

RDS/WHOIS and Data Protection Policy

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ICANN | G A C

Governmental Advisory Committee

Agenda

1. Status of Policy Development and Implementation

- Status Overview of EPDP Process
- Phase 1 Implementation Challenges
- Phase 2 Recommendations for an Access/Disclosure System (SSAD)
- Phase 2A Progress on Natural vs. Legal and Unique Anonymized Contacts
- Accuracy of gTLD Registration Data

2. Next Steps

- Overall Timeline
- GAC Input

Overview of Expedited Policy Development Process (EPDP)

Expedited Policy Development Process (EPDP) on gTLD Registration Data

- Launched as part of emergency measures, to replace the [Temporary Specification](#) (17 May 2018) now incorporated as the [Interim gTLD Registration Data Policy](#)
- [Phase 1](#) (Aug. 2018 - Feb. 2019)
 - Laid out foundation of new policy framework (purposes, data elements, etc.)
 - Sufficient basis to proceed (GAC [letter](#) to ICANN Board, 24 April 2019)
 - Most Policy Recommendations [adopted](#) by ICANN Board (15 May 2019)
- [Phase 1 Implementation](#) (ongoing)
 - Interim Registration Data Policy (20 May 2019) extended Temporary Specification
- [Phase 2](#) (May 2019 - Jul. 2020)
 - Focus on a System for Standardized Access/Disclosure (SSAD)
 - [Final Report](#) Published on 30 July 2020. GAC submitted a [Minority Statement](#) (24 August 2020), along with ALAC, BC, IPC, SSAC (Annex E of Final Report)
 - GNSO Council [adopted](#) (24 September 2020) the policy recommendations for eventual ICANN Board consideration
- [Phase 2A](#) (Started in Dec. 2020)
 - Focus on 2 of the 3 important policy issues not addressed in Phase 2 (treatment of data from legal entities; pseudonymized emails)

Phase 1 Implementation Challenges

Progress

- Work started in May 2019 with the formation of an Implementation Review Team (IRT) in which the GAC has been represented by some of its EPDP Team representatives
- Work to date includes numerous [meetings](#), [studies and reports](#), a [Draft Policy Language](#) document, and ongoing negotiations of Data Processing Agreements between parties
- Many inter-dependencies remain pending, and disagreements persist on policy language, including issues of importance to the GAC, such as timeframe for response to Urgent requests

Timeline

- [GAC Montreal Communiqué](#) (6 November 2019): the GAC Advised the ICANN Board to
 - i. Take all possible steps to ensure that the ICANN org and the EPDP Phase 1 Implementation Review team **generate a detailed work plan identifying an updated realistic schedule to complete its work** and provide and inform the GAC on the status of its progress by January 3, 2020;*
- The ICANN Board [accepted](#) this Advice (20 Jan. 2020) noting the [status update](#) provided by the ICANN CEO (6 Jan. 2020) including that “*the implementation plan that will be published for public comment will include an implementation timeline*”.
- There is currently no schedule for completion, nor publication of an implementation plan.

Phase 1 Implementation Challenges

Impact on Privacy/Proxy Service Accreditation Policy and Implementation (PPSAI)

- The GAC previously advised the ICANN Board regarding the need to resume implementation ([Kobe](#), [Marrakech](#) and [Montréal](#) Communiqué) in light of persistent issues as illustrated during the COVID crisis (See [ICANN68 GAC discussions](#))
- ICANN Org [reported](#) (12 Jan. 2021) on the impact of EPDP Phase 1 and 2 Recommendations on the PPSAI Policy and Implementation. The GNSO Council is now [expected](#) to discuss the report [during ICANN70](#) (Wed. 24 March 17:30 UTC).

Impact on Thick Whois Policy Implementation

- The Thick WHOIS Policy was [adopted](#) on 7 February 2014. [Legal](#) and [contractual](#) challenges emerged during implementation. In Nov. 2019, the ICANN Board [deferred compliance enforcement](#) of the policy until complete implementation of the EPDP Phase 1 policy recommendations.
- The ICANN Board [adopted](#) (15 May 2019) Rec. #7 (Transfer of data from Registrars to Registries) noting specific issues to be addressed during implementation, with the *“understanding that the EPDP Final Report does not repeal or overturn existing Consensus Policy including, in this case, the Thick WHOIS Policy”*
- The IRT, GNSO, and ICANN Board have exchanged views of the impact of Phase 1 Rec. #7. IRT [could not agree](#) whether it implicitly “rescinded” Thick WHOIS
- Nevertheless, the GNSO Council determined per a [communication to the ICANN Board](#) (29 Jan. 2021): *“notwithstanding the absence of a clear statement, [...] the intent of EPDP Phase 1 Recommendation #7 is to modify the Thick Whois Transition Policy”*

Phase 2 Recommendations for an SSAD (Adopted by the GNSO)

| | | |
|-----|---|---|
| #1 | Accreditation | Full Consensus |
| #2 | Accreditation of Governmental Entities | Full Consensus |
| #3 | Criteria and Content of Requests | Full Consensus |
| #4 | Acknowledgement of receipt | Full Consensus |
| #5 | Response Requirements | Strong support but significant opposition |
| #6 | Priority Levels | Divergence |
| #7 | Requestor Purposes | Consensus |
| #8 | Contracted Party Authorization | Strong support but significant opposition |
| #9 | Automation of SSAD Processing | Strong support but significant opposition |
| #10 | Determining variable SLAs for response times for SSAD | Strong support but significant opposition |

| | | |
|-----|---|---|
| #11 | SSAD Terms and Conditions | Full Consensus |
| #12 | Disclosure Requirements | Strong support but significant opposition |
| #13 | Query Policy | Full Consensus |
| #14 | Financial Sustainability | Divergence |
| #15 | Logging | Full Consensus |
| #16 | Audits | Full Consensus |
| #17 | Reporting Requirements | Full Consensus |
| #18 | Review of Implementation of recommendations concerning SSAD using a GNSO Standing Committee | Strong support but significant opposition |
| #19 | Display of information of affiliated privacy / proxy providers | Full Consensus |
| #20 | City Field | Consensus |
| #21 | Data Retention | Full Consensus |
| #22 | Purpose 2 | Consensus |

Consensus on Accreditation, Purposes and Centralization of Requests

Non-consensus on De-Centralized and Non-Automated Disclosure, Funding Arrangements and Requirement of Future Policy Development for Automation and Centralization of Disclosures

Phase 2 Recommendations for an SSAD

GAC Concerns

- In the [GAC Minority Statement](#) (24 August 2020), the GAC provided “input on its public policy concerns” in the way in which the recommendations:
 - *Currently conclude with a **fragmented rather than centralized disclosure system**,*
 - *Do not currently contain enforceable **standards to review disclosure decisions**,*
 - *Do not sufficiently address **consumer protection** and consumer trust concerns;*
 - *Do not currently contain reliable **mechanisms for the System for Standardized Access/Disclosure (SSAD) to evolve** in response to increased legal clarity; and*
 - *May impose financial conditions that risk an SSAD that calls for **disproportionate costs for its users** including those that detect and act on cyber security threats.*

Other Stakeholders Concerns

- **Representatives of prospective users of an SSAD and Internet Users** (ALAC, SSAC, BC and IPC) have expressed similar and additional concerns in Minority Statements (Annex E of [Final Report](#))
- **ALAC** expressed **concerns with adoption of non-consensus policy recommendations**, which the IPC and BC voted against
- **The IPC recently [requested](#)** (9 March 2021) that the **ICANN Board halts consideration of the EPDP Phase 2 Recommendations** due to the lack of consensus, public interest issues and emerging regulations to be taken into account (such as the European NIS2 Directive)

Phase 2 Recommendations for an SSAD

Current Status

- The **ICANN Board** is due to consider launching an **Operational Design Phase** to inform its formal consideration of the GNSO Recommendations
 - This follows development by ICANN org of a [Concept Paper](#) discussed with the Community, on which the GAC provided [input](#) (22 January 2021)
 - The ODP aims at assessing the operational impact of the implementation of the recommendations
 - Upon completion of the ODP, the ICANN Board is expected to consider whether the recommendations are in the best interests of the ICANN community or ICANN
- In a [letter](#) (9 March 2021) **the Intellectual Property Constituency (IPC) requests that ICANN pause** the ODP and further work on SSAD due to:
 - Lack of consensus on key recommendations
 - Public policy concerns
 - New proposed EU legislative developments (which would require the publication of non-personal data of legal entities, among other things)

Phase 2A Progress on Legal v. Natural, Unique Contacts

Distinction between Legal and Natural Persons

- The EPDP Team is to determine whether changes are necessary to Phase 1 Recommendation 17 *“Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”*
- GAC Reps have crafted a [proposed process to achieve this distinction while minimizing risks](#) to registrants (mis-identification) and contracted parties (inadvertent publication of personal data)
 - It is not clear whether consensus can be achieved, even if the proposed mechanisms are voluntary rather than required.
 - Contracted Parties and the NCSG have raised a number objections to the proposal.
- The EPDP Team is [expecting legal input](#) (Bird & Bird) on:
 - The levels of risks associated with the proposed safeguards and whether they mitigate risks to contracted parties and registrants
 - Whether the .EU Regulation, WHOIS practices of .EU and RIPE-NCC, and the recent proposed NIS2 Directive create precedent that could reduce risk in case of publication of a legal person’s registration data, even if it contained personal information

Phase 2A Progress on Legal v. Natural, Unique Contacts

Unique Anonymized Contacts

- The EPDP Team is expected to address
 - Whether or not unique contacts to have a uniform anonymized email address is feasible, and if feasible, whether it should be a requirement.
 - If feasible, but not a requirement, what guidance, if any, can be provided to Contracted Parties who may want to implement uniform anonymized email addresses
- Status
 - The Phase 2a team is considering --
 - the definitions to be used for any potential policies (noting the proper definition of “anonymized” versus “pseudonymized”
 - whether such email addresses would be uniform across registrars or uniform per registrant
 - The Legal Team is also considering what further guidance may be helpful

Phase 2A Progress on Legal v. Natural, Unique Contacts

EPDP Phase 2A Process

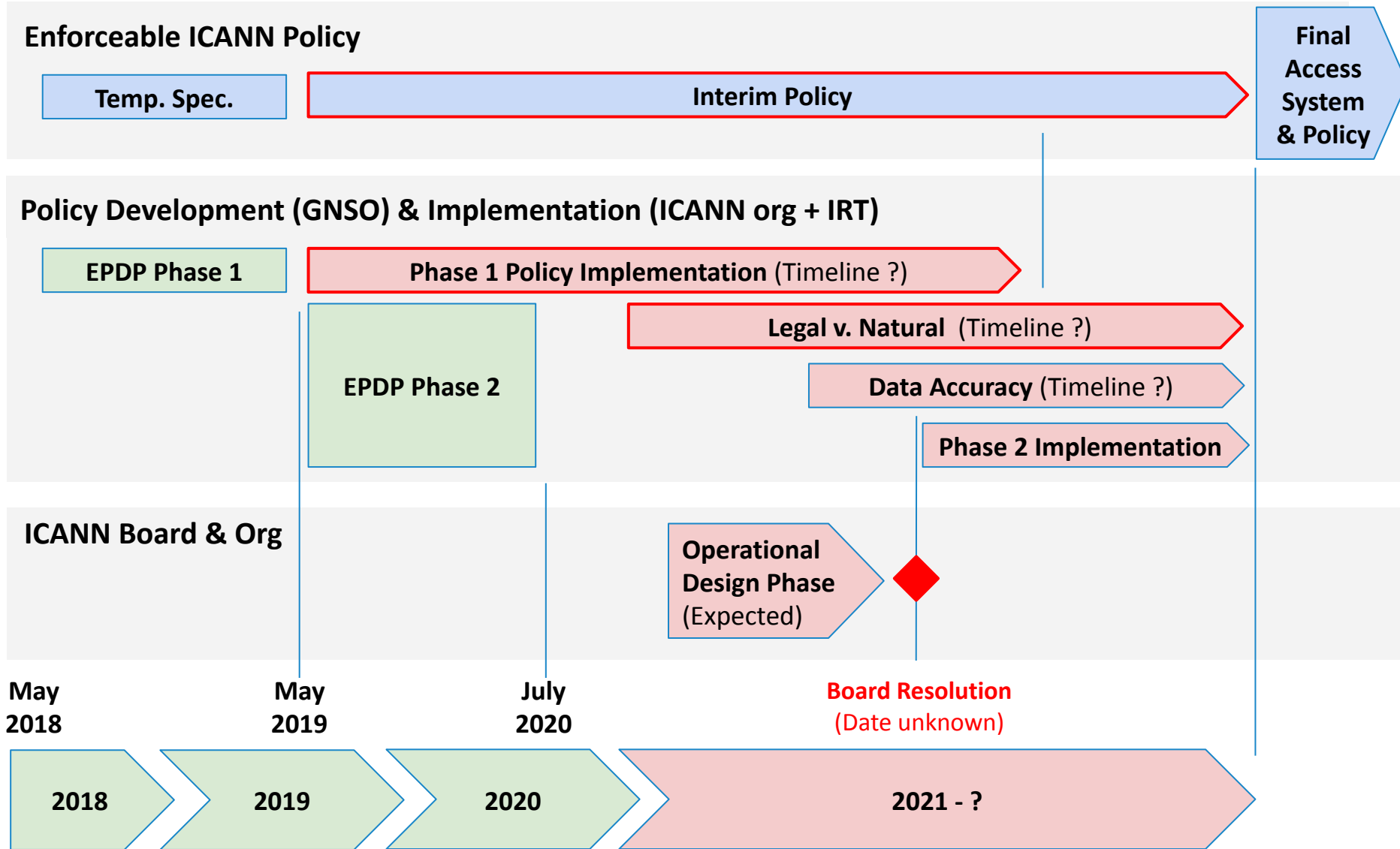
- Per its [decision](#) launching Phase 2A (21 October 2020) the GNSO Council plans to “*decide on next steps, which could include providing additional time for the EPDP to finalize its recommendations or termination of the EPDP if it is clear that no progress is being made or consensus is unlikely*”
- The GNSO Council will consider an update from the EPDP Chair and discuss next steps during its [ICANN70 GNSO Council Meeting](#) (Wed. 24 March 17:30 UTC), it is expected to highlight that:
 - More time is needed, in particular as the team is expecting further legal guidance
 - Consensus may be reachable on non-mandatory guidance to registrars
 - It is not clear whether consensus can be reached on potential policy requirements
- Next Opportunities for discussion if this matter by the GAC
 - [ICANN70 GAC meeting with the GNSO](#) (Wed. 24 March 14:00 UTC)

Accuracy of gTLD Registration Data

State of play

- GAC did not support EPDP Phase 2 conclusions to defer the consideration of the data accuracy issue ([GAC Minority Statement](#), [ICANN69 GAC Communiqué](#))
 - Accuracy is a data protection principle
 - Accuracy should be ensured in relation to the purpose for which the data are processed
 - Data controllers should collect and maintain accurate data
 - Inaccurate data defeats the purpose of SSAD and risks violating data protection rules
- Accuracy of registration data is currently not fully ensured
 - Data inaccuracy rate of 30-40% ([RDS/WHOIS2 Review report](#), 2019)
 - 13.5% of domains have an actual registrant identified in WHOIS ([Interisle study](#), 2021)
- Importance of accuracy for DNS security, stability, and resiliency ([SSR2 Review Final Report](#), 1/21)
- [ICANN org briefing](#), Feb 2021- To inform launch of the GNSO scoping exercise
 - Overview of accuracy-related requirements in contractual obligations, consensus policy and ICANN org programs
 - Assessment of effects of GDPR, Temporary Specification for gTLD Registration Data and Interim Registration Data Policy for gTLDs on accuracy implementation/enforcement
 - Suggests a study on measuring accuracy - *i.e.*, access to (non)-public registration data
 - GAC possible reaction: need to enforce relevant contractual obligations in the short-term; study to be properly scoped; policy process to be launched in parallel

Timeline to Access/Disclosure System





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