understanding given the language in Sections 2.1.2 and 3 of the Temporary Policy Specification:

- Section 2.1.2: “... If the one (1) year period expires or, if during such one (1) year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, Registry Operator shall no longer be required to comply with or implement such Temporary Policy.”
- Section 3: “[Registry Operator/Registrar] shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved.”

- 8. *In order to meet the one year time period, is the ICANN Board willing to make available the additional necessary resources that are expected to be required to meet this timeline?*

The Board remains available to discuss with the Council and RDS PDP WG leadership team the support and resources that are needed to meet the one-year timeline to work through the policy development process in the event the Board adopts a temporary specification. At the same time, the Board notes that the focus of the PDP is limited to confirming (or not) the temporary policy as a consensus policy, the deliberations may be less complex and as such less resource intensive compared to the current scope of the RDS PDP WG.

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Temporary Policy Assumptions from the RDS PDP WG Leaders

In response to the GDPR compliance work that has been happening and the associated possibility that the Board may implement a Temporary Policy as specified in Registry and Registrar agreements, the RDS PDP WG leadership team has been discussing possible implications of a Temporary Policy PDP. The purpose of this document is to provide initial guidance to the ICANN Board and the GNSO Council about such a PDP. In particular, we provide our assumptions about such a PDP and a problem statement that the RDS leaders are willing to explore further if desired by the Board and the Council.

Key Assumptions that the RDS PDP leadership team will use to develop guidance

1. gTLD Registry and Registrar agreements contain a Temporary Policy Specification that requires the Board to immediately initiate a GNSO Consensus PDP if they implement a Temporary Policy and any Consensus Policy from that PDP must be approved within a one-year period after the Temporary Policy is adopted by the ICANN Board.
2. The Consensus Policy Development Process (PDP) is defined in Annex A of the ICANN Bylaws and the Expedited PDP (EPDP) is defined in Annex A-1. These should be considered in conjunction with the PDP and EPDP Manual which are part of the GNSO Operating Procedures.
3. The Consensus PDP or EPDP must be followed in a Temporary Policy PDP unless the ICANN Bylaws are amended to change the Consensus PDP and/or the EPDP. (A Bylaws change would be time-consuming, and, as a result, not a desirable option to pursue.)
4. If current GNSO PDP practices are followed, it would be nearly impossible to develop and obtain Council and Board approval of Consensus Policy in a one-year period. However, the PDP manuals provide sufficient flexibility to modify some of the existing practices and working methods that could increase the chances of success. However, there are a number of set elements, such as required public comment periods, that cannot be changed and as such will need to be factored into the overall time line. Any preparatory work that could be done prior the one-year period commencing, such as considering modifications to the charter of the existing PDP WG or developing the scoping document required by an EPDP Initiation Request could benefit the time available for the other steps.
5. A RDS Temporary Policy PDP may meet the conditions given in Annex A-1 for an EPDP. The RDS leadership has requested clarification from the Board to make sure an EPDP is considered consistent with the Board initiated PDP as foreseen in the temporary specification; however, responsibility for any EPDP initiation ultimately lies with the GNSO Council. (Note: Per Annex A-1 (2), an EPDP may create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (b) as part of a previous PDP that was not completed.)

Problem Statement that the RDS PDP leadership team is willing to address

What resources and working methods would need to be put in place and approach would need to be taken (PDP, EPDP or repurposing of the existing PDP) to be able to meet the 1-year time limit in the temporary policy specification, while maintaining the integrity of the Consensus Policy development process?

Other Assumptions

- i. The more narrowly-scoped the issue to be addressed by the PDP/EPDP, the better the chances that consensus policy can be developed within the target time period. However, reaching consensus will also require balancing community needs and sensitivities when scoping the issue.

- ii. Depending on the Board/GNSO Council request for the PDP/EPDP, the PDP should take advantage of work that has already been done (e.g., EWG Report, RDS PDP WG, etc.), as deemed appropriate.
- iii. Optimizing team composition, representation and size will be needed for effective deliberation leading to consensus policy within the required time period.
- iv. Time will be saved any time tasks can be completed in parallel, except where dependencies require that prerequisite task(s) to be completed before dependent tasks can be effectively progressed.
- v. Extended face-to-face meetings, combined with regular remote participation meetings, in combination with offline completion of action items and adequate preparation for meetings, will likely increase the rate of progress.
- vi. Public comment opportunities are essential for the legitimacy of the Consensus Policy development process.
- vii. Additional funds will be needed to support outside research, if applicable, and special travel and meeting needs, to produce consensus policy within the target period.