

NCSG Minority Statement on the final report, EPDP phase 2a

The NCSG are glad to see the final tasks of the EPDP phases 1 and 2 completed. We are also glad that ICANN is finally complying with data protection law, something we have been pushing for since the earliest days of WHOIS policy discussions. The process for this EPDP has been unnecessarily long and painful, however, and does not reflect an appreciation for ICANN's responsibility to comply with data protection law but rather the difficulty in getting many stakeholders to embrace the concept of respect for registrants' rights. We also think that the proliferation of minority statements, reiterating positions that have been argued repeatedly over at least the last nine months, if not the past three years, is unnecessary. However, far be it from the NCSG to stand on principle and refuse to restate our own arguments.

We have repeatedly brought up the rights of the registrant. We were usually alone in stressing the rights of the registrant; we should be joined by at least ALAC, SSAC and the GAC, who have clear roles in representing registrants' rights. Fortunately the contracted parties also support their customers and pointed out their own obligations to them regularly. ICANN should also be stressing the rights of customers in its role as neutral broker of the MS arrangement to manage the gTLDs.

The lack of clarity about ICANN Org's role as a data controller in a co-controller relationship has also muddled the waters and made it more complex to imagine the policy. We have frequently stated that the precise nature of the roles of ICANN and the contracted parties should have been clarified, doubtless with the aid of outside legal counsel, at the outset of this effort. The nature of the co-controller arrangements is important; much time would have been saved, and confusion avoided, had we been more aware of these eventual contractual relationships.

Several parties have brought up the issue of draft regulations in Europe which may potentially impact the application of the GDPR, and this has slowed the procedure. It is our position that we should not attempt to modify the work achieved in the first two phases of this EPDP, based on speculation about potential regulation. Again, the desire to curb the implementation of the GDPR years before such regulations would be enacted and cast into national laws, indicates a failure to appreciate data protection law and the privacy rights of registrants.

With respect to the precise issues addressed in this report, we have stressed throughout this EPDP, and in a previous PDP on privacy proxy services, that the distinction between legal and natural is not a useful distinction to make, when deciding about the need to protect data in the RDS. It was, as we have reiterated many times, the wrong question to ask, because many workers employed by a legal person or company have privacy rights with respect to the disclosure of their personal information and contact data. The legal person does not have privacy rights, but people do.

Even if we follow the ‘legal vs. natural’ question with a clarifying question requiring the registrant to testify that no personal information is included in the information they provide, this by no means eliminates the risks of revealing personal information. Both questions are difficult for many organizations to answer, particularly the organizations which the NCSG represents, which includes non-profits, volunteer organizations, clubs and interest groups, religious groups, human rights organizations, etc.

This is also true of sole contractors, some types of professionals, and gig workers who are treated like contractors but are actually functioning in an employer/employee relationship. While it is easy enough for large corporations with legal teams, even those with extensive globally dispersed operations, to ensure that they could answer that question, it is not easy for smaller entities with smaller budgets, and a non-corporate manner of engagement with its volunteers and members.

Our position therefore is that because the distinction is not clear-cut for many entities, it is not practical or desirable to mandate the distinction, and whilst the contracted parties have developed excellent guidance for their members to help them decide how to deal with this distinction, that guidance must not form part of the policy. If it is part of the policy, it becomes guidance on legal matters; this is not something ICANN should be doing. The contracted parties are perfectly capable of publishing this guidance on their own, and ICANN is perfectly capable of pointing to it as private sector best practice, not guidance under their policy and enforced by ICANN. The contracted parties ought to know best their own legal risk, and since they are the controllers and responsible for any fines which might come as a result of enforcement action, they must be free to decide how to manage the disclosure of customer information.

We note that those parties who pushed the hardest for making this distinction between legal and natural persons also pushed hard for a field or fields to input the data. Given that the recommendation will remain that it is a voluntary field, and it is up to the contracted parties, whose business models vary enormously, how they use the field(s), we do not believe that recommendations concerning the precision of the field are useful. If ICANN undertakes to instruct the IETF, for instance, how to standardize the field, how is the distinction and the collection and disclosure of the relevant data necessary to make that distinction still voluntary? This is a matter to be left to private sector best practice.

We have also spoken for the rights of gig workers, sole contractors, and independent artists, sales and tradespeople, even though we are explicitly chartered to represent the noncommercial stakeholders. Nobody else is representing these folks, whose numbers are growing apace as employment patterns morph with the global Internet economy. This gap speaks tellingly of the emphasis on big business, and the lack of focus on competitive issues which are exacerbated by DNS policy. We hope that the contracted parties will address the rights of these individuals, and be careful to ensure that they are treated fairly and with due respect for privacy norms when this policy is implemented.

