

Comment of the Non-Commercial Stakeholders Group on the GNSO Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data Policy Recommendations for ICANN Board Consideration

The Non-Commercial Stakeholders Group (NCSG) welcomes the opportunity to comment on the GNSO Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data Policy Recommendation published for public consultation on 4 March 2019.¹ The NCSG would like to acknowledge the cross-community efforts that were put into the process of drafting this phase one final report and further reinstate our support for the document.

Reinforcing our continuous commitment to strengthening of the multistakeholder policy development process and the security, stability, and resilience of the Internet's unique identifiers system (whilst concomitantly considering the importance of transparency, due-diligence, and accountability of such processes), we would like to take this opportunity to provide the Board with an in-depth account of what consensus policy-making entailed, that is, where we compromised to achieve this final document. We would also like to draw the Board's attention to specific process-related challenges for the implementation and adoption of the recommendations set out in the final report.

As previously mentioned, the NCSG supports the final report in its entirety, which we hope underscores the value of the outcomes, and highlights the tireless dedication from all of the community. However we also believe that it is equally valuable to provide the Board with some insights as to the process and negotiations that led to this final version.

On adoption and implementation

According to the Registry Agreement and Registrar Accreditation Agreement temporary policies, the Board shall "reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy". After having reaffirmed the Temp Spec for two additional periods (08/21/2018 and 11/21/2018, respectively), the policy is finally set to expire on 25 May 2019.

Delay in adoption of the GNSO recommendations by the ICANN Board will result in an expired Temporary Specification, and a state of uncertainty in Consensus Policies and contractual obligations for Contracted Parties. As the RA and RAA state: "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."

¹ <https://www.icann.org/public-comments/epdp-recs-2019-03-04-en>

Unlike previous GNSO PDPs, the EPDP resulted in a recommended schedule for implementation of a Consensus Policy to replace the Temporary Specification. Therefore, any delay in adoption from the Board of the recommendations set out in the final report will result in further delays to the implementation schedule.

On consensus-building and compromise

It is important to note that on the two issues for which the decision-making designation on the EPDP Team was labelled under “divergence” (namely, recommendation #2 concerning additional purposes and recommendation #16 regarding geographic basis), the different groups (NCSG, RySG, RrSG and IPC/BC, SSAC, ALAC, respectively) compromised a great deal on the content/language in these recommendations in order to attempt to reach consensus, and still failed to do so.

The GNSO Council subsequently approved the recommendations, and the GAC did not object to them, either via their appointed members to the EPDP Team or in their ICANN64 Communique. The fact that “divergence” existed within the EPDP Team on these recommendations **should not deter** the ICANN Board from adopting them.

Delays in adoption of any of the GNSO recommendations by the ICANN Board resulting from the EPDP Team’s work will cause delays in addressing the issues scoped in phase 2 of the EPDP, which is a priority for a number of ICANN ACs and GNSO SGs/Cs. Such changes to the expected timeline should be carefully considered (and if possible, not taken as an option) as it could also result in further pressure from domestic legislation replacing the role of the consensus policy development.

The ICANN Board had liaisons to the EPDP Team who did not flag any issues with the final recommendations that might result in the Board not adopting them. With that being said, any concerns with the recommendations should have been addressed at an earlier time via its liaisons, and not after the GNSO adoption of the EPDP’s final report and recommendations.

As previously stated, we believe that Purpose 2 sets out a potential precedent by "enabling lawful disclosure requests", consolidating an open-ended mandate for data collection that goes against other principles set out in Art. 5 of GDPR, such as data minimisation and proportionality of use. In spite of disagreements on this subject (also reflected on Recommendation #3), we were able to achieve a final report, understanding that "pending further legal analysis of the controller/joint controller relationship, and consultation with the [European Data Protection Board] EDPB. The EPDP recommends that further work be done in phase 2 on these issues, including a review of a limited purpose related to the enforcement of contracted party accountability for disclosure of personal data to legitimate requests."

On the topic of accuracy reflected on Recommendation #4 (and its respective footnote), we have previously raised concerns on the lack of specification of the interpretation/definition of the term according to GDPR.

According to Recommendation #12, the Organization's name can be published if confirmed by the registrant. To do so, each registrar will have to develop their own process to (i)

re-confirm the existing data and (ii) publish or redact Organizational field data. First, the Recommendation establishes a process through which registrants can "opt in" to having the data published. Second, this assumes that registrants are informed and aware of whether it might be best to publish or redact.

As previously mentioned, Recommendation #16 was one of the key points of negotiation that were labelled as "divergence". Authorizing Registrars and Registry Operators to differentiate between registrants based on a geographic basis poses significant challenges to global access and disclosure of data, most imminently leading to unequal levels of data protection for data subjects according to their region. No final agreement was reached on this matter.

Recommendation #17, which allows Registrars and Registry Operators to distinguish between registrations of legal and natural persons, could further increase the possibility of inaccuracy of data. At the end, we reached a compromise where both Registrars and Registry Operators could voluntarily apply this differentiation. It is worthwhile to point out that GDPR does not, in fact, distinguish between legal and natural persons. It does, however, distinguish between the personal information of natural persons and legal persons. In many cases, a domain name registration by a legal person could very well include personal information of a natural person, which adds to the complexity and legal uncertainty of making distinctions based on the type of Registrant.

It is important to reiterate that, in spite of the intense negotiations, this final report reflects a compromise among NCSG and all other SOs and ACs. We hope that it provides a situated account of our experience in engaging at the first phase of the EPDP process and further highlights the efforts that were made to arrive at a final document within the proposed timeline.

The NCSG remains committed to the implementation of the consensus policies set out in phase one and looks forward to the start of the second phase of the EPDP.