

RRSG statement for GNSO Council meeting 24 Sept 2020

The Registrar Stakeholder Group recognises that all of the parties working on the EPDP Phase 2 dedicated countless hours and that compromises were made on all sides.

We have been clear from the outset that there are certain concessions which Registrars cannot make. We cannot decouple our legal and regulatory risks associated with disclosure decisions from our ability to make those decisions; doing so would effectively delegate our legal obligation to make correct disclosure decisions to ICANN or other third parties while leaving us with the resulting liabilities, a prospect no responsible business can accept.

Furthermore, we cannot agree to any policy obligations that undermine our Registrant customers' rights under data protection laws. These concessions are not ours to give. But from reading the minority statements from other participants in the EPDP Phase 2, it appears that these concessions are necessary to satisfy their expectations of the SSAD.

The EPDP Phase 2 team considered to the fullest extent possible the concept of a Unified Access Model (UAM) with centralized decision-making for data disclosure. However, as noted in EPDP Phase 2 discussions,¹ Bird and Bird legal guidance,² the Strawberry Report,³ and the

¹ See "Montreal - GNSO - EPDP Phase 2 Meeting (first part of 3 out of 4)," pg 16, <https://static.ptbl.co/static/attachments/233886/1573665734.pdf?1573665734>. A GAC Rep to the EPDP Phase 2 quoted comments made by Pearse O'Donohue (European Commission):

"[...] here's what Pearse said, 'There just one element where we have a very large question mark, and that's in relation to the idea that we may use this Unified Access Model as the return path for the data to be given to the requestor, in the sense that there would be a determination at the level of the central portal or gateway, as to whether or not that data should in fact be transmitted, which would require the collection and processing of the data by the access model. That actually renders everything even more complex under the GDPR.' And here, in my mind, is the significant part. This is my editorial, not a quote now. Now I'm going to the quote, 'It would not, at the same time, remove the liability of the data controller, which is the registrar or the registry. So, we would have a question as to whether it is actually worth that added complexity, and this added liability, which will actually fall onto ICANN as well as the liability which will continue to apply to the data controller—the other data controller.' Just so everyone has a shared common ground of what was said ... I can't read minds, but when I heard that, and when I'm looking at it, I'm thinking that the essential takeaway, at least from the European Commission, in the form of senior leadership of DG CONNECT, is saying that you may propose a model with a central gateway, in the hopes that that will reduce risk to the Contracted Parties, but we don't necessarily think that is so under the GDPR."

² See: "Questions 1 & 2: Liability, Safeguards, Controller and Processor," pg 12, paragraph 4.5 that states "If the CPs are controllers, and if a disclosure infringes the GDPR, they are unlikely to be able to avoid liability to individuals. Firstly, it will be more difficult to avoid all liability under Article 82 by proving that the CPs are "not in any way responsible for the event giving rise to the damage" – the "event" in question may well be held to be the actual disclosure, which CPs participate in actively, rather than (for instance) improper assessment of a Requestor's identity or its grounds for accessing the data."
<https://community.icann.org/download/attachments/117604842/ICANN-EPDP%20-%20Qs%201%20%26%202%20-%209th%20September%202019%5B2%5D.pdf?version=2&modificationDate=1568143518000&api=v2>.

response from the Belgian DPA,⁴ the ability to divide or reassign legal liability from one party to another was demonstrably unclear in terms of compliance with the GDPR and other relevant data protection regulation. It is critical that the documents noted above be read in their entirety, as they clearly articulate the complexity of the issues involved and the fact that Registrars are not able to relinquish their legal responsibilities associated with disclosure of data.⁵ In recognition of the above, the EPDP Phase 2 and its participating constituencies agreed to redirect its efforts to the Hybrid model, which is what is now reflected in the Phase 2 Final Report.

The EPDP Phase 2 recommendations do not put forward a perfect system for registration data disclosure, but the Registrar Stakeholder Group firmly believes that the recommendations offer a solid starting point and represent a model that Registrars are committed to continue evolving when or if additional authoritative clarity and/or guidance is provided.

The Registrar Stakeholder Group believes that the EPDP Phase 2 has achieved its Charter and mandate to the extent possible. We further believe that the EPDP Phase 2 is a successful example of the multistakeholder process, bringing parties together to find an operationally viable solution that respects legal constraints.

While the Registrar Stakeholder Group supports the SSAD as described in the EPDP Phase 2 Final Report, we are concerned that the intended users of the SSAD have definitively objected to it. Therefore, the Registrar Stakeholder Group strongly supports the Motion to request that the GNSO Council and ICANN Board to undertake a cost-benefit analysis of the SSAD recommendations prior to adoption by the Board.

Finally the Registrar Stakeholder Group supports the statement from the Registry Stakeholder Group.

³ See: "Exploring a Unified Access Model for gTLD Registration Data," 25 October 2019, at <https://www.icann.org/en/system/files/files/unified-access-model-gtld-registration-data-25oct19-en.pdf>.

⁴ See: Belgian DPA response to ICANN, December 4, 2019, at <https://www.icann.org/en/system/files/correspondence/stevens-to-marby-04dec19-en.pdf>.

⁵ In their December 4, 2019 letter to ICANN in response to the Unified Access Model for gTLD Registration Data proposal 25 October 2019, the Belgian DPA states at the bottom of page 3, "Insofar as ICANN acts as a joint controller, together with the registries and/or registrars, they must act within the boundaries of article 26 GDPR which implies that: ICANN together with the registries and/or registrars must determine their respective obligations for compliance with the obligations of the GDPR, in particular as regards the exercising of the rights of the data subject and article 13 and 14 by means of an arrangement. As prescribed by article 26.2 and art.26.3 GDPR, this arrangement must duly reflect the respective roles and relationships of the joint controllers vis-a-vis the data subjects and irrespective of the terms of the arrangement, the data subject would be entitled to exercise his or her right under the GDPR in respect of and against each of the controllers involved. See: <https://www.icann.org/en/system/files/correspondence/stevens-to-marby-04dec19-en.pdf>.