**EPDP PHASE 2A – FINAL REPORT INPUT FORM**

Instructions: EPDP Team members are to review section 3 of the Final Report and indicate if there are any aspects of this section that your group cannot live with. Please indicate your rationale for flagging an item and provide a proposal for how your concern can be addressed, factoring in previous discussions.

Please use the second table for flagging any minor / non-substantive / not rising to the level of ‘cannot live with’ edits.

**CANNOT LIVE WITH ITEMS**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Line numbers & topic** | **Group** | **Rationale** | **Proposed Changes** | **For EPDP Team Consideration** |
| **Proposal to the GNSO Council** | | | | |
| **Lines 59-60/ NIS2 and trigger for GNSO action** | GAC, ALAC | If passage of NIS2 results in new obligations relevant to Phase 2a topics, then passage alone of such legislation should provide sufficient notice to GNSO and trigger GNSO Council action to follow existing procedures to identify and scope possible future policy work. Awaiting implementation by all member states would unduly delay appropriate action. | Delete “and implementation plans are clear” | If proposed changes are applied:  The EPDP Team recognizes that current and future legislative developments may require further policy work on this topic, either to address potential conflicts with existing policy requirements and/or to consider whether there is a risk of marketplace fragmentation that needs to be addressed. At the same time, the EPDP Team recognizes that until legislation is adopted, ~~and implementation plans are clear,~~ it may not be possible to accurately assess the impact. The EPDP Team **recommends** ~~expects~~ the GNSO Council to follow these developments through the legislative / regulatory reports that ICANN org produces.  Noting the current discussions and expected adoption of the Revised Directive on Security of Network and Information Systems (“NIS2”), the EPDP Team strongly encourages the GNSO Council to follow existing procedures to identify and scope possible future policy work following the adoption of NIS2 ~~and confirmation of EU Member State implementation plans~~ to assess whether or not further policy development is deemed desirable and/or necessary.  **Question for EPDP Team:**   1. Recognizing that this is a recommendation to the Council, and it remains up to the Council if/how/when to implement this recommendation, have any of these changes resulted in “cannot live with” for other groups? |
| 61 | RrSG, ALAC | Should use standard language of recommendation, rather than nebulous expectations | Current: The EPDP Team expects the GNSO Council to follow these developments through the legislative / regulatory reports that ICANN org produces.  New: The EPDP Team recommends that the GNSO Council to follow these developments through the legislative / regulatory reports that ICANN org produces. |
| 61 | RySG | “Expects” is not appropriate language to council; use “suggests” instead. | Change to read: “Team suggests the GNSO Council to follow these developments through the |
| Line 68 | GAC, ALAC | Same as for lines 59-60 | Delete “and confirmation of EU Member State implementation plans” |
| **Intro text to recommendation #1** | | | | |
| 79 - 82 | RrSG | This description could be confusing as to what the actual Phase 2 Recommendation requires | Delete this sentence: This concept of identifying the type of domain name registration data involved is also referenced in EPDP Phase 2 recommendation #9.4.4 (automated response to disclosure requests), which indicates that a Contracted Party needs to have a mechanism to identify that a registration record does not contain any personal data. | Instead of deleting the whole sentence, consider the following change:  This concept of identifying the type of domain name registration data involved is also referenced in EPDP Phase 2 recommendation #9.4.4 (automated response to disclosure requests)~~, which indicates that a Contracted Party needs to have a mechanism to identify that a registration record does not contain any personal data~~.  **Question for EPDP Team consideration**:   1. As SSAD is mentioned in the recommendation, it does seem to make sense to reference the relevant section from the Phase 2 report, but if there is concern about the description, that part can be removed. Would that be acceptable to RrSG, RySG and other groups? |
| 79-82 | RySG | This sentence is misleading here as this differentiation is different from the disclosure automation discussed in phase 2 section 9.4.  The concept is already covered later in the document (lines 194-202) | Delete last sentence: “This concept of identifying the type of domain name registration data involved is also referenced in EPDP Phase 2 recommendation #9.4.4 (automated response to disclosure requests), which indicates that a Contracted Party needs to have a mechanism to identify that a registration record does not contain any personal data.” |
| Lines 87-91 | GAC, ALAC | This text does not adequately capture the views of of other SGs that support mandatory implementation of the data element, | Change to:  ". . . obligatory even for those contracted parties who decide not to differentiate. . ."  Our position is that for new registrations and renewals, the CP's should require completion of these fields to the greatest extent possible and that further discussions should take place on how to update these fields for prior registrations. | If proposed changes are applied:  Do note that some EPDP Team members are of the view that the use of such a field should be obligatory **even** for those Contracted Parties **who** ~~that~~ decide **not** to differentiate, while other EPDP Team members are of the view that because there is no requirement to differentiate, there should not be a requirement to use this field, and a Contracted Party should be able to determine itself how to implement such a differentiation.  Or  Delete paragraph  **Question for EPDP Team**:   1. Noting that other “opinions” have been moved to the minority statement section, would it result in “cannot live with” if this paragraph is removed? |
|  | RySG | Noting this disagreement here seems out of place and doesn’t add value to section 3, but rather distracts from the recommendation that follows.  We suggest that such a statement of parties beliefs would be better suited to Minority statements, so as not to confuse the reader. | Delete paragraph |
| **Recommendation #1** | | | | |
| 95 - 96 | RrSG | The discussions about this field were not specific in terms of where the field would be until quite late in the phase; the working agreement was that this field could exist only within the CP’s own system, e.g. as described in line 255 of this report, which is no longer possible with the current version of the text in lines 95-96. | Current: a field or fields MUST be created for the RDDS that MAY be used by those Contracted Parties  New: a field or fields MAY be created for the RDDS that MAY be used by those Contracted Parties  OR  NEW: a field or fields MUST be created that MAY be used in the RDDS that MAY be used by those Contracted Parties | If proposed changes are applied:  The EPDP Team recommends that, a field or fields MUST be created **that MAY be used in** ~~for~~ the RDDS **and** ~~that~~ MAY5 be used by those Contracted Parties that differentiate between legal and natural person registration data and/or if that registration data contains personal or non-personal information.  **Question for EPDP Team**:   1. Recognizing that this change aligns with the footnote (“it may be left blank or may not be present”), does this change result in “cannot live with” for other groups? |
| 95-96 | RySG | Successive edits have changed the meaning to make this an RDDS only field which was not the intent. | Change to: “The EPDP Team recommends that, a field or fields MUST be created that MAY be used in RDDS and MAY be used by those Contracted Parties that differentiate between legal and natural... |
| **Footnote recommendation #1** | | | | |
| 96 (footnote 5) | RySG | Make clear that inclusion of this field (even blank) in an RDDS response is optional. | Change to: Implementation note: Contracted Parties MAY make use of this field, which means that if a Contracted Party decides not to make use of this field, it may be left blank or may not be present and is NOT required to be included in a RDDS response. | If proposed changes are applied:  Implementation note: Contracted Parties MAY make use of this field, which means that if a Contracted Party decides not to make use of this field, it may be left blank or may not be present **and is NOT required to be included in a RDDS response**.  **Question for the EPDP Team:**   1. Can anyone not live with this clarifying language? |
| 105, 113 | ALAC | The report must make clear that lines 105 and 113 are the default values. | Add “(Default value)” at the end of each line. | If proposed changes is applied:   * The legal status distinction was not made **(default value)**   (…)   * The presence of personal data wasn’t determined **(default value)**   **Question for the EPDP Team**:   1. Does this addition result in “cannot live with” for other groups? |
| **Recommendation #2 (Guidance)** | | | | |
| 226-227 | RySG | “Should” is making a value judgment here about use of this guidance. “May” is more appropriate to reflect that this guidance is truly optional to use. | Change to: “The EPDP Team recommends that Contracted Parties who choose to differentiate based on person type SHOULD MAY follow the guidance below . . .” | If proposed change is applied:  The EPDP Team recommends that Contracted Parties who choose to differentiate based on person type ~~SHOULD~~ **MAY** follow the guidance20 below and clearly document all data processing steps.  **Question for the EPDP Team**:   1. Recognizing that “Should” was already used in the Initial Report, does this change result in “cannot live with” for other groups? |
| 257 | RrSG | Making unsupported assumptions | Current: Such flagging would facilitate review of disclosure  New: Such flagging could facilitate review of disclosure | If proposed change is applied:  As part of the implementation, Registrars should consider using a standardized data element in the RDDS, SSAD or their own data sets that would indicate the type of person it concerns (natural or legal) and, if legal, also the type of data it concerns (personal or non-personal data). Such flagging ~~would~~ **could** facilitate review of disclosure requests and automation requirements via SSAD and the return of non-personal data of legal persons by systems other than SSAD (such as Whois or RDAP). A flagging mechanism may also assist in indicating changes to the type of data in the registration data field(s).  **Question for the EPDP Team**:   1. Does this change result in “cannot live with” for other groups? |
| 257 | RySG | “Would” is very speculative here, “could” is more appropriate. | Change to: (personal or non-personal data). Such flagging **could** facilitate review of disclosure |
| **Recommendation #3 (Code of Conduct)** | | | | |
| 286 - 287 | RrSG | Lacking context of where these considerations should occur | Current: the above developed guidance concerning legal/natural differentiation should be considered by any future work by the relevant controllers and processors in relation to the development of a GDPR code of conduct  New: the above developed guidance concerning legal/natural differentiation should be considered by any future work within ICANN by the relevant controllers and processors in relation to the development of a GDPR code of conduct | If proposed change is applied:  The EPDP Team recommends, in line with GDPR Article 40 requirements for Codes of Conduct,24 that the above developed guidance concerning legal/natural differentiation should be considered by any future work **within ICANN** by the relevant controllers and processors in relation to the development of a GDPR code of conduct.  Or  The EPDP Team recommends, in line with GDPR Article 40 requirements for Codes of Conduct,24 that the above developed guidance concerning legal/natural differentiation should be considered by any future work **by ICANN** ~~by the relevant controllers and processors~~ in relation to the development of a GDPR code of conduct.  **Question for the EPDP Team**:   1. Does this change result in “cannot live with” for other groups? Also, what does “within ICANN” or “by ICANN” mean or imply? Note that work on a Code of Conduct was not part of phase 1 or phase 2 recommendations. |
| 283-291 | RySG | Applying this to any future work by relevant controllers/processors is too broad and inappropriate. Reword to make it ICANN specific | Change to: should be considered by any future work **by ICANN** in relation to the development of a GDPR code of conduct. |
| **Recommendation #4 (feasibility of unique contacts)** | | | | |
| 526 - 528 | RrSG | Point (ii) is confusing.  How does masking email addresses in the public RDDS provide risk reduction or relate to conducting the balancing test for disclosure?  If the intent was that the masked email address is itself what is disclosed, that is not clear in this text. | Current: However, even if considered personal data, masking email addresses does provide benefits compared to publishing actual registrant email addresses, including: (i) demonstrating a privacy-enhancing technique/data protection by design measure (Article 25 GDPR); and (ii) some risk reduction relevant when conducting a legitimate interest balancing analysis for disclosure of data to third parties.  We should remove the part (ii), or the relevant benefit should be made clear.  Alternative possible text:   (ii) some risk reduction relevant when conducting a legitimate interest balancing analysis for disclosure of the masked email address to third parties. | If change is applied:  However, even if considered personal data, masking email addresses does provide benefits compared to publishing actual registrant email addresses, including: (i) demonstrating a privacy-enhancing technique/data protection by design measure (Article 25 GDPR); and (ii) some risk reduction relevant when conducting a legitimate interest balancing analysis for disclosure of **the masked email address** ~~data~~ to third parties.  **Question for the EPDP Team**:   1. Does this change result in “cannot live with” for other groups? |
|  |  |  |  |  |
|  |  |  |  |  |
|  |  |  |  |  |

**MINOR EDITS**

|  |  |  |  |
| --- | --- | --- | --- |
| **Line numbers & topic** | **Group** | **Rationale** | **Proposed Changes** |
| **Line 26/ Public Comment** | GAC | Reference to “public comment forum comment on the addendum” is confusing. | Suggest simply referring to “public comment proceeding.” Readers will know that the public comments relate to the Initial Report on Phase 2a. |
| Line 34 fn 2/ placement of fn on treatment of legal entities | GAC | Fn not in best place. | Suggest moving fn 2 to end of next sentence (line 36) to refer to GDPR for discussion of applicability to legal entities. |
| Line 76 fn 4 | GAC | Fn 4 seems to duplicate fn 18 | Delete fn 4. If retained please add views of other SGs: “other SG's would prefer mandatory measures to differentiate between legal and natural persons with appropriate safeguards."  Note: apply same decision as made with other “opinions” (see above). |
| Lines 437 | GAC | Ambiguity. What does the asterisk after “web form” signify? | If this intended to signal a footnoted explanation then that content needs to be added. Or, can simply delete the asterisk. |
| 33 - 36; 147 (same sentence in both places); grammatical mismatch | RrSG | The sentences don’t match up; the second sentence should be adjusted to read properly | Current: As a starting point, the EPDP Team notes that the GDPR and many other data protection legislations set out requirements for protecting personal data of natural persons. It does not protect the non-personal data of legal persons.  New: They do not protect the non-personal data |
| 68; add words for clarity | RrSG | Current version is unclear (is it “implementation plans to assess” or is it “implementation plans” and separately “to assess…” | Current: confirmation of EU Member State implementation plans to assess whether or  New: confirmation of EU Member State implementation plans in order to assess whether or |
| 293; add section break | RrSG | The example scenarios section looks like it’s part of the Rec 3 (Code of Conduct), it should be its own section | Add a section title above “Three example scenarios” |
| 46 | RySG | Make it clear what the EPDP is responding to. | Change text to read: “The EPDP Team is putting forward the following response to the Council’s instruction whether any updates are required to the EPDP Phase 1 recommendation on this topic (“Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so“); |
| 56-58 | RySG | The language suggests that potential conflicts with policy and market fragmentation are the only reasons to consider further policy work. | Change to read: “...require further policy work on this topic, such as to address potential conflicts with existing policy requirements and/or to consider whether there is a risk of…”  If change is applied:  The EPDP Team recognizes that current and future legislative developments may require further policy work on this topic, **such as** ~~either~~ to address potential conflicts with existing policy requirements and/or to consider whether there is a risk of marketplace fragmentation that needs to be addressed. |
| 65-66 | RySG | Change “strongly encourages” to “suggests”. Better/more appropriate word choice. | on Security of Network and Information Systems (“NIS2”), the EPDP Team suggests the GNSO Council to follow existing procedures to identify  (Note – covered above) |
| 75 | RySG | Add a subsection header to make it clear this paragraph starts a new section different from the previous section on monitoring NIS2.0. | Add a subsection header: “Differentiation Guidance” (or similar as appropriate) |
| 84-85 | RySG | The recommendation involves how a Contracted Party can reflect the results of their differentiation, but not how to conduct that differentiation. | Change to: “In the following recommendation, the EPDP Team outlines how a Contracted Party that wants to differentiate can do so by using a new field or fieldscapture the results of that differentiation using a new field or fields.” |
| 87-91 | RySG | Noting this disagreement here seems out of place and doesn’t add value to section 3, but rather distracts from the recommendation that follows.  We suggest that such a statement of parties beliefs would be better suited to Minority statements, so as not to confuse the reader. | Delete paragraph  (Note – covered above) |
| 222 | RySG | FN 19 doesn’t capture our reasoning about this not being considered best practices. It is not just that best practices are reserved for industry bodies, but we remain unconvinced that they are best practices. We have done no work, evaluation, testing, or benchmarking to say that these are in fact best practices. | Either revise: “Some EPDP Team members have indicated a preference for using the term “best practices”, while other EPDP Team members have indicated that the development of “best practices” is typically reserved for industry bodies, and that the EPDP team has done no testing, evaluation, or benchmarking to determine whether these are in fact “best” practices.  Or delete first sentence of footnote and defer to minority statements (if deleting, remove footnote 18 as well)  Note: apply same decision as made with other “opinions” (see above). |
| 254-261 | RySG | This guidance should be tied to recommendation 1 which creates the standard data element. | Change to: As part of the implementation, Registrars should consider using the standard data element described in Rec #1 in the RDDS, SSAD or their own data sets that would indicate the type of person it concerns (natural or legal) and, if legal, also the type of data it concerns |
| 449 | RySG | Clarify that this is from the Phase 2 deliberations. | Change to: “Note, during the Phase 2A deliberations, some EPDP Team members . . .” |
| 460-466 | RySG | This language seems specific to the initial report and not applicable to the final report. | Remove:  Nevertheless, if further evidence concerning issues with web forms is received during the public comment period as well as specific proposals for why and how the issues identified should be addressed, the EPDP Team will, at a minimum, pass on this information to the GNSO Council and ICANN org (e.g., to be relayed to the Phase I IRT) to see if/how the issues identified can be further considered. This could result in the GNSO Council directing further policy work on this topic, or the Phase I IRT or ICANN org looking into this subject. |
| 507 | RySG | This is the second recommendation #3 - see line 283 | Change to Recommendation #4 |
|  |  |  |  |