

Via Email: comments-epdp-2-policy-recs-board-08feb21@icann.org

March 30, 2021

Mr. Maarten Botterman
Chair of the Board
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Comment by Namecheap, Inc. regarding Priority 1 Policy Recommendations for ICANN Board Consideration from EPDP Phase 2

Dear Chairperson Botterman and Members of the ICANN Board,

Namecheap, Inc. (“Namecheap”) thanks ICANN for the opportunity to provide a comment on the Priority 1 policy recommendations for ICANN Board consideration from the [Final Report of the Temporary Specification for gTLD Registration Data Phase 2 Expedited Policy Development Process](#) (“Phase 2 Final Report”).

I. Introduction/General Comments

Namecheap was an active participant within the Registrar Stakeholder Group (“RrSG”) EPDP team, and would like to acknowledge the significant work by the many participants of the EPDP team over approximately eighteen months. Although the recommendations of the Phase 2 Final Report are not perfect, they represent significant compromise, and above all, they mostly represent a privacy by design system (see comments below) that complies with applicable laws. While the EPDP team considered (and ultimately did not adopt) other recommendations and proposals, the team did so because they were contrary to privacy by design, violated applicable laws, or represented an unacceptable risk to domain name registrant privacy rights.

Namecheap supports the Phase 2 Final Report (Priority 1 and Priority 2) as a complete package, both within the EPDP and at GNSO Council level. The RrSG notes that the results of EPDP Phases 1 and 2 were the culmination of a great deal of work and compromises on all sides, and the EPDP Team discussed many varied topics and positions. Namecheap would like to reiterate that all recommendations must be taken together (and not interpreted independently), including the recommendations of Phases 1 and 2.

Namecheap is concerned about what appears to be a lack of good faith of several participants in the EPDP process. After many months of discussion, compromise, and revision to proposals, several groups withdrew support for the very sections that they previously supported. They

submitted minority statements that may represent their respective groups, but are not reflective of the collective efforts of the EPDP team. Additional actions after, including withdrawing support at the GNSO Council, and subsequent [correspondence](#) with ICANN and [statements](#) at ICANN meetings and other forums (see [1](#) (p. 37), [2](#), [3](#), [4](#), and [5](#)) lead many to question the commitment of these parties to the ICANN process and multistakeholder model. This process and model allow for ICANN policies that are reflective of a broad cross section of interests, and often do not represent all of the wants and desires of every participant. This is the very nature of compromise. To question this process is to question the ICANN community itself, and complicates future collaborative efforts. Additionally, advocating for government action to circumvent ICANN policy harms the ICANN model, and is another example how some participants lack good faith when participating in the ICANN policy development process.

Namecheap is also concerned about parties that participate in the ICANN policy development process, only to resort to legal action to address perceived inadequacies. Even while complying with current ICANN requirements, contracted parties around the world are subject to lawsuits by these parties (within and outside of the ICANN community) that falsely perceive that failure to disclose private customer information without due process is a violation of ICANN policies and the law. It is Namecheap's understanding that none of contracted parties facing such litigation have been determined to be non-compliant by ICANN, or in breach of legal obligations. Namecheap is concerned that this litigation will continue- even with a fully operational and utilized SSAD.

Namecheap follows a global, privacy by design/default standard for disclosure. The default position is that Namecheap does not share customer personal information unless the requestor has a legal right to that information. As a United States based registrar (with many customers subject to GDPR), we require a court order (or similar), a UDRP proceeding, a contract between the parties, or consent by the customer, before disclosing data. It is Namecheap's understanding that this global process is compliant with the SSAD recommendations.

II. Recommendation 1

Regarding the accreditation process generally, Namecheap notes that great care should be applied in developing the accreditation procedures. It is understandable that law enforcement may become accredited. However, the system will need to be able to account for jurisdictional restrictions that are specific to each contracted party. This could be a privacy concern for two reasons. First, it creates a potential avenue to disclose personal information with full automation (and there may be legitimate bases for not disclosing personal information to law enforcement). Second, there are national laws regarding the disclosure of information to non-local law enforcement (e.g. countries/jurisdictions that are hesitant to share personal information with law enforcement in the United States in light of the USA PATRIOT Act).

III. Recommendation 8

Namecheap does not support Recommendation 8.5 because it does not provide sufficient privacy protection for registrants. Many registrars lack the ability to determine whether or not alleged claims of intellectual property infringement are valid and properly documented due to the significant experience and expertise required to make such a determination. These registrars rely upon processes such as subpoenas or UDRP proceedings before disclosing data. The underlying personally identifying information is not required to begin these legal processes, and third parties with the required background and knowledge have determined that the claims are prima facie valid. A minimal legal standard exists within these that must be met in order to have a “right” to personal information and, having a minimal legal standard, ensures due process when determining whether to disclose. This language removes the legitimate ability to deny a request for info because such a standard has not been met.

Namecheap will take all action necessary to ensure that its customers’ personal information is not disclosed merely upon request, or for a request that Namecheap lacks the ability to adequately determine whether the legal claim for the data is valid. Additionally, Namecheap notes that the disclosure framework requirements in the SSAD are applicable only to registrars, and do not apply to third party privacy or proxy providers (which are not bound by ICANN Consensus Policies).

For Recommendation 8.7.2, Namecheap notes that the recommendation appears to be a mashed-up list of random GDPR terms. Both the contracted party and the requestor must have a legal basis, and the contracted party must consider both. The legal basis for one is independent of the other. There are six legal bases, and all require that the data be necessary to the purpose for which the requestor is seeking to use it. It is not clear how Recommendation 8.7.2 is listed as part of a step-by-step formula. Some of the bases, such as legitimate interest, have gating requirements that must be met first before even performing to the balancing test.

Namecheap is concerned that Recommendation 8.8.1 does not comply with the GDPR. ICANN, or any third party, cannot by contract require disclosure under legitimate interest- and there is supporting case law. To process data under a contract, it is required that the processing must be necessary for the performance of the “core” of the contract. That is not the case here when dealing with the “MUST” disclose requirement. This type of requirement must be expressly provided for by national law and subject to the necessary and proportionality requirement, and Namecheap is not aware of any country under the GDPR that meets these requirements.

Recommendation 8.9 additionally does not comply with the GDPR. A contracted party has a duty to ensure that a requestor has a legal basis. As indicated above, a contract cannot require disclosure or processing that is not necessary to the performance of the contract. Moreover, this Recommendation 8.9 (and recommendation 8 in general) are drafted contrary to the GDPR principle of data protection by design (Article 25).

IV. Cost and SSAD Users

Finally, Namecheap has significant concerns regarding the cost of creating and maintaining the SSAD. The estimated \$9 million to create, and \$9 million annually to operate, appears to be excessive. If ICANN engages the services of a third-party vendor to create and maintain the SSAD, then it should be through a public bidding process that is subject to community review. The initial creation and integration process will be paid by ICANN and contracted parties, and for the most part the source of these funds will be from registrants. The cost to them should be minimized. Additionally, Namecheap is concerned that the users of the SSAD, in large part, indicate that they are not willing to pay for or use the SSAD. This is concerning, because these participants helped create the SSAD, and it was understood throughout the process that they would pay for the operation of the SSAD. If the ICANN Board approves creating the SSAD, then it should reiterate that ICANN org will not pay for the ongoing operational costs of the SSAD (which should be operated on a cost recovery basis under Recommendation 14.7).

V. Conclusion

Namecheap again thanks the significant efforts of the ICANN community and the ICANN org for their efforts in completing the Phase 2 Final Report. In the continued spirit of compromise, Namecheap supports the adoption of this report, and calls on all ICANN community participants to support the implementation of this report.

Sincerely,

Owen Smigelski
Head of ICANN Compliance & Relations
Namecheap, Inc.