

## Draft Motion For Discussion Only

### Affirmation of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data Phase 1 Final Report on Recommendation 7

#### WHEREAS

1. The GNSO Council [adopted](#) all the policy recommendations, including Recommendation #7, in the EPDP Phase 1 Final Report on 4 March 2019 with the required GNSO Supermajority.
2. Recommendation #7 of the Final Report was developed by the EPDP Phase 1 Team following an extensive discussion of (i) ICANN org’s lawful purposes for processing registration under Purpose 1B (p. 35) and the accompanying data elements workbook and associated definitions (p. 103 and 94, respectively); and (ii) the transfer of data from Registrar to Registry Operators (please refer to the EPDP Team meeting transcript from [06 February 2019](#)).
3. Recommendation #7, which provides: “[t]he EPDP Team recommends that the specifically-identified data elements under ‘[t]ransmission of registration data from Registrar to Registry’, as illustrated in the [aggregate data elements workbooks](#), must be transferred from registrar to registry provided an appropriate legal basis exists and data processing agreement is in place. In the aggregate, these data elements are: [followed by the list of data points that may be transferred, some marked as Required (mandatory) (namely, domain name, fields pertaining to the Registrar and Domain Statuses), others as Optional (contact fields, name servers, Registrar expiry date and Reseller)]”, achieved a consensus designation of “Full Consensus / Consensus” (see Annex E of the [Final Report](#)).
4. As part of the Final Report, a number of Minority Statements were submitted. Two of these, specifically referencing the issue of “Thick Whois”:
  - a. “[e]mbedded throughout the report is the concept that we will abandon the concept of Thick WHOIS. ICANN and the volunteer community recently spent considerable time and effort on the Thick WHOIS PDP which determined that there were substantial benefits to using the Thick model. This was discarded by the EPDP without due consideration of whether these benefits could justify the incorporation of this model into the GDPR solution. It was simply deemed to be ‘non-conforming’ with GDPR without addressing the underlying rationales and alternatives.” (At-Large Advisory Committee (ALAC))
  - b. “[w]e agree with concerns expressed by ALAC regarding Thick WHOIS. A middle ground may be to have currently-thick TLDs remain thick, and permit currently-thin gTLDs to stay thin. There are no assurances of verification for data accuracy in non-redacted WHOIS fields, nor any requirement to respect a registrant’s consent to publish his or her contact information.” (Business Constituency (BC) and the Intellectual Policy Constituency (IPC))
5. On 29 March 2019, the GNSO Council submitted the Final Report and the GNSO Council’s [Recommendation Report](#) to the ICANN Board.
6. On 15 May 2019, the ICANN Board passed a [resolution](#) adopting most of the EPDP-P1’s Final Report recommendations, including Recommendation #7.

While adopting Recommendation 7, the ICANN Board noted the following regarding the transfer of data from the Registrar to the Registry within its accompanying [scorecard](#):

- a. 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.
- b. The Board requests that the EPDP Phase 2 Team consider whether the suggested corrections contained in the Registry Stakeholder Group's comments and the accompanying chart in Appendix G more accurately reflect the Phase 1 consensus and should be adopted.
- c. 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.

With regard to 6(a) above, there are divergent views within the Council. With regard to 6(b) above, the Council understands that the request from the Board was not communicated to the EPDP Phase 2 Team nor did the EPDP Phase 2 Team consider such request.

7. On 20 May 2019, ICANN Org published a [Call for Volunteers](#) and on 29 May 2019, the Implementation Review Team held its [first formal meeting](#).
8. On 07 November 2019, the ICANN Board passed a [resolution](#) to defer contractual compliance enforcement on the [Thick WHOIS Transition Policy for the fifth time](#), noting that three conditions must be satisfied before enforcement can begin:
  - a. the gTLD Registration Data Policy Implementation Review Team (IRT) completes its review and establishes an implementation timeline estimate of the Expedited Policy Development Process (EPDP) Team's [recommendations](#) as [adopted](#) by the ICANN Board on 15 May 2019;
  - b. ICANN org and the IRT provide the GNSO Council with the required information on the impacts of the EPDP Team's recommendations on existing policies and procedures (including the Thick WHOIS Transition policy), and
  - c. the GNSO Council makes a determination on whether to take action on updates to relevant policies and procedures (which could include additional policy work, guidance, or other actions to be determined) impacting the Thick WHOIS Transition Policy.
9. On 14 January 2020, ICANN Org submitted to the GNSO Council, per the EPDP Phase 1, Recommendation #27, the [Wave 1 report](#) denoting the impacts of other consensus policies as a result of implementing the Phase 1 recommendations. The report notes that the impact was identified as “High” and noting in part that the draft Registration Data Policy does not use the terms “thin” or “thick”, but rather is structured by processing activities of collection, transfer, and publication. It also states, “[t]he Thick [WHOIS] Transition Policy Section 2 references Thin and Thick definitions, which may be eliminated if there is no need for a distinction among these types of registries.”

10. On 10 March 2020, ICANN GNSO Policy staff submitted to the GNSO Council a report on possible next steps to address the Recommendation 27 Wave 1 report, noting in particular, “TBD – Some questions have arisen in the IRT concerning the impact of the phase 1 recommendations on the Thick [WHOIS] policy. Those questions should be addressed before further consideration is given to if/how to affect further updates.”
11. On 11 March 2020, The ICANN Board sent a [letter](#) to the GNSO Council noting, “this letter is to address what appears to be reaching an impasse in regard to completing the implementation of the Phase 1 recommendations. [. . .] The Board understands that ICANN org has drafted the Registration Data Policy language based on the direction provided by the Board when it took action on the policy recommendations -- that is, ‘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’. [. . .] Given the uncertainty characterizing the implementation discussions on Recommendation 7, I would underscore that the Board supports continued dialogue on a mechanism to transparently identify any impacts of proposed new policies on existing policies as part of the GNSO Council or Board consideration of new recommendations going forward. Absent a clear statement in new consensus policy recommendations that the new policy is intended to supercede (in whole or part) requirements in existing consensus policies, the Board’s position is that existing policy requirements will continue to stand. If a policy recommendation is unclear as to its intended impact on an existing ICANN consensus policy, this may be a basis to conclude that its adoption would not be in the best interests of the ICANN community or ICANN org, pursuant to Annex A, Section 9, of the ICANN Bylaws. In such case, the Bylaws provide for Council and Board discussions and potential Supplemental Recommendations from the Council.”
12. On 22 April 2020, representatives from the ICANN Board attended a Registration Data Policy IRT [meeting](#) to [reinforce](#) the ICANN Board’s position related to Recommendation #7 and its letter to the GNSO Council.
13. On 18 May 2020, the Contracted Party House, via their representatives serving on the Registration Data Policy IRT, sent a [letter](#) to the GNSO Council stating their position regarding Recommendation #7.
14. On 29 May 2020, the GNSO Council [responded](#) to the ICANN Board’s letter of 11 March 2020 regarding Recommendation #7, agreeing with the ICANN Board that Recommendation #7 does not overturn the existing policy of Thick WHOIS and confirming, “the role of the GNSO Council to initiate an appropriate policy development process to review and recommend any required changes to impacted Consensus Policies.” Further, the GNSO Council requested “the GNSO Council liaison to engage with the IRT to attempt to resolve the disagreement, and better understand the potential impasse. If the GNSO Council liaison, in consultation with the IRT, determines that there is consensus to raise an issue with the GNSO Council, then the GNSO Council requests, given the technical and detailed nature of this matter, a clear and concise briefing from ICANN org and the GNSO Council liaison detailing the precise nature of the impasse so that the GNSO Council can make an informed determination on how to proceed.”

15. On 29 May 2020, the GNSO Council instructed the Council’s Registration Data Policy IRT Liaison to engage with the IRT to further investigate the possible impasse regarding the EPDP-P1’s Recommendation #7.
16. On 17 June 2020, an IPC and BC joint paper was submitted to the Council’s Liaison to the Registration Data Policy IRT and the IRT.
17. On 07 July 2020, the ICANN Board [acknowledged](#) the GNSO Council’s letter from 29 May 2020, “[w]e [ICANN Board] ask that the Council carefully consider, when and if reviewing the issue, that implementation of EPDP Phase 1 recommendation #7 be consistent with the current Thick [WHOIS] Transition Policy, and that any change to that policy needs to be done through a GNSO policy development process, as you have already acknowledged.”
18. On 14 September 2020, the EPDP-P1 IRT GNSO Council Liaison submitted his [report](#) on the possible impasse regarding Recommendation #7 within the Registration Data Policy IRT. The Liaison engaged IRT participants and documented the following inputs:
  - a. [Marc Anderson’s 20 Dec 2019 paper](#)
  - b. [Letter by the CPH sent to the GNSO Council on 18 May 2020](#)
  - c. [IPC and BC joint paper](#)
19. On 24 September 2020, at its meeting, the GNSO Council agreed to reconvene the small team to work on a response/guidance to the IRT and to expedite the review of Thick WHOIS Transition Policy as envisaged by Recommendation 27 of the EPDP Phase 1 Final Report, in alignment with the [Implementation Review Team Principles and Guidelines](#) for the Council to “make a determination on how to proceed which could include, for example, the initiation of a GGP, a PDP or further guidance to the IRT and/or GDD staff on how to proceed” and the Consensus Policy Implementation Framework [https://www.icann.org/uploads/ckeditor/CPIF\\_v2.0\\_2019CLEAN.pdf](https://www.icann.org/uploads/ckeditor/CPIF_v2.0_2019CLEAN.pdf), which provides: “ICANN org is accountable to the GNSO Council (or its agent, such as an Implementation Review Team) for ensuring that the implementation of policies is consistent with the policy recommendations and the reasoning underlying the policy recommendations as outlined in the Final Report. Where there is uncertainty surrounding the intent underlying a policy recommendation, GDD staff will consult with the IRT to clarify that intent. “... “Once policies are adopted by the Board, the GNSO Council serves as a resource for staff who have questions about the background or intent of the policy recommendations during its implementation. The GNSO Council may continue to provide input on the implementation of a policy, for example, if the GNSO Council believes that the implementation is inconsistent with the policy.”

## RESOLVED

1. The GNSO Council:
  - a. Reaffirms the intent of EPDP-P1 Recommendation# 7 and determines that the inclusion of the recommendation language, “must be transferred from registrar to registry provided an appropriate legal basis exists and data processing agreement is in place” into the Registration Data Policy conforms with the intention of the EPDP Phase 1 Team’s recommendation and the subsequent GNSO Council adoption.

- b. Per Section III. A of the Consensus Policy Implementation Framework, the “GNSO Council may continue to provide input on the implementation of a policy, for example, if the GNSO Council believes that the implementation is inconsistent with the policy”, and, as such, instructs the Council’s Liaison to the Registration Data Policy IRT to communicate this input.
    - c. Will communicate this input to the ICANN Board.
  2. The GNSO Council will form a scoping team consistent with EPDP Phase 1 Recommendation 27: Registration Data Policy Impacts Report, (“Wave 1 Report”) Section 3.10 to develop the initiation request and a proposed Charter for an Expedited Policy Development Process on the Thick WHOIS Transition Policy.

## RATIONALE

As part of the EPDP Phase 1 deliberations, a compromise within the Contracted Parties House resulted in the bifurcation of Purpose 1 into Purpose 1A, “In accordance with the relevant registry agreements and registrar accreditation agreements, activate a registered name and allocate it to the Registered Name Holder” and Purpose 1B, “Subject to the Registry and Registrar Terms, Conditions and Policies and ICANN Consensus Policies: (i) Establish the rights of a Registered Name Holder in a Registered Name; and (ii) Ensure that a Registered Name Holder may exercise its right in the use, maintenance and disposition of the Registered Name.”

During its discussion of Purpose 1B, the EPDP Phase 1 Team specifically investigated the processing activities of transferring personal data from Registrars to Registry Operators and noted that in some cases, a Purpose and/or a legal basis may not be established. The EPDP Phase 1 Team the Final Report notes (at p.43):

“ As part of this analysis, the EPDP Team has identified a set of data elements that are required to be transferred from the registrar to the registry in order to fulfill the Purposes for Processing Registration Data. This set of data elements constitutes an “aggregate minimum data set.” This is an aggregate minimum data set of all identified Purposes that registrars will be required to transfer to registries. This aggregate minimum data set also includes those data elements that MAY NOT be transferred from the registrar to the registry, where such a registry does not require such a transfer (**with due regard to that registry’s terms, conditions, and policies**). (Emphasis added)

The reference to “registry’s terms, conditions and policies” was meant to refer to individual registries’ own legitimate purposes and legal basis that would support the lawful transfer of registrant contact data from the registrars.

The GNSO Council understands that the inclusion of the Recommendation #7 language “must be transferred from registrar to registry provided an appropriate legal basis exists and data processing agreement is in place” was previously agreed to by the full IRT and it would best reflect the intent of the EPDP’s recommendation. Further, it is the GNSO Council’s view that this will, in the near term, resolve the impasse between ICANN Org and the IRT, thus allowing the IRT to continue forward with its assigned work and responsibility, recognizing that this issue has been one of several root causes for other disagreements for additional processing activities that have also contributed to missing the 29 February

2020 deadline to implement this policy. Further, the inclusion of this language in the policy allows the IRT to move forward with implementation of Recommendation #7 as written and intended by the EPDP Team. The GNSO Council does understand, however, that inclusion of this language ultimately results in a compliance issue until such time as the Thick WHOIS Transition Policy is either enforced, reconfirmed, amended, or repealed.

The GNSO Council also recognizes that the current Thick WHOIS Transition Policy enforcement is deferred until three conditions are met:

- a. the gTLD Registration Data Policy Implementation Review Team (IRT) completes its review and establishes an implementation timeline estimate of the Expedited Policy Development Process (EPDP) Team's recommendations as adopted by the ICANN Board on 15 May 2019;
- b. ICANN org and the IRT provide the GNSO Council with the required information on the impacts of the EPDP Team's recommendations on existing policies and procedures (including the Thick WHOIS Transition policy); and
- c. the GNSO Council makes a determination on whether to take action on updates to relevant policies and procedures (which could include additional policy work, guidance, or other actions to be determined) impacting the Thick WHOIS Transition Policy.

To date, the GNSO Council has yet to initiate additional policy work on the Thick WHOIS Transition Policy mostly due to lack of resources and community bandwidth constraints. However, the GNSO Council affirms that currently defined processes are followed precisely, and therefore could not take more immediate action until it was properly notified of the issue within the Registration Data Policy IRT. As a reference:

*Additionally, pursuant to Implementation Review Team (IRT) Principles & Guidelines, In the event of disagreement between ICANN Staff and the IRT or any of its members on the implementation approach proposed by ICANN Staff, the GDD Project Manager, in consultation with the GNSO Council liaison if appropriate, shall exercise all reasonable efforts to resolve the disagreement. Should the disagreement prove irreconcilable despite such efforts, the GNSO Council liaison in consultation with the IRT is expected to make an assessment as to the level of consensus within the IRT on whether to raise the issue with the GNSO Council for consideration, using the standard decision making methodology outlined in the GNSO Working Group Guidelines. If the GNSO Council liaison makes the determination that there is consensus for such consideration, the liaison will inform the GNSO Council accordingly which will deliberate on the issue and then make a determination on how to proceed which could include, for example, the initiation of a GGP, a PDP or further guidance to the IRT and/or GDD staff on how to proceed. This process also applies to cases in which there is agreement between the IRT and GDD staff concerning the need for further guidance from the GNSO Council and/or when issues arise that may require possible policy discussion.*

While resource and bandwidth constraints are still a concern, the GNSO Council will immediately launch a scoping team to inform the possible initiation of an EPDP on the review of Thick WHOIS Transition Policy now that it has been properly notified by the IRT's Liaison of the apparent urgency of this issue.

Regarding communication back to the ICANN Board regarding this decision, the GNSO Council takes note of GNSO Operating Procedures, p. 75:

*ICANN staff should inform the GNSO of its proposed implementation of a new GNSO recommended policy. If the proposed implementation is considered inconsistent with the GNSO Council's recommendations, the GNSO Council may notify the Board and request that the Board review the proposed implementation. Until the Board has considered the GNSO Council request, ICANN staff should refrain from implementing the policy, although it may continue developing the details of the proposed implementation while the Board considers the GNSO Council request.*