

ALAC Advice to the ICANN Board Related to the Phase 1 Final Report on the Temporary Specification for gTLD Registration Data EPDP

The ALAC has significant concern related to three aspects of the EPDP Report. **Specifically, the ALAC is concerned not only with the outcomes, but with the process that was followed to address the issues.**

All three impact the ability to access registration data and the completeness of that data. As such the issues call into question whether the EPDP Recommendations address a key requirement in the Temporary Specification (and since confirmed as an important criterion by the Board. Specifically: ***“to identify the appropriate balance for a path forward to ensure compliance with the GDPR while maintaining the existing WHOIS system¹ to the greatest extent possible”***.

Moreover, the EPDP was to address compliance with the GDPR and not to re-legislate and revise existing ICANN policy unless it impacted GDPR compliance.

The issues raised here are in alignment with previous ALAC statements and moreover are all strongly supported by the SSAC as well as others in the ICANN ecosystem.

Effective Disappearance of Thick WHOIS

With one exception, all new gTLDs authorized under the auspices of ICANN have operated under Thick WHOIS rules whereby all registration data is transferred to the registry. The only exception is .JOBS along with two legacy TLDs .COM and .NET. The Thick WHOIS PDP recommended (with unanimous consensus) that the three Thin WHOIS TLDs convert to Thick and the recommendation was ratified by the GNSO Council and by the Board.

The EPDP does not require that all TLD operate under Thin rules, but makes it extremely unlikely (i.e. is virtually impossible) that there be any other result. Specifically, the EPDP allows all data to be transferred to registries only if all parties agree that there is a strong legal basis for doing so. It is clear that some contracted parties do not currently agree that there could be such legal basis, and the issue was not really discussed for this reason.

The EPDP did ask its independent legal counsel whether thick WHOIS was “legal”, but the reply had not been received at the time the final report was issued. It has since been received¹ and says, in short, that the arguments presented in the Thick WHOIS PDP report are sufficient justification for allowing Thick WHOIS throughout the gTLD space.

¹ <https://community.icann.org/download/attachments/102138857/ICANN%20-%20Memo%20on%20thick%20Whois%5B1%5D.docx>

The issue is particularly relevant because the way the Temporary Specification has been implemented has shown that the registrar and registry for a given registration may apply radically different redaction rules on the same registration.

The ALAC advises the Board to request that the issue of Thick WHOIS be discussed during the EPDP Phase 2 in light of the new legal opinion.

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Geographic Differentiation

GDPR, in rough terms, only applies to entities within the European Economic Area (EEA) and to entities outside that are targeting individuals resident within the EU. It specifically does not apply to entities outside of the EEA that do not process data within the EEA or target customers within the EU.

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The Temporary Specification allowed contracted parties to apply the GDPR globally without consideration of geography, and the EPDP is recommending the same rule.

The issue was never substantially discussed within the EPDP, with arguments for preserving the Temporary Specification rule being:

- It is too difficult to determine the location of a registrant
- Other jurisdictions might also have privacy regulations
- Privacy is a good thing and we should preserve the privacy of all registrants

The first point was never discussed in any detail, nor was it explained why one could not rely on Country field in the registration data (a field that the registrant is required to provide and certify that it is accurate).

The second point is certainly true, although some jurisdictions might have less stringent rules, and the EPDP was chartered SOLELY to address GDPR compliance.

The third point is certainly accepted by many (including those within At-Large) but the EPDP was not chartered to be an all-encompassing privacy PDP, but to address compliance (and not over-compliance) with the GDPR.

Moreover, there was virtually no discussion about the impact of security and stability of redacting vast amounts of data not required under GDPR. GDPR is explicitly requires balancing various needs and this was not considered during the EPDP (attempts were made to initiate such a discussion).

At the time the report was issued, there was also an outstanding question to the EPDP legal counsel whether ICANN's presence in the EU implies that the GDPR applies to ALL personal data regardless of location, and this possibility was a consideration in the recommendation. The EPDP has since received a legal opinion² that the ICANN European offices do not make ICANN sufficiently European as to have GDPR apply in all cases.

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² <https://community.icann.org/download/attachments/102138857/ICANN%20-%20Memo%20on%20Territorial%20Scope%20.docx>

A number of members within the EPDP (including those from the ALAC and SSAC) understood that there would be further study and discussion of the issue during Phase 2, but apparently that was not the understanding of the all.

The ALAC advises the Board to request that the issue of geographic differentiation be re-opened during the EPDP Phase 2 in light of the new legal opinion and the lack of considering the competing needs of privacy vs the benefits of non-redaction on cyber-security activities and that the ensuing discussion factor in the needs of those using the data for cyber-security and other legitimate purposes.

Legal/Natural Person Differentiation

The Temporary Specification allows contracted parties to treat legal persons as natural persons and redact data, and the EPDP recommendations do as well.

The issue was discussed during Phase 1. The rationale for allowing contracted parties flexibility was that there is currently no indication within the registration data that explicitly indicates that the registrant is a legal or natural person. Some registrars have used the Organization field for this purpose but others have not done so. Again, the balancing of the needs of contracted parties for simple, inexpensive, risk-free solutions was not balanced against the competing needs for data access.

The Legal/Natural Person is on the agenda for discussion within Phase 2, but there is no indication that the outcome will be any different than during Phase 1, and the EPDP practice has been to favor contracted party needs when the group is divided³.

It is understood that if a legal/natural distinction is to be required, registrars will need to be given significant time to phase this in.

The ALAC advises the Board to request that the issue of legal/natural differentiation be discussed during the EPDP Phase 2 explicitly considering the competing needs of those using the data for cyber-security and other legitimate purposes.

Further Investigation

Both Geographic differentiation and Legal/Natural differentiation could benefit from additional independent study from two perspectives

- the experiences of others who support such differentiation to better understand the difficulty of such implementation as well as the GDPR-related risks;
- the current experience within the cyber-security field of the impact of redactions as a result of the Temporary Specification.

³ This was clearly indicated by how the Technical Contact field was handled. These fields will be optional for registrants to complete, but some registrars preferred to not collect the fields at all (a change from the Temporary Specification) and that is how it ended.

Such studies will allow the EPDP to consider all aspects of these issues and not only the costs and risks to contracted parties providing the balancing approach required by the GDPR.

Given that the EPDP is likely to first work on access issues prior to restarting work on the Phase 1 topics, there should be adequate time for such studies.

The ALAC believes that independent studies related to the implementation of geographic and legal/natural differentiation as well as the impact of the Temporary Specification implementation on cyber-security are needed to allow a thorough discussion of these issues by the EPDP. The ALAC advises the Board to initiate such studies or to request that the EPDP Phase 2 commission such studies. If the latter, the Board should ensure adequate funding for such work.

The ALAC believes that the issues being raised here have not received sufficient full discussion by the EPDP. The ALAC understands that the Board cannot compel the GNSO or EPDP to take specific actions.

But it is critical that, if the Board believes, as the ALAC does, that the EPDP decisions must take all applicable issues into consideration and make fully informed decisions, the Board needs to ensure that this is fully understood by the GNSO and EPDP.

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