Addendum – Recap of 12 January Meeting between Council, EPDP Phase 2 Members and SG/C Leadership

(Please note that this is a high level recap of the main points raised during the discussion. For the full details, please see here for the recording and background materials for this meeting)

- The objectives of the meeting were identified as:
  - Consider initial reactions following 20 Dec presentation & informal discussion (see also Discussion Paper)
  - Determine what further steps, if any, need to be taken to prepare for the consultation with the ICANN Board
  - Determine what common views, if any, there are on potential next steps and possible Council action
- There was general agreement that a substantive discussion and formulation of a possible position can only happen after the Council had an opportunity to review the detailed findings and data that are expected to be contained in the Operational Design Assessment (ODA).
- At the same time, it was agreed that it would be important to hear from the ICANN Board about their possible concerns, especially if there are concerns beyond the cost aspect of SSAD.
- Some indicated that even though the GNSO Council has the ability to modify the SSAD recommendations before the ICANN Board considers these, there might be value in letting the ICANN Board make a determination first as that would require the ICANN Board to provide its views as well as concerns that could help inform possible modifications in the form of a Supplemental Recommendation.
- Some noted the importance of better understanding how any cost estimates in the ODA have been arrived at and what the sources may have been to arrive at these estimates. In addition, better understanding the costs / complexities of the different parts would also facilitate any possible consideration of either removing certain parts or considering a phased implementation approach.
- Some suggested that a phased implementation could be a path to be further explored although others pointed out that there might be costs and complexities involved in adding features at a later stage. Some also highlighted that increasing the automation of certain features, such as accreditation, could reduce costs and complexities. Some also pointed to the fact that the original recommendations were to be considered as a package – if certain features are to be removed, would that change the original support that was obtained?
- Some pointed out that the conversation around cost reduction might be more accurately referred to as shifting of costs: something (a "feature"/function/etc) which may not be done, supported or funded by SSAD, is likely to be transferred to another party such as Contracted Parties or registrants who instead may bear the costs.

Action items:
1. Philippe to reach out to ICANN Board to relay expectations in relation to upcoming conversation (starting point to learn about Board perspectives, ODA information will need to be reviewed by Council before any formal position can be taken).

2. Council and EPDP Phase 2 members to put forward suggestions for how/who should review and analyse ODA once this information becomes available.
3. Council to discuss in further detail during the upcoming Council meeting (20 January) the procedural avenues available to the Council as well as possible approach for reviewing ODA.

EPDP Phase 2 – System for Standardized Access & Disclosure (SSAD)
Possible Next Steps Discussion Paper – 4 January 2022

Following the informal SSAD ODP update on 20 December, in which representatives from the ICANN Board GDPR Caucus, ICANN org, the GNSO Council and GNSO appointed members of the EPDP Phase 2 team participated, the following paper aims to provide a high level outline of the different ideas and suggestions that were made during that meeting. This is intended to serve as a basis for further discussions within the GNSO community for how to prepare for next steps in the consultation with the ICANN Board.

Procedural Considerations

As outlined in Philippe's original email (see https://mm.icann.org/pipermail/council/2021-December/025259.html), there are roughly three scenarios which can be anticipated, two of which would require involvement of the GNSO Council.

1. *The ICANN Board determines that the adoption of the recommendation is not in the best interest of the ICANN community or ICANN*

In this scenario the ICANN Board would not adopt all or part of the recommendations, following which the GNSO Council will be requested to affirm or modify its recommendations in the form of a "Supplemental Recommendation". This process is described in Annex A-1 of the ICANN Bylaws (see Annex). The process does not prescribe how the GNSO Council is expected to develop a possible supplemental recommendation. In recent history, one supplemental recommendation was adopted by the GNSO Council in the context of EPDP Phase 1, where part of recommendation #12 was not adopted by the ICANN Board. In this specific case, the GNSO Council consulted with the EPDP Team on how to proceed (see https://gnso.icann.org/en/council/resolutions/1999-2019#20191219-3).

Possible advantages of this approach:
- The Board is required to articulate the reasons for its determination that the adoption of the recommendations is not in the best interest of ICANN the community or ICANN org. This could provide the GNSO Council with further insights into what specific aspects are considered problematic, which it could then factor into the development of a possible supplemental recommendation.

Possible disadvantages of this approach:
- This approach requires the GNSO Council to wait until the Board has taken action which could mean that significant time is lost during which the GNSO Council could have already been working on possible changes adding to the overall timeline of addressing this issue.

2. *GNSO Council decides to make amendments or modification to the policy recommendations*

Based on the information received during the meeting, the GNSO Council could also determine that it proactively wants to make amendments or modifications to the

recommendations it approved, per section 16 of the GNSO PDP Manual (see Annex) before the ICANN Board considers the recommendations for approval. Section 16 prescribes the minimum requirements that need to be followed, including consultation with the EPDP Team on the proposed amendments or modifications as well as posting the amendments or modifications for a minimum of 30 days. This procedure has been used most recently in the context of the topic of Red Cross Names (see https://gnso.icann.org/en/council/resolutions/1999-2019#20180927-3).

Possible advantages of this approach:
- It would allow the GNSO Council to take the initiative and propose modifications that it believes are necessary to ensure that the recommendations are in the best interest of the ICANN community or ICANN org.
- It would allow the GNSO Council to start working on this now, instead of waiting for the ICANN Board to take action.

Possible disadvantages of this approach:
- As noted during the informal meeting, unless the GNSO Council is very specific in relation to the proposed modifications and what these can and cannot reopen, there is a risk of relitigation. Some suggested that if this approach were to be followed, all would need to accept the premise that also in a modified version of SSAD Contracted Parties would remain responsible for making the ultimate determination about whether personal data is disclosed.

Substantive ideas and suggestions

During the informal discussion, several ideas and suggestions were made for possible modifications (whether as a result of #1 or #2 above) that could be further considered in order to address the concerns about complexity and costs that were raised as a result of the ODP.

General observations / comments:
- Several indicated that before embarking on any further work, it will be important to analyze the findings of the ODP, especially the detailed costing models, which are expected to be published in the form of an Operational Design Analysis (ODA) in February 2022, to better understand which specific aspects are adding to the complexity and/or cost of SSAD.
- There seemed to be receptiveness to the idea that ICANN org would bear the costs for developing and running a simplified system, although some noted that there might need to be a token costs for requestors to avoid a barrage of requests.
- Should further consideration be given to making SSAD the required or recommended path for data disclosure requests so that if a system is built, it can count on requestors using it, instead of using the alternative path of going directly to a Contracted Party?
- It was suggested that if/when modifications are made, consideration would need to be given to ensuring that the end result 1) remains secure and compliant with existing legislation; 2) is less complex and can be implemented more easily, and 3) adds value for those using the system.

- Although it is important that timely decisions and action is taken, it is also imperative that no rushed decisions be made and due consideration needs to be given to any potential modifications and their potential impact.

a. Develop a phased approach to implementing most/all of the recommendations

In order to reduce the costs and complexities at the outset, and allow for experience with some of the basic functionality (request intake & responses) to help inform if/when to add on other features, the GNSO Council could recommend a phased approach in which certain recommendations would be implemented at the outset, while others would be implemented at a later stage. In this approach, further consideration should be given to what aspects are essential at the outset, and which aspects could follow later (prioritize). Further consideration would need to be given in this scenario to whether all recommendations would be considered adopted, or whether conditionality would be built in so that based on the experience gained, and/or possible changes in the legal landscape, a decision would need to be taken (by GNSO Council and/or ICANN Board) on whether to proceed with the implementation of the recommendations in subsequent phases.

b. Remove recommendations that add significant complexity and costs

This approach would focus on removing recommendations that are deemed to add significant costs and complexity to SSAD for perceived little value (for example, accreditation). What would remain would be a centralized intake system with a standardized process for requests, consideration of requests and format of responses to requests. Further consideration would need to be given in this approach on the impact of removing certain recommendations from the current package as there is significant cross-referencing and dependencies built in.

c. Recommend a small-scale pilot type implementation of all recommendations before full implementation is done

This approach suggests that all recommendations are implemented at the outset, but their implementation would be on a smaller scale than currently foreseen. For example, instead of rolling out governmental accreditation authorities in all countries that want to participate, one or two countries would first be requested to participate in pilot format so that lessons learned could be applied to the full implementation of the system. Further consideration would need to be given to whether this approach would significantly reduce costs and complexities because even though the roll out would be on a more limited basis, it would still require all systems and procedures to be in place.

Possible next steps & questions for further consideration

As a first question, the GNSO Council, with input from GNSO SG/Cs, could consider whether there is a preference for scenario 1 (await ICANN Board consideration) or scenario 2 (GNSO Council to work on modifying the recommendations), as that would dictate the timeline for action. Of course, even if scenario 2 is the preferred approach, the GNSO Council is expected to continue its consultations with the ICANN Board so it can better understand the ICANN

Board's possible concerns in relation to the existing recommendations so that any modifications would also address these.

Secondly, assuming that the GNSO Council is willing to consider modifications to the recommendations, it would consider which approach to pursue (see a-c above, or other approach). Input from SG/Cs via their EPDP Team appointed members will be key in understanding the possible implications of the different approaches as well as possible modifications. As noted above, regardless of the approach chosen, the GNSO Council would need to agree on the parameters of the assignment to ensure that it is possible to complete in a timely and focused manner. The GNSO Council would also need to give further consideration to whom would be tasked with developing proposed modifications.

As also noted previously, there will be a need to further analyze the information of the ODA to better understand the cost breakdown and complexities to help inform further work, but, until such time this information is available, the GNSO Council can already start thinking about the preferred approach and put, as necessary, things in motion so that any further work and consideration can be undertaken in an efficient manner.

Proposed homework assignment:

Please share this paper with your respective groups so you can start thinking about your group's positions on the scenarios and possible approaches outlined above. Of course, if there are options missing, feel free to flag these.

GNSO Council Leadership aims to schedule a meeting in the second week of January to continue the conversation with GNSO Council members, GNSO appointed EPDP Phase 2 members, and SG/C Chairs. Ideally you are able to share your group's thinking in advance of this meeting so it can help inform the discussion.

As other ACs, such as the ALAC, GAC and SSAC, also participated in the development of these recommendations, we would also like to encourage our liaisons to and from these respective groups (where these exist) to share this paper and bring back any input these groups may have for the GNSO Council. In the case of the SSAC, GNSO Council leadership will reach out directly to the SSAC with the same question.

ANNEX

From the ICANN Bylaws – Section 6. Board Approval Processes
https://www.icann.org/resources/pages/governance/bylaws-en/#annexA1

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

a. Any EPDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than a GNSO Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN community or ICANN.

b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN community or ICANN (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and co mmunicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN community or ICANN. For any Supplemental Recommendation approved by less than a GNSO Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN community or ICANN.

From the PDP Manual - Section 16. Amendments or Modifications of Approved Policies
Approved GNSO Council policies may be modified or amended by the GNSO Council at any time prior to the final approval by the ICANN Board as follows:

1. The PDP Team is reconvened or, if disbanded, reformed, and should be consulted with regards to the proposed amendments or modifications;
2. The proposed amendments or modifications are posted for public comment for not less than thirty (30) days;

3. The GNSO Council approves of such amendments or modifications with a Supermajority Vote of both Houses in favour.

Approved GNSO Council policies that have been adopted by the ICANN Board and have been implemented by ICANN Staff may only be amended by the initiation of a new PDP on the issue.