

Dear Keith,

Following the request of the GNSO Council for the EPDP Team to identify any questions, comments or concerns to be shared with the ICANN Board in relation to their action on the EPDP Phase 1 Recommendations, 3 groups provided their feedback (see Annex A) which the EPDP Team discussed during its meeting on 6 June 2019. Although there was not sufficient time to formalize and agree on an EPDP Team response, the team felt it important to share the different perspectives with you to help inform the Council's preparation for the consultation process with the ICANN Board. My take-away from the discussion was that:

- In relation to purpose 2, there is general understanding for why the Board decided to not adopt this purpose and the EPDP Team confirms that it considers it firmly within its scope for phase 2 to further review this purpose in the context of the System for Standardized Access / Disclosure (SSAD);
- For recommendation #12, some additional context has been provided that may help explain the thinking behind the EPDP Team's original recommendation. However, there is no agreement at this stage on whether or not the Board's non-adoption should be supported.

The EPDP Team understands that following the GNSO Council's consultation with the ICANN Board you will follow up with us to provide an update on dialogue with ICANN Board and request further input on the possible next steps for GNSO Council. The EPDP Team stands ready to assist as needed.

Best regards,

Janis Karklins

## ANNEX A

### Input from Registrar Stakeholder Group

#### Recommendation 1

The RrSG does not have significant concerns with regard to Recommendation #1, Purpose #2. The Board's decision is aligned with our position since the very beginning of Phase 1, and is also aligned with the recent letter to ICANN from the European Commission.

#### Recommendation 12

With regard to Recommendation #12 (Registrant Organization Field), the RrSG would like the Board to fully appreciate the complexities around this Recommendation, and how we arrived at Rec 12.

- a. Rec 12 is a compromise between those who believe that the Registrant Org is not personal data, and those who believe it could possibly be personal data, or used to infer/obtain personal data via other sources (This last bit was supported by Bird & Bird).
- b. Registrants and Registrars have been using Registrant Org in non-standard ways for almost 20 years. We have a significant legacy of mixed uses and purposes for this field. There is no standardization across the registrar landscape in how this field is utilized.
- c. No matter what the outcome, the ePDP will effectively "change the rules" for Registrants who may have entered data years ago without regard for the privacy implications.
- d. We need to provide Registrants a path to confirm if the data entered in Registrant Org indicates that their domain name is actually registered by a legal (vs. natural) person. As this will result in the legal person's Org data being published, this needs to be an explicit confirmation, similar to opt-in consent.
- e. If a Registrant explicitly deletes the data in Registrant Org, then Registrars should make this change in their own databases, and at the Registry.
- f. But if the Registrant doesn't respond to attempts by the registrar to confirm the type of data subject they are, then that must be taken as an "opt-out" of the new rules supporting this field. (Privacy by Default)
- g. We have no method at this time to relay a consent status to the registry. Deletion of data is a workaround which allows the natural person's Org field to remain private, but which may cause databases to get out of sync, thus negatively impacting the accuracy of registration data
- h. If deletion was later found to be an error on the part of the Registrant, it is a trivial matter for them to re-enter the data.
- i. But if their personal data is exposed in error, then it cannot be un-exposed, and the Registrar/Registry involved could be subject to GDPR enforcement.
- j. Exposing the data by accident is an issue, but we also need to know our liability and responsibility under Art 17.2 of the GDPR.
- k. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.
- l. The latest decision of the Polish DPA (see: <https://iapp.org/news/a/polish-dpas-first-fine-pay-close-attention/>) indicates that

reasonable steps might involve a lot of WORK for us. Of course the first question here is, who is the controller? ICANN? CP's?

### Possible solutions

- 1) The Board's concern was that deleting the Org field would result in a domain with no valid owner (e.g. first/last name is 'domain admin'). However, the option to delete the data is important for the reasons listed above. One solution would be to follow a process similar to what the EPDP team already agreed on in Rec 29, which says in part, "...prior to eliminating Administrative Contact fields, all Registrars must ensure that each registration contains Registered Name Holder contact information." We could add a similar obligation in Rec 12, that prior to deletion of the Org field data the registrar should ensure there's a valid registrant name.
  
- 2) Another alternative to deletion would be continued redaction if no opt-in is received so the registry would continue to only get the redaction notice/placeholder data (exact method TBD depending on Phase 1 IRT outcomes).

## **Input from Registry Stakeholder Group**

GNSO Council feedback – Board consultation RySG team members

The following is RySG team member feedback for the GNSO council per request from GNSO council chair Keith Drazek to help inform their consultation with the ICANN Board resulting from the board's partial acceptance of recommendation 1 and 12 of the ePDP phase 1 final report.

We understand that the likely outcome of any council/board consultation is that for recommendation 1 and 12, the council may ask the board to reconsider the recommendations as is, may submit modifications to the recommendations for the board to consider or the council may accept the board's partial acceptance of those two recommendations.

We further note the ICANN Board resolution and accompanying scorecard includes responses intended for the ePDP. These should be tracked and considered during our phase 2 deliberations as appropriate.

Letter from Chalaby to Drazek on board action:

<https://www.icann.org/en/system/files/correspondence/chalaby-to-drazek-15may19-en.pdf>

ICANN Board resolution:

Preliminary report:

<https://www.icann.org/resources/board-material/prelim-report-2019-05-15-en>

Scorecard:

<https://www.icann.org/en/system/files/files/epdp-scorecard-15may19-en.pdf>

Approved Resolution:

<https://www.icann.org/resources/board-material/resolutions-2019-05-15-en>

### **Recommendation #1 (Purpose 2)**

Clearly the ICANN board considered the correspondence with the European Commission on the final report.

Initial comments:

<https://mm.icann.org/pipermail/comments-epdp-recs-04mar19/attachments/20190417/6f0a65b2/CommentsontheTemporarySpecificationforGLDRegistrationDataPolicyRecommendations-0001.pdf>

Follow-up questions from Goran:

<https://www.icann.org/en/system/files/correspondence/marby-to-odonohue-26apr19-en.pdf>

Response to Goran from Pearse O'Donohue:

<https://www.icann.org/en/system/files/correspondence/odonohue-to-marby-03may19-en.pdf>

The RySG team would like to remind the working group of our feedback on purpose 2 the text of which was included in the phase 1 final report at page 166:

## 2) Purpose 2

The RySG supports the inclusion of Purpose 2 in the Final Report.

However, the RySG notes that it expresses such support with the understanding, and continued reminder to the EPDP Team, that Purpose 2 does not qualify as a legal “Purpose” as defined in the GDPR. We also remind the EPDP Team of the advice of the European Data Protection Board<sup>[1]</sup>, which cautions against conflating ICANN’s purposes

with those of third parties. The RySG believes this conflation continues to be at the root of the confusion regarding Purpose 2.

Along with the above statement, we make the following observations:

- The RySG accepts the current Purpose 2 is a placeholder statement that may be impacted by additional analysis conducted during Phase 2.
- The RySG concurrently accepts that, regardless of the inclusion of Purpose 2, requests for disclosure may legally be made to all contracted parties under the terms of GDPR (Art 6(1)). We restate that such disclosure requests do not require a ‘Purpose’ for disclosure.
- We also accept that, in line with the GDPR, disclosure of data may only be granted where a requester establishes a valid legal basis, demonstrates sufficient necessity and, where applicable, that the balance of the data subject’s rights has been duly considered. Such a decision to disclose MUST lie solely with the Contracted Party of whom the request has been made.

Therefore, noting the above, the spirit of Purpose 2 remains agreeable to the RySG, and as such, we shall not seek to object to its publication in the final report.

[1] Letter from jelinek to marby, 5th July, 2018 -

<https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-05jul18-en.pdf>

It’s also important to note that the Board did adopt recommendation #3 in which the ePDP team agrees to make a recommendation on standardized/lawful disclosure of non-public registration data (in line with purpose #2). Also adopted was recommendation #18 which recommends a new policy “Reasonable Requests for Lawful Disclosure of Non-Public Registration Data” which may be revised or superseded by the work in phase 2.

Given the above data points, the RySG team suggests that the GNSO Council accept the ICANN Board’s treatment of recommendation #1. It does not seem to materially impact the implementation of the phase 1 recommendations.

The RySG team does not support any effort to modify the text of Purpose 2 to gain adoption by the ICANN board. Such an effort would distract from the work phase 2 which should be our focus.

### **Recommendation #12**

The RySG team has concerns about the way the ICANN board has modified recommendation #12. We are opposed to the GNSO council accepting the ICANN board treatment as is.

We are supportive of providing the ICANN board with additional information/rationale for why we drafted the recommendation the way we did and asking the board to reconsider. We note the feedback provided by the RrSG and are supportive of their comments and the additional background they have provided.

We note that in the scorecard provided by the board (<https://www.icann.org/en/system/files/files/epdp-scorecard-15may19-en.pdf>) they request the ePDP further consider deletion. Given the intended phased implementation of recommendation #12 we are concerned about implementing the board modified recommendation #12 and then reconsidering it in phase 2 in parallel to or after implementation. This may result in re-work or create unintended consequences.

## **Input from the Business Stakeholder Group**

With regard the recent Board action on the Phase 1 Report – here are a few observations from the BC:

- Rec 1: Purpose 2: The BC agrees that Purpose 2 should be reworked in light of the recent EU Correspondence. As such, the consultation with the GNSO should determine how to accomplish this change. Under the current circumstances, it seems the EPDP is in the best position to suggest a change. We propose to split Purpose 2 into two separate purposes:
  - Enabling ICANN to maintain the security, stability, and resiliency of the Domain Name System in accordance with ICANN’s mission and Bylaws through the controlling and processing of gTLD registration data
  - Enabling third parties to address consumer protection, cybersecurity, intellectual property, cybercrime and DNS abuse involving the use or registration of domain names
- Recommendation 12: The BC agrees with the Board’s concerns regarding the ORG Field, and suggests that the EPDP update its Phase 1 recommendations to remove the deletion option. Instead, the recommendation could be modified to allow the contracted parties to update any inaccuracies in the ORG field, as appropriate.