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 SSAD Operational Design Phase, EPDP Phase 2A Policy Recommendations, and scoping of possible policy work regarding accuracy of registration data.

Leadership Proposal for GAC Action

1. **Consider providing further input to the ICANN Board** regarding the proposed Standardized System for Access/Disclosure of Registration Data (SSAD) given ICANN org's analysis of costs, benefits and risks in the SSAD Operational Design Assessment (25 Jan. 2022)

2. **Assess the public interest impacts of the current interim policy regime** for gTLD registration data, in light of:

   a. **Prospects of implementation and community concerns with policy recommendations** in Phase 1, Phase 2 and Phase 2A of the Expedited Policy Development Process (EPDP) on gTLD Registration Data;

   b. **Suspension of pre-existing implementations efforts** such as Thick WHOIS Transition Policy[1], Privacy/Proxy Accreditation Policy[2] and the WHOIS Accuracy Reporting System (ARS)[3]

   c. **Board responses[4] to the GAC Montréal Advice** (1 Nov. 2019), and subsequent Follow-up in the ICANN72 Communiqué (1 Nov. 2022), to "*ensure that the current system that requires 'reasonable access' to non-public domain name registration is operating effectively*"

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[1] See https://www.icann.org/resources/pages/thick-whois-transition-policy-2017-02-01-en and the related recent decision by the GNSO Council (29 January 2021)

[2] See full analysis of the impact of EPDP Phase 1 on the Privacy/Proxy Services Accreditation policy implementation in a detailed report by ICANN org (12 January 2021)

[3] See ICANN org Memo on the WHOIS Accuracy Reporting System (January 2022) providing background information and discussing the decision to put ARS on hold, issues with continuing ARS, and potential objectives of future accuracy studies.

[4] See latest Board Scorecard (16 Jan. 2022) on ICANN72 GAC Communiqué

Current Status and Recent Developments

Most Recent Development

- **Feasibility of a System for Standardized Access/Disclosure of Registration Data (SSAD)** has been assessed by ICANN org as part of an [Operational Design Phase](#) (ODP) which has now completed. Discussions continue between the ICANN Board and GNSO Council on next steps.

    - 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*"**[5].

        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.**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 and its results reported in a [webinar](#) on 18 November 2021.

    - After presenting design proposals and costs assessments in several [webinars](#) to the GNSO, GAC, and ICANN Community, the GAC [alerted the GNSO](#) (15 December 2021) that ICANN's proposed design of Governmental Accreditation Authorities goes beyond the scope envisioned in [GAC Principles on Accreditation](#) (21 Jan. 2020) which were incorporated in Recommendation 2 of the EPDP Phase 2 Final Report.

    - ICANN org has delivered its [Operational Design Assessment](#) (25 Jan. 2022).

    - A GNSO Small Team is now reviewing ICANN org's Assessment with a view to support GNSO Council consultation with the ICANN Board, including addressing questions and concerns expressed in an [ICANN Board letter](#) (24 Jan. 2022).

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[5] During a 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.

Status of Policy Development

- **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*". The ICANN Board accepted this Advice (26 January 2020). The GAC requested an update on these efforts in Follow-up to Previous Advice in the ICANN72 Communiqué (1 Nov. 2021). In its response (16 Jan. 2022), the ICANN Board suggested that standardization and centralization of requests would be achieved by an SSAD. It noted however that "*data from both Contractual Compliance and Global Support do not indicate this lack of centralized intake system to be a significant issue for Internet users*".

- **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 highlighted in the ICANN72 Communiqué (1 Nov. 2021) "*with continued concern that the Phase 1 Implementation Review Team (IRT) lacks a current published implementation timeline*" recall its previous Advice in the Montréal Communiqué (6 November 2019) and Follow-up since in the ICANN70 Communiqué (25 March 2021) and ICANN71 Communiqué (21 June 2021)In its response to the ICANN72 Communiqué (16 Jan. 2022), the ICANN Board listed and discussed several remaining milestones including negotiation of data protection agreement between ICANN org and Contracted Parties. It also urged "*the GAC, as a participant in the processes that yield community recommendations, to work with the respective community groups to achieve clarity and alignment across the community of what recommendations will institute regarding requirements or obligations*"

    - As a consequence of the adoption of the EPDP Phase 1 policy recommendations, **the implementation of several pre-existing efforts were suspended**, and in particular the Thick WHOIS Transition Policy[6], Privacy/Proxy Accreditation Policy[7] and the WHOIS Accuracy Reporting System (ARS).

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[6] See https://www.icann.org/resources/pages/thick-whois-transition-policy-2017-02-01-en and the related recent decision by the GNSO Council (29 January 2021)

[7] See full analysis of the impact of EPDP Phase 1 on the Privacy/Proxy Services Accreditation policy implementation in a detailed report by ICANN org (12 January 2021)

- **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 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).

- **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:
    – *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."**

  ○ After adoption of these policy recommendations by the GNSO Council, the ICANN Board provided the [bylaw-mandated notification to the GAC](#) (9 Dec. 2021), in [response](#) to which **the GAC requested that the ICANN Board** "c*onsiders [...] the GAC Minority Statement in its entirety, as well as available options to address the outstanding public policy concerns expressed therein.*" (9 Feb. 2022).

- **The GNSO Scoping Team on Accuracy of Registration Data** 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). In the [ICANN72 GAC Communiqué](#) (1 November 2021) the GAC welcomed "the effective start of the accuracy scoping exercise launched by the GNSO" and expressed support for "*all four assignments, namely, i) enforcement and reporting, ii) measurement of accuracy, iii) effectiveness and iv) impact and improvements, for scoping the work on accuracy"* noting that "*assignments iii) and iv) are particularly important for the purpose of assessing possible improvements of accuracy of registration data"* and stressing *"the importance of delivering on all four tasks in a timely and effective manner."*

  ○ The GAC has nominated two representatives (European Commission and United States) to participate in these [weekly deliberations](#) which started on 5 October 2021.

  ○ The work of the scoping team is also being informed by an [ICANN org briefing](#) (26 February 2021), an [ICANN org Memo on the WHOIS Accuracy Reporting System](#) (January 2022) and [ICANN org responses](#) to questions by the Scoping Team.

  ○ In the [ICANN72 GAC Communiqué](#) (1 November 2021) as part of *Issues of Importance* the GAC reiterated "*that maintaining accurate domain name registration data is an important element in the prevention and mitigation of DNS abuse*". The GAC also noted that it is "*looking forward to exchanging with other constituencies not only on the definition and measurement of accuracy but also on solutions on how to enhance accuracy. The GAC gives particular importance to the verification, validation and correction of all registration data by registrars, and certain registries, in line with their contractual obligations, and supports rigorous monitoring and enforcement of such contractual obligations by ICANN."*

Key Reference Documents

- ICANN org SSAD [Operational Design Assessment](#) (25 January 2022)

- GAC Advice in the GAC ICANN72 Communiqué (1 Nov. 2022) and related ICANN Board [Scorecard](#) (16 January 2022)

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

- GAC Advice in the [GAC ICANN70 Communiqué](#) (25 March 2021), related ICANN Board [Scorecard](#) (12 May 2021) and [GAC Response to ICANN Board Clarifying Questions](#) (16 Nov. 2021)

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

- [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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