

15 May 2019

Keith Drazek
Chair GNSO Council

Dear Keith,

I am writing you on behalf of the ICANN Board to inform you about the Board's action in relation to the GNSO's Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data policy recommendations. The Board is appreciative of the EPDP Team and the Council's efforts on this issue. We are aware that significant work still remains, both in the context of the implementation of these recommendations as well as phase 2, but we count on the Council's continued leadership to bring these to a successful conclusion.

Following extensive deliberations spanning various meetings, the ICANN Board adopted all of the recommendations, apart from portions of two recommendations, during its meeting on 15 May 2019.

The Board action is in the best interests of ICANN and the community and will serve the global public interest by allowing ICANN and gTLD registry operators and registrars to continue to comply with existing ICANN contractual requirements and community-developed policies concerning gTLD registration data (including WHOIS) in light of the GDPR. More detail is available in the Board Resolution and the accompanying Rationale and scorecard. The Board has adopted twenty-seven of the twenty-nine recommendations in the Final Report. The Board did not adopt two of the recommendations in full, where the Board has identified that portions of those recommendations are not in the best interests of the ICANN Community or ICANN and is initiating the consultation process between the Board and the GNSO Council. This concerns recommendation #1, purpose 2 and recommendation #12, deletion of data in the Organization field. As required under the ICANN Bylaws at Annex A-1, Section 6.b, a Board Statement is attached as Annex A, articulating the reasons for the Board's determination on these two items. The resolution and rationale are being prepared for publication and will be sent to you when available. In the meantime, a summary of the reasoning for the Board's actions can be found in Annex A, B, and C.

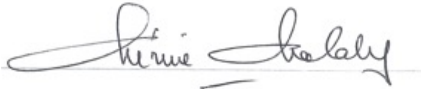
For a number of other recommendations, the ICANN Board noted specific issues that it expects to be addressed during implementation or the EPDP Team's phase 2. As such, the Board expects that the GNSO Council will direct the EPDP Team to address the issues identified in Annex B during phase 2.

As per the Bylaw requirements (Annex A-1, Section 6.c), "the Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement." The Board would like to suggest

conducting this discussion by teleconference yet is open to considering other means per your feedback.

I look forward to hearing from you at your earliest convenience when it would suit the GNSO Council to discuss the Board Statement with the ICANN Board.

Sincerely,



Cherine Chalaby
Chair, ICANN Board of Directors

Annex A - Board Statement: Recommendations That the Board Does Not Adopt at This Time

Recommendation Overview	Issue Synopsis	Board Action
<p>Recommendation 1, Purpose 2 – “Contributing to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN’s mission through enabling responses to lawful data disclosure requests.”</p>	<p>The European Commission stated in its 17 April 2019 letter that the purpose “seems to describe a “means” or a processing activity, rather than a purpose in itself.” The letter also said that “the purposes of ICANN and contracted parties must not be conflated with the interests of third parties in accessing registration data.”</p> <p>The European Commission’s 3 May 2019 letter expanded upon its views on this topic. In that letter, the European Commission reinforced its position that there is “[a] need to ensure effective and secure treatment of third party access requests requires therefore ICANN and the community developing a unified method for accessing non-public gTLD registration data.”</p> <p>Based on the views presented in the letters, Purpose 2, as stated in the EPDP Team’s Final Report, may require further refinement to ensure that it is consistent with and facilitates a predictable and consistent user experience compliant with applicable law. ICANN org is continuing to evaluate this proposed purpose and plans to request additional guidance from the DPAs regarding the interplay between legitimate and proportionate access to registrant data and ICANN’s SSR mission.</p>	<p>The Board does not adopt this Recommendation at this time.</p> <p>The Board does not adopt this Recommendation at this time in light of the EPDP Team’s characterization of this as a placeholder and the need to consider recent input from the European Commission. Based on the views presented in the recent letters from the European Commission, Purpose 2, as stated in the EPDP Team’s Final Report, may require further refinement to ensure that it is consistent with and facilitates ICANN’s ability to deliver a predictable and consistent user experience compliant with applicable law. The Board’s concern is that if the wording of Purpose 2 is deemed inconsistent with applicable law, the impact might be elimination of an ICANN purpose. There are clear ICANN purposes that ICANN should be able to employ under existing legal frameworks to deploy a unified method to enable those with a legitimate and proportionate interest to access non-public gTLD registration data, although such purposes may need to be restated or further refined based on additional legal, regulatory or other input based on this and other input. The Board directs ICANN org to continue to evaluate this proposed purpose and to request additional guidance from the DPAs, regarding the legitimate and</p>

	<p>The Final Report notes that this purpose is a placeholder pending additional work in Phase 2.</p>	<p>proportionate access to registrant data and ICANN's SSR mission.</p>
<p>Recommendation 12 – Defines requirements for collection and display of the information in the Organization field.</p>	<p>The Recommendation states that the Organization field will be published if that publication is acknowledged or confirmed by the registrant. If the registrant does not confirm, registrars may redact or delete the contents in the field. Once implemented the Recommendation may result in loss of identifying information about who the registrant is. For example:</p> <p>Domain name: icann.org Registrant: Domain Administrator Organization: ICANN</p>	<p>The Board adopts this Recommendation with respect to redaction of data in the Organization field and does not adopt at this time the portion of this Recommendation with respect to deletion of such data and/or reassignment of the Registered Name Holder. The Board requests that as part of Phase 2, the EPDP consider the extent to which deletion (as opposed to redaction) that results in loss of or changes to the name of the registrant is in the public interest and consistent with ICANN's mission.</p>

Annex B - Recommendations That the Board Adopts, Noting Specific Issues to Be Addressed During Implementation and/or EPDP Phase 2

Recommendation Overview	Issue Synopsis	Board Action
<p>Recommendation 1 – Defines “ICANN purposes” for processing of gTLD registration data</p> <p>All purposes other than Purpose 2 (see Section C below for Board action on Purpose 2)</p>	<p>The Temporary Specification for gTLD Registration Data does not assign purposes to parties. Based on previous EDPB guidance to not conflate the purposes of ICANN and contracted parties with the interests of third parties in accessing registration data, the EPDP Team reviewed the purposes in the Temporary Specification and refined them into 7 new “ICANN purposes.”</p>	<p>Adopt Recommendation (defer consideration of Purpose 2, see Section C).</p> <p>The Board notes additional input from the European Commission on this topic, in its 17 April 2019 letter submitted during the public comment period and the clarifying letter sent to ICANN org on 3 May 2019. The Board understands that ICANN org’s and the contracted parties’ analysis of the purposes of gTLD registration data processing, as well as the applicable roles and responsibilities, continues and will be considered during implementation. The Board directs ICANN org to account for any subsequent inputs from relevant authorities and additional legal guidance when implementing these Recommendations.</p>
<p>Recommendation 7 – Defines data elements to be transferred from registrars to registry operators.</p>	<p>The Thick WHOIS Transition Policy for .com, .net, and .jobs requires transfer of registrant contact information from registrars to registry operators.</p> <p>The EPDP Final Report states that data elements collected and generated by the registrars “must be transferred from registrar to registry provided an appropriate legal basis exists and a data processing agreement is in place.” The Final Report further states that</p>	<p>Adopt Recommendation.</p> <p>In adopting this Recommendation, the Board notes that the Purposes contained in the Final Report (Recommendation 1) provide the legal basis for processing the aggregate minimum data set under this Recommendation.</p> <p>The Board requests that the EPDP Phase 2 Team consider whether the suggested corrections contained in the Registry Stakeholder Group’s comments and the</p>

	<p>transfer is optional for registrant contact information.</p> <p>The intended impact of this Recommendation on the Thick WHOIS Policy was not clearly identified in the Final Report.</p>	<p>accompanying chart in Appendix G more accurately reflect the Phase 1 consensus and should be adopted.</p> <p>Finally, the Board confirms its understanding that the EPDP Final Report does not repeal or overturn existing Consensus Policy including, in this case, the Thick Whois Policy. Consistent with Recommendation 27, the Board directs ICANN org to work with the Implementation Review Team to examine and transparently report on the extent to which these Recommendations require modification of existing Consensus Policies. Where modification of existing Consensus Policies is required, we call upon the GNSO Council to promptly initiate a PDP to review and recommend required changes to Consensus Policies.</p>
<p>Recommendation 15 – Revises current data retention requirements.</p>	<p>Currently, registrars are required to retain data that includes contact information, billing information, and communications with registrants for use by law enforcement and others.</p> <p>The Recommendation asks that ICANN org undertake a review to identify instances where personal data is needed beyond the life of the registration. In the meantime, the Recommendation identifies that the Transfer Dispute Resolution Policy is one instance where personal data is needed beyond the life of the registration. As a result, the Recommendation</p>	<p>Adopt Recommendation</p> <p>In adopting the Recommendation, the Board understands that the EPDP Team is committed to additional work in Phase 2 on the topic of data retention. The Board directs ICANN org to undertake a review to identify instances where personal data is needed beyond the life of the registration, as recommended by the EPDP Team.</p>

	sets the data retention period at 15 months beyond the life of the registration plus three months to implement the deletion, for a total of 18 months.	
Recommendation 16 - Allows registrars and registry operators to differentiate between registrants on a geographic basis.	This Recommendation allows registrars and registry operators to differentiate between registrants on a geographic basis. The EPDP Team diverged on this issue and committed to considering this issue in Phase 2. Despite this divergence, the GNSO Council approved this recommendation by a supermajority vote. No new considerations were raised related to this topic during the public comment period.	<p>Adopt Recommendation</p> <p>In adopting this Recommendation, the Board notes its understanding that there was divergence in the EPDP about the value of a study to inform the policy, and that requests for such a study have been presented to the Board. The Board directs the CEO and org to discuss with the EPDP Phase 2 Team the merits of a study to examine the feasibility and public interest implications of distinguishing between registrants on a geographic basis based on the application of GDPR. Further action should be guided by the conversations within the EPDP Phase 2 Team</p>
Recommendation 17 – Revises Temp Spec requirements relating to publication of gTLD registration data for legal versus natural entities.	<p>The Temporary Specification for gTLD Registration Data does not distinguish between legal and natural entities in publication of gTLD registration data. The Recommendation allows registrars and registries to differentiate between registrations of legal and natural persons, but does not obligate differentiation. The Recommendation asks for ICANN org to undertake a study to determine costs and risks of differentiating. The EPDP Team is committed to determine and resolve the issue of legal versus natural in Phase 2.</p> <p>In its San Juan Communiqué, the GAC advised the Board to instruct ICANN org to “Distinguish</p>	<p>Adopt Recommendation. The Board directs ICANN org to undertake the recommended study, to determine the costs and risks of differentiating between legal and natural persons.</p> <p>The Board continues to defer San Juan Communique GAC advice on the basis that the: (i) the GAC stated that it “would welcome the ICANN Board’s adoption the EPDP Phase 1 policy recommendations as soon as possible.”; (ii) EPDP Team has said that it “will determine and resolve the Legal vs. Natural issue in Phase 2.” See https://www.icann.org/resources/board-</p>

	<p><i>between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR.”</i> As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board deferred consideration of this advice pending further discussion with the GAC.</p> <p>The SSAC opposed this Recommendation in its statement on the EPDP recommendations. The SSAC wrote that this enables ongoing redaction of information about legal persons that do not have the protections of natural persons. The EPDP Team considered this input but did not modify the Recommendation, and the Recommendation was subsequently adopted by the GNSO Council by a supermajority vote. The SSAC has not communicated with the Board on this topic.</p>	<p>material/resolutions-2018-05-30-en#1.b; and https://www.icann.org/en/system/files/files/resolutions-sanjuan61-gac-advice-scorecard-30may18-en.pdf.</p> <p>As noted in the Barcelona GAC Advice scorecard, the Board monitored the progress of the EPDP, which has now concluded its Phase 1 work. The public comment on the EPDP Team Final Report closed on 17 April 2019, and ICANN org has published a report of public comments.</p> <p>Because the GAC stated that it “would welcome the ICANN Board’s adoption the EPDP Phase 1 policy recommendations as soon as possible” and the EPDP Team has said that it “will determine and resolve the Legal vs. Natural issue in Phase 2”, the Board continues to defer action on this advice.</p>
<p>Recommendation 18 – Defines criteria for submitting requests and for responding to requests for access to non-public gTLD registration data.</p>	<p>The Temporary Specification for gTLD Registration Data requires registrars and registry operators to provide reasonable access to non-public gTLD registration data on the basis of a legitimate interests pursued by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the Registered Name Holder or data subject pursuant to Article 6(1)(f) GDPR.</p>	<p>Adopt Recommendation. The Board also adopts the GAC Advice on this topic. See https://www.icann.org/resources/board-material/resolutions-2018-05-30-en#1.b; and https://www.icann.org/en/system/files/files/resolutions-sanjuan61-gac-advice-scorecard-30may18-en.pdf.</p> <p>In adopting this Recommendation, the Board understands that this Recommendation provides a mechanism for third parties with</p>

	<p>The Recommendation replaces this Temporary Specification requirement with criteria for requests as well as responses to requests to provide more predictability to the process of requesting access to non-public gTLD registration data. The Recommendation further states that: <i>“delivery of a properly formed Reasonable Request for Lawful Disclosure to a Registrar or Registry Operator does NOT require automatic disclosure of information.”</i> And that <i>“Registrars and Registry Operators will consider each request on its merits, including the asserted GDPR legal bases.”</i></p> <p>In its San Juan Communiqué, the GAC advised the Board to instruct ICANN org to: <i>“Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties.”</i> As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board deferred consideration of this advice pending further discussion with the GAC.</p>	<p>legitimate interests to access to non-public gTLD registration data and obligates the contracted parties to disclose the requested non-public data if the request passes the balancing test.</p> <p>The Board anticipates that this recommended model for requests for lawful disclosure of non-public registration data will be expanded upon in Phase 2, in light of Recommendation 3, which states that the EPDP Team undertakes to make a recommendation pertaining to a standardised model for lawful disclosure of non-public Registration Data now that the gating questions in the charter have been answered. This will include addressing questions such as:</p> <ul style="list-style-type: none"> ● Whether such a system should be adopted? ● What are the legitimate purposes for third parties to access registration data? ● What are the eligibility criteria for access to non-public Registration data? ● Do those parties/groups consist of different types of third-party requestors? ● What data elements should each user/party have access to?
<p>Recommendation 19 – Data protection agreements with contracted parties</p>	<p>The Recommendation directs ICANN org to negotiate and enter into data required protection agreements, as appropriate, with the contracted parties.</p>	<p>Adopt Recommendation</p> <p>In adopting this Recommendation, the Board notes that the determination of the roles and</p>

		responsibilities for the processing of gTLD registration data and the most appropriate mechanism to implement this recommendation will be based on further analysis of the law. The Board directs ICANN org to undertake this legal analysis and consult with the Data Protection Authorities as appropriate.
Recommendation 20 – defines data processing activities and responsible parties associated with gTLD registration data.	The Recommendation identifies ICANN and the contracted parties as a “responsible party” for several processing activities. The Recommendation further states that these are to be confirmed during implementation.	Adopt Recommendation In adopting the Recommendation, the Board notes that the determination of the roles and responsibility for the processing of gTLD registration data is based on a legal analysis of the law. The Board directs ICANN org to undertake this legal analysis and consult with the Data Protection Authorities as appropriate.
Recommendation 28 – sets the policy effective date as 29 February 2020.	Policy effective date	Adopt Recommendation The Board notes that the Recommendation sets an effective date for the Policy. Given the complexity of the implementation, and the possibility of additional input on the recommendations from DPAs or other sources, there is a potential that this date may not be met. The Board directs ICANN org to provide regular status updates of the progress of implementation and flag any potential issues or concerns with timeline so that issues can be addressed in a timely manner.