WHOIS and Data Protection Policy (incl. Accuracy)

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I C A N N | **G A C**
Governmental Advisory Committee

Agenda

1. **Background on WHOIS and Data Protection**

2. **WHOIS Disclosure System**

3. **Draft gTLD Registration Data Policy**
   (EPDP Phase 1 Implementation)

4. **Registration Data Accuracy**

5. **Considerations for Cancún Communiqué**

WHOIS and Data Protection: Importance to the GAC

Why this is important for the GAC

Per the GAC Principles Regarding gTLD WHOIS Services (28 March 2007), recalled in the GAC Abu Dhabi Communiqué (1 Nov. 2017), the GAC noted they "*continue to reflect the important public policy issues associated with WHOIS services*" including that "*WHOIS data [...] is used for a number of legitimate activities, including:*

1. *Assisting law enforcement authorities in **investigations and in enforcing national and international laws**, assisting in **combating against abusive use** of internet communication technologies;*

2. *Assisting businesses, other organizations, and users in **combating fraud, complying with relevant laws, and safeguarding the interests of the public**;*

3. *Combatting **infringement and misuse of intellectual property**; and*

4. ***Contributing to user confidence in the Internet** as a reliable and efficient means of information and communication by helping users identify persons or entities responsible for content and services online."*

And still relevant when considering compliance with Data Protection Law

The GAC advised the ICANN Board "*it should use its best efforts to create a system that continues to facilitate the legitimate activities recognized in the 2007 Principles, including by:*

1. ***Keeping WHOIS quickly accessible for security and stability purposes**, for consumer protection and law enforcement investigations, and for crime prevention efforts, through user-friendly and easy access to comprehensive information to facilitate timely action.*

2. ***Keeping WHOIS quickly accessible to the public** (including businesses and other organizations) for legitimate purposes, including to combat fraud and deceptive conduct, to combat infringement and misuse of intellectual property, and to engage in due diligence for online transactions and communications"*

WHOIS and Data Protection: Background

Efforts to Define a New Policy Framework for Registration Data Services in Compliance with Data Protection Law (1/4)

- Expedited Policy Development Process (EPDP) Launched to replace the Temporary Specification (17 May 2018) now incorporated as the Interim gTLD Registration Data Policy (20 May 2019) which the GAC observed created *"potentially thousands of distinct policies depending upon the registrar involved"* in the Barcelona Communiqué (25 Oct. 2018) and letter to the ICANN Board (24 April 2019)

- **EPDP Phase 1 Policy Development** (Aug. 2018 - Feb. 2019) **and Implementation** (May 2019 -)
  - Foundation of new policy framework (purposes, data elements, etc.).
    Mostly adopted by ICANN Board (15 May 2019)
  - Implementation timeline delivered following GAC Advice in Montreal, and Follow-up
  - ICANN Board listed the remaining milestones in Scorecard on ICANN72 GAC Advice (Jan. 2022)
  - **Ongoing** consideration of public comments received on the proposed Registration Data Consensus Policy for gTLDs as reported in ICANN's Summary of Public Comments (20 January 2023)

WHOIS and Data Protection: Background

Efforts to Define a New Policy Framework for Registration Data Services in Compliance with Data Protection Law (2/4)

- **EPDP Phase 2 SSAD Policy Dev** (May 2019 - Jul. 2020), **Operational Design Phase** (Mar. 2021 - Jan. 2022), **Proof of concept**
  - EPDP Phase 2 Final Report (30 July 2020).
  - GAC Advice in the ICANN70 Communiqué (25 Mar. 2021) and response to Board Clarification Questions (6 Oct. 2021) re: GAC Minority Statement (24 Aug. 2020) concerns:

    1) fragmented rather than centralized disclosure system;

    2) do not currently contain enforceable standards to review disclosure decisions;

    3) do not sufficiently address consumer protection and consumer trust concerns;

    4) do not currently contain reliable mechanisms for the System for Standardized Access/Disclosure (SSAD) to evolve in response to increased legal clarity; and

    5) 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.

WHOIS and Data Protection: Background

Efforts to Define a New Policy Framework for Registration Data Services in Compliance with Data Protection Law (3/4)

- **EPDP Phase 2 SSAD Policy Development** (May 2019 - Jul. 2020), **Operational Design Phase** (Mar. 2021 - Jan. 2022), **Proof of concept (continued)**

  - ICANN Board directed (25 Mar. 2021) ICANN to conduct an Operational Assessment of the GNSO Recommendations, delivered (25 Jan. 2022)

  - As part of the Board/GNSO consultation, GNSO Council requested (27 Apr. 2022) the ICANN Board pauses consideration of the SSAD Policy Recommendations to allow work on a proof of concept. ICANN Board confirmed (9 Jun. 2022) its decision to pause consideration of the recommendations.

  - **Recently launched** development of WHOIS Disclosure System (or "Registration Data Request Service") to be delivered in early 2024, per ICANN Board resolution (27 Feb. 2023) based on ICANN's Design Paper (13 Sep. 2022) and Input from the GNSO (Nov. 2022)
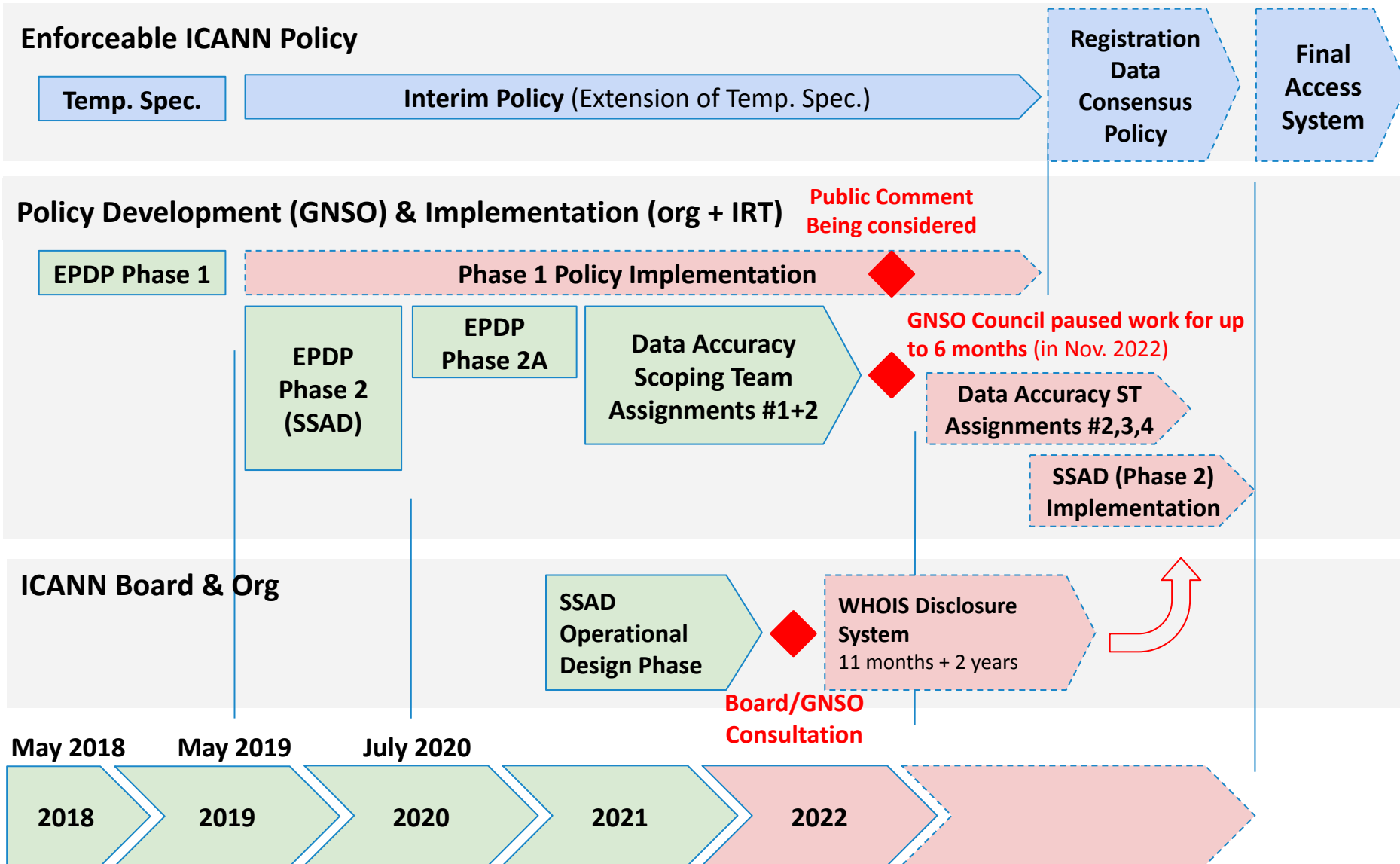
WHOIS and Data Protection: Background

Efforts to Define a New Policy Framework for Registration Data Services in Compliance with Data Protection Law (4/4)

- **EPDP Phase 2A Policy Development** (Dec. 2020 - Sep. 2021) **and Implementation** (Mar. 2022 -)
  - Focus on treatment of data from legal (vs. natural) entities and pseudonymized emails: Final Report (3 Sep. 2020)
  - GAC submitted a Minority Statement (10 Sep. 2021) and requested (9 Feb. 2022) its consideration by the ICANN Board
  - ICANN Board adopted the recommendations (10 Mar. 2022) and directed ICANN to proceed to implementation

- **Registration Data Accuracy Scoping Team for potential GNSO Policy Development** (Oct. 2021-)
  - Accurate registration data is important to the prevention and mitigation of DNS abuse (ICANN72 Communiqué)
  - The GAC stressed the importance of delivering on all four tasks in a timely and effective manner.
  - **Ongoing** GNSO Council consideration of preliminary recommendations (5 Sep. 2022).

WHOIS and Data Protection: Timeline to New Framework

Enforceable ICANN Policy

Temp. Spec.

Interim Policy (Extension of Temp. Spec.)

Registration Data Consensus Policy

Final Access System

Policy Development (GNSO) & Implementation (org + IRT)

Public Comment Being considered

EPDP Phase 1

Phase 1 Policy Implementation

EPDP Phase 2 (SSAD)

EPDP Phase 2A

Data Accuracy Scoping Team Assignments #1+2

GNSO Council paused work for up to 6 months (in Nov. 2022)

Data Accuracy ST Assignments #2,3,4

SSAD (Phase 2) Implementation

ICANN Board & Org

SSAD Operational Design Phase

WHOIS Disclosure System
11 months + 2 years

Board/GNSO Consultation

May 2018   **May 2019**   **July 2020**

| 2018 | 2019 | 2020 | 2021 | 2022 | |

Legend: Completed   Ongoing   Uncertain Timeline

Draft Registration Data Consensus Policy (EPDP Phase 1)

Background

- The GNSO initiated Phase 1 of the EPDP in 2018 to determine if the Temp Spec should become an ICANN policy as-is or with modifications. In addition, the charter directed that the result must comply with the GDPR and take into account other relevant privacy and data protection laws.

- In February 2019, the EPDP Phase 1 Team submitted its Final report, with the GNSO Council adopting all 29 recommendations. Subsequently, the GAC provided input on the Draft Final Report of the EPDP on gTLD Registration Data, outlining a number of concerns, including with respect to the misuse of WHOIS data and conflicts with applicable privacy and data protection laws.

- In May of 2019, the Board adopted 27 of the 29 GNSO approved recommendations, triggering the community-based Implementation Review Team (IRT) to begin implementing the Policy.

- In August 2022, ICANN org initiated a public comment proceeding seeking input on:
  - The draft Registration Data Consensus Policy for gTLDs, which sets out Consensus Policy requirements concerning the collection, transfer, and publication of gTLD registration data.
  - Updates to the policies and procedures that were impacted by the Registration Data Consensus Policy due to EPDP - Temp Spec Phase 1 Recommendation 27.

Draft Registration Data Consensus Policy (EPDP Phase 1)

GAC Public Policy Concerns (per GAC Comments, 21 Nov. 2022)

- The GAC raised the following concerns with respect to the implementation of the Phase 1 recommendations, including:

  - **The definition and proposed timelines to respond to urgent requests**: while the GAC acknowledged the importance of maintaining a narrowly tailored set of circumstances warranting "urgent requests for lawful disclosure," it recommended that this include "imminent or ongoing cybersecurity incidents."

  - **The collection and publication of reseller data**: The GAC supported inclusion of the "reseller" data element, noting its view that under the 2013 RAA, the definition of "reseller" could include privacy and/or proxy services. The GAC also sought clarification as to which entities should or should not be considered resellers under the policy.

  - The **collection/publication of registration information related to legal entities**: while not strictly within the scope of Phase 1 implementation, the GAC noted that required data elements under the Consensus Policy may change as a result of pending policy recommendations (e.g. Phase 2A).

  - Qualifiers related to **"commercial feasibility" in connection with redacted data**: The noted concern regarding the option to redact data (including legal person data) where it is not technically or commercially feasible to limit such application.

Draft Registration Data Consensus Policy (EPDP Phase 1)

GAC Public Policy Concerns, cont.

- The GAC also noted:

    - **A need for greater clarity**, including regarding the obligation to enter into data protection agreements;

    - **The reasoning behind the conclusion that certain policies are deemed "superseded"** by the Phase 1 implementation; and

    - The need for ICANN Compliance to assess **whether Registrars are providing links on to how to make a disclosure request**.

- Other Big Picture concerns:

    - **Lack of clear standards** in terms of implementation and enforcement

    - Implementation of a **Partial System Resulting in a Policy Gap**

- **Next Steps:**
    - ICANN issued a [Report of Public Comments](#) (20 January 2023).
    - The IRT continues to assess community input.

WHOIS Disclosure System - Background

- **EPDP Phase 2 recommended a Standardized System for Access and Disclosure (SSAD)** after several years of deliberations. **Significant concerns remained** as the GNSO Council recommended it to the ICANN Board. The GAC provided a GAC Minority Statement (24 August 2020) as did many stakeholder groups.

- ICANN's Operational Design Assessment of the SSAD recommendations (24 January 2022), requested by the ICANN Board, **concluded that a complex set of systems and processes would be required, with a wide range of costs and fees** due to uncertain demand

- **The GNSO Council** had requested a consultation with the ICANN Board, upon delivery of the SSAD recommendations, to discuss "*the financial sustainability of SSAD and some of the concerns expressed within the different minority statements*". It **requested the Board pauses consideration of the recommendations to allow work to continue on a proof of concept** given "*the ODA does not provide enough information to confidently determine the cost / benefit of the SSAD recommendations*" (GNSO Council correspondence to ICANN Board, 27 April 2022)

- Following the suggestion of an SSAD-light Concept (April 2022), the proposal of a WHOIS Disclosure System Design (Sep. 2022), **the ICANN Board approved the development of the WHOIS Disclosure System** (Board resolution, Feb. 2023), possibly the "Registration Data Request Service"
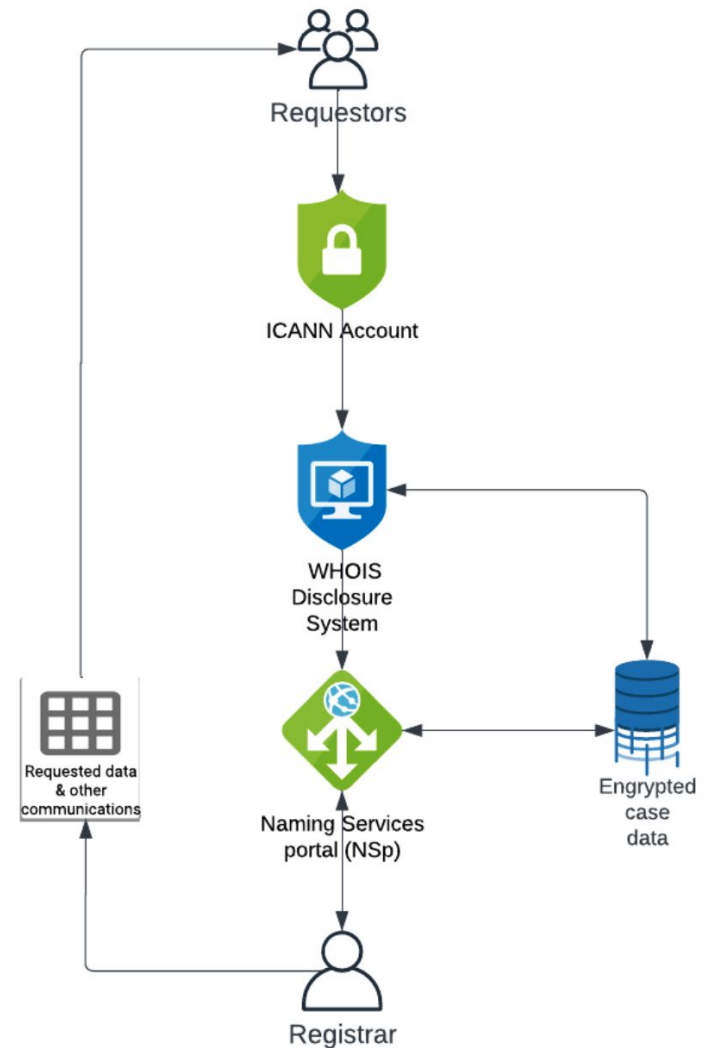
WHOIS Disclosure System

Timeline (per Board [resolution](#) on 27 Feb.):

- Development and launch over the next 11 months (in consultation with Community)

- Operation for up to 2 years (once launched)

- Reporting on usage data "*at a regular cadence*"

- No later than 2 years of operation, re-initiate discussions regarding next steps on SSAD recommendations

Reminder of Key Features per ICANN org [Design Document](#)

- Central portal for intake of requests

- No cost to requestors

- No authentication / identify verification of requestors

- Only Registrars to respond to requests for disclosure of data (does not include requests directed at Registries)

- Requests are automatically routed to the appropriate registrar's Naming Services portal (in use for other services)

- All requestor/registrar communications (including disclosure of data) to take place outside of the system

GAC Kuala Lumpur Communiqué: *This system is a useful first step towards building a more comprehensive solution [...]. It should facilitate the collection of useful data [...] in a quicker and more cost-effective manner*

WHOIS Disclosure System Usage Data

Usage Data as recommended by the GNSO Small Team addendum (7 Nov. 2022) to include:

- Number of registrars participating (total) and new participating registrars (current period)

- Number of requestors (total) and new requestors (current reporting period)

- Number of disclosure requests

- Number of times the data request form for non-participating registrars has been used

- Number of disclosure requests by priority

- Number of disclosure requests by requestor type (LEA, IP, Cybersecurity, etc)

- Number of disclosure requests broken out by participating and non-participating registrars

- Number of open disclosure requests

- Number of closed disclosure requests

- Number of closed disclosure requests by type (approved, partial approval, rejected, etc)

- Average disclosure request response time (approved, partial approved and denied responses)

- Response time distribution (mean, median, histogram by timeframe), including time from the request until the request is addressed, differentiating between approved and denied responses.

WHOIS Disclosure System - GAC Consideration

Reminder: Risks and related concerns (discussed by the GAC during ICANN75)

- Uncertainty as to adoption by Registrars (participation is voluntary)

- Lack of awareness, misconceptions about guaranteed data disclosure may lower/deter usage

- May not produce actionable data for consideration of SSAD (due to lack of use)

- No functionality for confidentiality of law enforcement requests (per Ph. 2, Rec. 12)

Relevant GAC Statements in the GAC Kuala Lumpur Communiqué (26 Sept. 2022):

- *The GAC highlights the **importance of engaging in education and outreach** with potential requesters so that these requesters learn of the WHOIS Disclosure System's availability.*

- *The GAC invites ICANN to consider the participation in the System of registry operators, as well as exploring **incentives for both registries and registrars to participate***

- *The GAC finds it very important to **log [approvals or denials of requests, timing of the response, and reasons for denial] in a proper manner** as this will help to ensure the system is generating robust and useful data to inform future work*

- *The GAC stresses the **importance of including a mechanism to allow for confidential law enforcement requests**. The GAC recommends ICANN org engages with the GAC PSWG to further discuss the issue of how confidentiality of law enforcement requests will be ensured and how the (meta) data of all the requests of law enforcement agencies will be handled.*

WHOIS Disclosure System - Next Steps / Open Questions

Per ICANN Board Resolution (27 February 2023):

- ICANN to work with the GNSO to **encourage comprehensive System usage by data requestors and by ICANN-accredited registrars** throughout the development and operation of the System.

- The ICANN Board urges the GNSO Council to **consider a Policy Development Process or other means to require registrars to use the System**

- The ICANN Board will engage with the GNSO Council together with the Small Team and ICANN org to **establish success criteria for this System**, which should include analysis of relevant usage data

- **Usage statistics** will inform periodic check-in discussions

Registration Data Accuracy (1/3)

GAC Positions to Date

- In the ICANN72 GAC Communiqué, the GAC expressed support for the GNSO Scoping Team's work.

- In the ICANN73 GAC Communiqué, the GAC "*emphasized the importance of holding contracted parties accountable for their compliance with the existing accuracy requirements, as well as the importance of increasing transparency about compliance, in order to inform an evidence-based analysis of these issues*" while noting that "*maintaining accuracy must be considered along with any policy's impact on the privacy needs of all registrants, including those registrants with enhanced privacy needs.*"

- In the ICANN74 GAC Communiqué, the GAC called for the Scoping Team to move toward resolution of Assignment 1, stressing that "*contractual requirements are not limited to accurate but also reliable data,*" while welcoming continued work on the development of a Registrar Survey and "*additional and complimentary work items, such as testing of accuracy controls in a manner that is not dependent on access to personally identifiable data.*"

Registration Data Accuracy (2/3)

Interim Report to the GNSO Council

- On 6 September, the Scoping Team's [Interim Report](#) was delivered to the GNSO covering:
    - assignment #1: a "Current Description" of Accuracy
    - assignment #2: Possible ways to measure the current state of accuracy that require or do not require access to registration data.

- The report includes three recommendations in total:

    1. **A Registrar Survey be conducted** on the status of accuracy of their domains under management.

    2. **A Registrar Audit be considered** regarding procedures for determining the accuracy of registration data.

    3. **A pause of the Scoping Team's work on _only_ those proposals that require access to registration data** until such time when it is sufficiently clear whether proposals that require access to registration data are a viable path to assess the current state of accuracy.
    The Scoping Team further recommends the GNSO Council:
        – Request ICANN org to proceed with their outreach to the EDPB as a matter of urgency
        – Request ICANN org to proceed with a Data Protection Impact Assessment in connection with the scenario(s) in which the processing of data takes place
        – Call out the importance of finalizing the Data Processing Agreement between ICANN and Contracted Parties

Registration Data Accuracy (3/3)

ICANN75 Position.

- In the ICANN75 GAC Communiqué, the GAC took "*note of the recommendations of the Interim Report on Assignments #1 and #2 and encourages the Scoping Team to continue its work while ICANN awaits feedback from the relevant data protection authorities regarding its legal basis for processing data for the purposes of measuring accuracy*" while "*encouraging the widest possible participation of registrars in the Registrar Survey and welcomes the exploration of approaches to incentivize participation in it, as well as consideration by the Scoping Team or the GNSO Council of the use of a third party to aid in its design.* "

Intersessional Update:

- In November, the GNSO Council adopted a motion to pause the work of the scoping team and to defer consideration of recommendations #1 and #2 "until such time the DPA negotiations between ICANN org and Contracted Parties have completed and there is feedback from ICANN org on if/how it anticipates the requesting and processing of registration data to will be undertaken in the context of measuring accuracy, or for six months, whichever is the shorter."

Considerations for Cancun Communiqué

- Draft Registration Data Consensus Policy (EPDP Phase 1):

  - Are there public policy concerns raised in the GAC's Public Comment that GAC would like to highlight under Issues of Importance ?

- Further consideration of SSAD dependent on outcomes of RDRS pilot

  - Need for more information on processes to encourage robust participation by Contracted Parties and requesters

  - Follow-up on Kuala Lumpur Communiqué request for engagement on confidentiality of Law Enforcement requests

  - Are there any other GAC concerns with the pilot as launched by the ICANN Board ?