

IPC Statement at GNSO Council of 24 September 2020

Re: Item 4 of the Agenda: Adoption of the Final Report of the EPDP on the Temporary Specification Phase 2

I. Introduction.

The IPC wishes to thank all of the members of the EPDP and ICANN staff for the incredible amount of work that has gone into deliberations and the creation of the EPDP Phase 2 Final Report. As many know, the IPC and BC together submitted a minority statement¹ detailing its reasoning as to why the EPDP Phase 2 Final Report fails to deliver a System for Standardized Access that meets the needs of its users. This statement is not an indictment of the ICANN consensus-driven multi-stakeholder model. To the contrary, the IPC believes that the Final Report is premature and that with proper scoping, processes, and additional regulatory guidance that consensus on a real workable Standardized Access system can be achieved.

Fundamentally, the IPC believes that the EPDP's Charter² remains unfulfilled. This is problematic, for several important reasons. Firstly, more than two years of resource-intensive efforts by the ICANN community and ICANN Org are essentially wasted by an outcome that will not meet the needs of, and therefore will not be used by, stakeholders. Secondly, the GNSO Council's approval of a PDP outcome that leaves charter requirements unresolved or unfulfilled sets a dangerous and yet entirely avoidable precedent for future ICANN policy development, which in turn puts the viability and legitimacy of the ICANN multi-stakeholder model at risk. The impacts of the upcoming GNSO Council vote on the EPDP Phase 2 Final Report will extend far beyond the subject matter of the EPDP, undermining us all and what we could achieve together in this model.

The IPC therefore implores the GNSO Council to take due account of their own procedural rules and requirements as documented in the GNSO Operating Procedures.³ These procedures, which include the GNSO Working Group Guidelines, the Policy Development Process Manual, and the Expedited GNSO Policy Development Process Manual, provide clear instructions to the GNSO Council to ensure that the responsibility conferred upon it by the ICANN Bylaws is carried out properly. These procedures *require* that the GNSO Council deliberate in a particularly considered way “[i]n the event that the Final Report includes recommendations that did not achieve the consensus within the PDP Team”.

The IPC appreciates that the community feels a crushing fatigue. We feel it, too. Nevertheless, we all have a duty to uphold the GNSO Operating Procedures and the ICANN Bylaws. Failure to do so may invalidate any outcomes of this effort and undermine the GNSO's unique authority to develop policy affecting gTLDs.

¹ <https://gns0.icann.org/sites/default/files/file/field-file-attach/epdp-phase-2-temp-spec-gtld-registration-data-2-31jul20-en.pdf> (at page 114 of 199)

² <https://gns0.icann.org/sites/default/files/file/field-file-attach/temp-spec-gtld-rd-epdp-19jul18-en.pdf>

³ <https://gns0.icann.org/sites/default/files/file/field-file-attach/op-procedures-24oct19-en.pdf>

The IPC recognizes and applauds the years of hard work and sacrifice that the EPDP members have made to create the current version of the EPDP, but the IPC cannot support the Phase 2 Final Report as drafted because more work is left to be done to create a robust and efficient system that will be sustainable.

II. The EPDP's Charter Remains Unfulfilled.

As set forth in the Bylaws for Internet Corporation for Assigned Names and Numbers (ICANN), the GNSO Council “shall be responsible for developing and recommending to the Board substantive policies relating to generic top-level domains and other responsibilities of the GNSO as set forth in these Bylaws.”⁴ A significant aspect of the GNSO Council’s responsibilities is to serve as a program manager of the various policy-making and implementation projects. To this end, the GNSO Council has thoughtfully developed guidelines and processes for the study and initiation of issues reports, the chartering of Policy Development Processes (PDPs), the creation of working groups and rules for their deliberations, consensus assessment and preparation of PDP reports, including final reports made to the GNSO Council.

The Policy Development Process Manual (“PDP Manual”) provides that after collection and review of information, the PDP Team and Staff are responsible for producing an Initial Report, which is to include recommendations for policies, guidelines, best practices or other proposals to answer or address the issues raised in the PDP Charter.

On 19 July 2018, the GNSO Council initiated an Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data and setting forth the following mission and scope in the charter for the EPDP Team:

Mission and Scope. This EPDP Team is being chartered to determine if the Temporary Specification for gTLD Registration Data should become an ICANN Consensus Policy, as is or with modifications, while complying with the GDPR and other relevant privacy and data protection law. As part of this determination, the EPDP Team is, at a minimum, expected to consider the following elements of the Temporary Specification and answer the following charter questions. The EPDP Team shall consider what subsidiary recommendations it might make for future work by the GNSO which might be necessary to ensure relevant Consensus Policies, including those related to registration data, are reassessed to become consistent with applicable law.

With respect to Phase 2, the Charter Questions to be answered were related to:

- (a) Purposes for Accessing Data
- (b) Credentialing
- (c) Terms of access and compliance with terms of use

⁴ ICANN Bylaws at Article 11: <https://www.icann.org/resources/pages/governance/bylaws-en/#article11>.

Notwithstanding GNSO Council's prerogative to remove the concept of accuracy from the EPDP's remit, several other sections of the EPDP Charter which were not removed remain unfulfilled.

Phase 1 Charter Questions h3)-h5)

The concept of whether contracted parties should be “allowed or required to treat legal and natural persons differently, and what mechanism is needed to ensure reliable determination of status” **remains unresolved**. In fact, legal advice on the latter was sought and received by the EPDP Team, but never considered. Furthermore, at the direction of the Phase 1 Final Report Recommendation #17, ICANN put significant time and effort into conducting a study on the feasibility of making this distinction. Yet, the EPDP Team neither considered nor discussed the contents of that study.

System for Standardized Access Charter Questions (a)

Several parts of Question (a) have not been addressed since the EPDP ventured into developing a “hybrid model.” The EPDP did not consider what eligibility criteria could ensure access to data as required by Section a3). The EPDP also did not decide which data elements users should have access to as required by Section a5) and a6). Finally, the EPDP did not consider how RDAP could be used to respond to automated queries as required by Section a7).

System for Standardized Access Charter Questions on Temp Spec Annex

The EPDP Charter called for it to address “the items included in the Temporary Specification Annex, listed as ‘Important Issues for Further Community Action.’” However, the EPDP did not address Sections 2, 4, or 5 in the Annex. These important sections include topics: “feasibility of requiring unique contacts to have a uniform anonymized email address,” “consistent process for continued access...on a mandatory basis for all contracted parties,” and “distinguishing between legal and natural persons to allow for public access to the Registration Data of legal persons, which are not in the remit of the GDPR.”

The IPC is not alone in its concerns. Three out of four of the ICANN Advisory Committees submitted minority statements to the EPDP Phase 2 Final Report.⁵ All such minority statements were similar in pointing out concerns and urging the EPDP to continue with its important work to reach consensus.

In addition, the IPC, like others, believes that a centralized unified access model (UAM) is possible. Although, initially, the Belgian DPA wrote that, “...it is not possible to make a determination” based only on the level of detail in ICANN's UAM proposal. The Belgian DPA clarified that policy questions around, “who gets access to what, and under what conditions, for how long, as well as other relevant safeguards” are, “extremely important when assessing whether the model which is ultimately developed complies with the requirements of GDPR.”

⁵ <https://gns0.icann.org/sites/default/files/file/field-file-attach/epdp-phase-2-temp-spec-gtld-registration-data-2-31jul20-en.pdf>

To eliminate any remaining doubt, after the EPDP team misinterpreted this letter as decrying the UAM, the Belgian DPA explicitly clarified its position during its February 14, 2020 meeting with ICANN staff. Göran Marby, President and CEO of ICANN, reported from that meeting:

With respect to the possibility of developing a centralized model that is GDPR-compliant, the representatives said that the letter from the Belgian DPA was intended as encouragement to continue efforts to develop a comprehensive system for access. They said that the letter was not meant to deter the development of a centralized model. Rather, the Belgian DPA's representatives said a centralized model is worth exploring and it seems to be a better, "common sense" option in terms of security and for data subjects.

As a final example, the Bird & Bird memo to the EPDP on automation and centralized decision-making noted that the scenario presented where ICANN makes disclosure decisions centrally, "offers least risk of liability to CPs." While rejecting a centralized/UAM model may have been a policy preference for some parties, it was not a foregone conclusion.

The IPC recognizes and applauds the years of hard work and sacrifice that the EPDP members have made to create the current version of the EPDP, but the IPC cannot support the Phase 2 Final Report as drafted because more work is left to be done to create a robust and efficient system that will be sustainable.