RDS/WHOIS and Data Protection Policy

Session 9

Contents

Session Objective

This session aims to discuss and consider possible next steps for the GAC regarding implementation of GAC Advice and the consideration of new ICANN policy related to gTLD Registration Data: EPDP Phase 1 Implementation, EPDP Phase 2 Operational Design Phase, EPDP Phase 2A Policy Recommendations, and scoping of possible work on Accuracy of registration data.

Leadership Proposal for GAC Action

1. **Consider next steps, including potential GAC Advice** subject to GAC Discussion**, regarding public policy concerns** related to GNSO Policy Recommendations being considered for **a System for Standardized Access/Disclosure of Registration Data (SSAD)[1]** and **voluntary guidance for distinction between legal and natural persons** in gTLD registration data[2].

2. **Assess the public interest impacts** of current interim gTLD registration data policy regime[3], in light of the delayed implementation of policy recommendations of EPDP Phase 1 and Phase 2, as well the impacts of the related **suspended implementations** of the **Thick WHOIS Transition Policy[4]**, as determined by the GNSO (29 January 2021), and of the **Privacy/Proxy Accreditation Policy** Recommendations, as reported by ICANN org (12 January 2021).

3. **Consider GAC follow-up regarding** ICANN org's ongoing assessment as part of **the SSAD Operational Design Phase (ODP)[5],** including a survey of GAC Members[6], regarding options for accreditation of public authorities and their legitimate users to access a potential SSAD, as well as existing legal bases for a range of data processing, including access requests and data transfer across jurisdictions.

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[1] See EPDP Phase 2 Final Report, GAC Minority Statement, GAC Advice in the ICANN70 GAC Communiqué, ICANN Board Scorecard on the ICANN70 GAC Communiqué and expected GAC Response to the ICANN Clarifying Questions on the ICANN70 Advice in the Key Reference Documents section

[2] See EPDP Phase 2A Final Report and the related GAC Minority Statement in the Key Reference Documents section.

[3] The Interim Registration Data Policy for gTLDs requires Contracted Parties to continue to implement measures that are consistent with the Temporary Specification, while implementation of the EPDP Phase 1 recommendations is ongoing.

[4] See https://www.icann.org/resources/pages/thick-whois-transition-policy-2017-02-01-en

[5] Per ICANN org's recent SSAD ODP Update (28 September 2021)

[6] Survey to close on 15 October 2021

Current Status and Recent Developments

- **The current interim policy regime** applicable to gTLD Registration Data **is expected to remain in place for the foreseeable future, but may not guarantee access** to non-public data for public authorities and other legitimate third parties

  - Following GAC input to the ICANN Board regarding EPDP Phase 1 Policy Recommendations (24 April 2019) **the ICANN Board** took action (15 May 2019) and laid the foundation for the future policy regime regarding gTLD Registration Data. Subsequently, the Temporary Specification on gTLD Registration Data expired on 20 May 2019 and was replaced by the Interim Registration Data Policy for gTLDs, which requires **Contracted Parties to continue to implement measures that are consistent with the Temporary Specification**, while implementation of EPDP Phase 1 policy is ongoing.

  - In the Montréal Communiqué (6 November 2019), the GAC advised the ICANN Board to "*ensure that the current system that requires 'reasonable access' to non-public domain name registration is operating effectively*". In its Scorecard of GAC Advice (26 January 2020), the ICANN Board accepted this Advice and instructed ICANN org to take several actions, including "*to collaborate with the Registry and Registrar Stakeholder Groups to develop a voluntary standard request form that can be used by stakeholders to request access*". As part of implementation of the Montréal GAC Advice, ICANN Contractual Compliance has deployed new complaint forms and is now reporting data[7] for alleged violations of the Temporary Specification on gTLD Registration Data.

- **Implementation of the EPDP Phase 1 Policy Recommendations** (adopted by the ICANN Board on 15 May 2019) has revealed significant challenges, with possible public policy implications.

  - The GAC observed in the ICANN71 Communiqué (21 June 2021), "*with continued concern that the **Phase 1 Implementation Review Team (IRT) lacks a current published implementation timeline**.*" and recalled its Advice in the Montréal Communiqué (6 November 2019) and further discussion in the ICANN70 Communiqué (25 March 2021).

  - Two existing sets of pre-existing GNSO policy recommendations have been directly affected, leading their implementation to become effectively suspended:

  - Regarding EPDP Phase 1 **impact on the Thick WHOIS Policy**, the GNSO Council informed the ICANN Board (29 January 2021), after substantial debates among affected stakeholders, that "*notwithstanding the absence of a clear statement*" the intent of EPDP Phase 1 Rec. 7 "*is to modify the Thick Whois Transition Policy*", potentially affecting its expected outcomes[8].

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[7] See ICANN's monthly Contractual Compliance Dashboard Reports which now include a granular report on "*Registrar Complaints Processed [...] Related to Requirements Under the Temporary Specification for gTLD Registration Data*"

[8] The ICANN Board adopted the Thick WHOIS Policy on 7 February 2014 given community consensus on its benefits and despite concerns including in terms of data protection. Implementation of the Thick WHOIS policy eventually ran into legal issues, as described in a correspondence by Verisign to ICANN (20 June 2017). Following the entry into force of the GDPR, the ICANN Board resolved (7 November 2019) to defer compliance enforcement until PDP Phase 1 Implementation is complete and the GNSO determines whether to take action regarding potential impact on its original recommendations

- - Regarding EPDP Phase 1 **impact on Privacy/Proxy Accreditation Policy**:
    - – ICANN org concluded its [analysis of impact](#) (11 January 2021) stating that the Privacy/Proxy Service Accreditation Issues (PPSAI) Policy and Implementation is "*substantively impacted by the new Registration Data Policy requirements, indicating a need for significant changes in the proposed implementation of PPSAI*", and noted that *'The GNSO may also wish to undertake policy work"* in relation to these impacts.
    - – In the [ICANN71 Communiqué](#) (21 June 2021) the GAC followed up on its previous advice to the ICANN Board[9] "*regarding the need to resume implementation in light of the importance of implementing procedures that govern these services*" and highlighted "*the need to prioritize this implementation*".
    - – In [response to ICANN org's analysis](#) (7 July 2021), the GNSO Council concluded that "*there appears to be no required updates or any bar to continuing the implementation of the original policy recommendations*".
    - – In its [Scorecard](#) (12 September 2021) of Board Action on the GAC ICANN71 Communiqué, the ICANN Board acknowledged the GNSO's response as "*to be considered*".

- **Policy Development in Phase 2 of the EPDP concluded** with the publication of a [Final Report](#) (31 July 2020), which recommended a System for Standardized Access/Disclosure (SSAD) to gTLD Registration Data with a significant level of divergence among stakeholders as documented in the Consensus Designations (Annex D) and Minority Statements (Annex E), including the [GAC Minority Statement](#) (24 August 2020).

    - **Consensus was achieved on** aspects of the SSAD relating to **accreditation of requestors and centralization of requests** (recommendations 1-4, 11, 13 and 15-17). Once implemented these recommendations should improve the current fragmented systems by providing a central entry point to request access to registration data, according to clearly defined standards, and providing guarantees of appropriate processing (including safeguards for data subjects and requestor).

    - **Stakeholders could not agree on** the policy recommendations necessary to provide for **a System for Standardized disclosure** that meets the needs of all stakeholders involved, including public authorities (recommendations 5-10 and 12). Neither could stakeholders agree on the possibility to evolve the SSAD towards more centralization and more automation of disclosure decisions in the future. (recommendation 18)

    - In the [ICANN70 GAC Communiqué](#) (25 March 2021), the GAC Advised the ICANN Board "*to consider the [GAC Minority Statement](#) and available options to address the public policy concerns expressed therein, and take necessary action, as appropriate.*" The Board [accepted](#) the advice (12 May 2021) noting that "*standing on its own, the GAC's Minority*

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[9] See in particular GAC Advice in the [Kobe Communiqué](#) (14 March 2019), and follow-up on this Advice in both the [Marrakech Communiqué](#) (27 June 2019) and [Montreal Communiqué](#) (6 November 2019).

Statement does not constitute consensus advice", and included a detailed discussion of issues raised in the GAC Minority Statement on EPDP Phase 2.

- ○ The GAC issued a [response](#) (6 October 2021) to the Board's [clarifying questions](#) on the ICANN70 advice that were re-iterated before and discussed during the [GAC/Board ICANN71 Communiqué clarification call](#) (29 July 2021).

- **Feasibility of a System for Standardized Access/Disclosure of Registration Data (SSAD) is currently being Assessed** by ICANN org as part of an [Operational Design Phase](#) (ODP)

  - ○ The GNSO [resolution](#) on the EPDP Phase 2 Final Report (24 September 2020) **adopted the 18 recommendations that seek to establish an SSAD**, **requesting a consultation with the ICANN Board** prior to its consideration of the policy recommendations **to discuss "*questions surrounding the financial sustainability of SSAD and some of the concerns expressed within the different minority statements [...] including whether a further cost-benefit analysis should be conducted before the ICANN Board considers all SSAD-related recommendations for adoption*"[10].

  - ○ Prior to considering the GNSO's SSAD Policy Recommendations, **the ICANN Board** [launched](#) (25 March 2021) a newly proposed **Operational Design Phase (ODP),** for an initial duration of 6-months, [to perform an assessment](#) of possible implementation parameters. Several community surveys were launched to this effect, including to assess potential demand for an SSAD.

  - ○ The ICANN org [reported](#) (28 September 2021) on survey results to date, progress of its assessment and current working assumptions. Further updates are expected during ICANN72 as the assessment is reported to be taking more time than initially anticipated.

  - ○ **A specific ICANN org** [survey](#) **for GAC Members**, regarding the accreditation of governments entities and their legitimate users, as well as legal bases for various types of processing of registration data, was [circulated](#) to the GAC on 15 July 2021. Its deadline was recently [extended](#) to **15 October 2021.**

- **Policy Development in Phase 2A of the EPDP** to address the issues of **legal vs. natural persons** and the **feasibility of unique contacts** to have a uniform anonymized email address, **concluded** with the publication of a [Final Report](#) (3 September 2021)

  - ○ The EPDP Team Chair presented the report as "*a compromise that is the maximum that could be achieved by the group at this time under our currently allocated time and scope, and it should not be read as delivering results that were fully satisfactory to everyone*" and underscored *"the importance of the minority statements in understanding the full context of the Final Report recommendations"*

  - ○ In its [Minority Statement](#) (10 September 2021), the GAC acknowledged "*the usefulness of many components of the Final Recommendations"* including:

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[10] During a recent GAC/GNSO Leadership call (29 September 2020) and during the pre-ICANN69 [Joint GAC/GNSO Call](#) (1 October 2020), The GNSO leadership clarified that it intends to focus this consultation on the issue of financial sustainability and that it was not expected to change its policy recommendations to the ICANN Board.

- _the creation of data fields to flag/identify legal registrants and personal data;_
- _specific guidance on what safeguards should be applied to protect personal information when differentiating between the domain name registrations of legal and natural persons;_
- _encouragement for the creation of a Code of Conduct that would include the treatment of domain name registration data from legal entities;_
- _encouragement for the GNSO to follow legislative developments that may require revisions to the current policy recommendations, and_
- _useful context and guidance for those who wish to publish pseudonymized emails._

- ○ **The GAC** noted however that it **"remains _concerned that almost none of the Final Recommendations create enforceable obligations"_** which _**"fall short of the GAC's expectations**_ for policies that would require the publication of domain name registration data that is not protected [...] and create an appropriate framework to encourage the publication of pseudonymized email contacts with appropriate safeguards."_

- ○ **Adoption of the EPDP Phase 2 policy recommendation by the GNSO Council** for consideration by the ICANN Board **is currently subject to** procedural considerations in light of a challenge[11] by the Registries Stakeholder Group (RySG) of Recommendation 1 (creation of data field in domain registration data to identify legal registrants and personal data) as being out of the scope of EPDP Phase 2A.

- ● **Regarding gTLD registration Data Accuracy**, a **GNSO Scoping Team** is due to initiate the work that has been discussed since the conclusion of EPDP Phase 2.

  - ○ The GAC has nominated two representatives (European Commission and United States) to participate in these deliberations.

  - ○ This scoping team is expected to facilitate understanding of the issue of **Accuracy of Registration Data and** issues associated with **the WHOIS Accuracy Reporting System,** before potential further policy work is considered.

  - ○ The GNSO Council adopted substantive and procedural instructions for the Scoping Team (22 July 2021), whose work will be informed by an ICANN org briefing (26 February 2021) which had been requested by the GNSO Council (4 November 2020)

  - ○ The first meeting of the Scoping Team took place on 5 October 2021.

  - ○ The GAC expects a holistic approach in scoping the issue, addressing the question 'how to ensure accuracy of registration data'.

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[11] See the RySG Minority Statement section "IV. Recommendation #1 is Out Scope and Raises Significant Implementation Questions" on p.69 of the EPDP Phase 2 Final Report, and minutes of the GNSO Council meeting on 23 September.

Key Reference Documents

- [GAC Minority Statement](#) (24 August 2020) on EPDP Phase 2 [Final Report](#) (31 July 2020)

- GAC Advice in the [GAC ICANN70 Communiqué](#) (25 March 2021) and ICANN Board [Scorecard](#) of ICANN70 Communiqué (12 May 2021)

- GAC Advice in the [GAC ICANN71 Communiqué](#) (21 June 2021) and ICANN Board [Scorecard](#) of ICANN71 Communiqué (12 September 2021)

- [GAC Minority Statement](#) (10 September 2021) on EPDP Phase 2A [Final Report](#) (3 September 2021)

- [GAC Response](#) (6 October 2021) to [ICANN Board Clarifying Questions](#) (21 April 2021) on the ICANN70 GAC Advice regarding the GAC Minority Statement on EPDP Phase 2, as reiterated during the ICANN71 Communiqué clarification discussions.

Further Information

GAC Policy Background Document on WHOIS and Data Protection
https://gac.icann.org/briefing-materials/public/gac-policy-background-whois-data-protection.pdf

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