**Registries Stakeholder Group**

**Minority Statement to the Final Report of Phase 2A of the Expedited Policy Development Process on gTLD Registration Data**

After more than three years of diligence, the RySG is pleased to celebrate the resolution of the Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data (“EPDP”). This was an almost unprecedented effort, triggered by the enactment of GDPR, which required the ICANN community to come together to address long-standing incompatibilities with data protection obligations. The RySG is incredibly grateful for the hard work and commitment of our Chairs and Vice-Chairs, the indefatigable ICANN staff support team, and EPDP team members who have engaged in good faith to reach common ground and understanding on these admittedly complex topics.

The RySG is confident that, as in prior phases of this work, we have struck the appropriate balance between protecting data subject’s privacy rights, fulfilling our legal obligations, and not creating unnecessary obstacles or operational challenges for our customers or our businesses.

**I. The Legal vs. Natural Issue is Resolved**

Phase 2A has resolved the issue of legal versus natural differentiation. A PDP does not have to result in consensus recommendations to resolve an issue. That the working group did not agree on changes to the previous recommendation (Phase 1 Recommendation 17) on legal v. natural is a valuable and acceptable outcome. After three phases of EPDP deliberation, a study produced by ICANN org, and legal advice from outside counsel on the legal vs. natural issue, it is well past time to recognize this issue as closed.

Indeed, the EPDP Team diligently followed the GNSO Council’s instructions to “answer . . . 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.”)”[[1]](#footnote-1)  Responding to that specific question required consideration of the three-part Phase 1 Recommendation 17 in its entirety.[[2]](#footnote-2) Arguments that the EPDP Team has not satisfied 17.3 (“The EPDP Team will determine and resolve the Legal vs. Natural issue in Phase 2”) takes a deliberately narrow view of the recommendation text, ignoring the plain language of the GNSO Council instructions. The RySG is concerned that some have suggested this issue is not resolved.  This question has been discussed in three separate phases of the EPDP and the result each time has been that Contracted Parties may differentiate but are not required to do so.  This clearly demonstrates that this matter has been addressed appropriately and consistently.  A perception that this work is somehow unresolved could be detrimental to the ICANN community and seen as undermining the effectiveness of the multistakeholder model.  It would also be unfair to the members of the working group and the countless hours they spent deliberating and resolving the issue.

**II. Optional Differentiation Remains a Good Outcome**

The RySG strongly believes that maintaining the permissive but not mandatory Phase 1 policy recommendations[[3]](#footnote-3) for legal vs. natural person registration data is an objectively good outcome of our policy development work. This outcome is not about simply maintaining the status quo. We affirmatively believe that the balance struck (after significant consideration) in the Phase 1 Recommendation 17 language is crucially important, especially given the regulatory uncertainty that many on the EPDP Team repeatedly invoke as their justification to change the Phase 1 recommendation. Instead, that uncertainty is in part why Recommendation 17 is an appropriate, flexible, and elegant solution to the question of legal vs. natural differentiation.

1. **Contracted Parties must be permitted to control their own legal risks**

As the RySG has explained throughout Phase 2A, the flexibility inherent in permitting but not requiring differentiation is important in allowing Contracted Parties to control their own legal risks and mitigate risks to their customers. Registries and Registrars have repeatedly stated this as a fundamental premise throughout the entirety of the EPDP.

The legal memos clearly state, “[i]f the relevant parties had no reason to doubt the reliability of a registrant's self-identification, then they likely would be able to rely on the self-identification alone, without independent confirmation. However, we understand that the parties are concerned that some registrants will not understand the question and will wrongly self-identify. Therefore, there would be a risk of liability if the relevant parties did not take further steps to ensure the accuracy of the registrant's designation.”[[4]](#footnote-4) Similarly, “[i]f there is a reasonable risk that data subjects will wrongly self-identify, then failing to make the consequences of the self-identification known to data subjects could result in liability for failing to meet the Lawfulness, Fairness and Transparency Principle.”[[5]](#footnote-5)

The RySG appreciates that Bird & Bird has provided guidance on how to mitigate those risks. However, the question of how to adopt those procedures and in what manner, not to mention determining what is and is not an acceptable risk, must be the sole responsibility of the Contracted Parties who bear that risk. In any other commercial arrangement this would be an uncontroversial proposition. As we have said since the beginning of this PDP, where Contracted Parties bear liability for processing of data, decisions about that data must reside with Registries and Registrars rather than third parties who do not bear any risk themselves, and do not have shared interests in terms of the protection of our customer’s data. 

1. **Flexibility is desirable**

Maintaining flexible rather than prescriptive policies on legal vs. natural differentiation ensures that Registrars and Registries are nimble and able to quickly respond to future regulatory changes that may impact the publication of legal person data without requiring additional policy making. The RySG recognizes that the [Revised Directive on Security of Network and Information Systems](https://digital-strategy.ec.europa.eu/en/library/revised-directive-security-network-and-information-systems-nis2) (“NIS 2”) has the potential, once adopted, to affect how Registrars and Registries process legal person data. The uncertainty around how and when EU Member States will implement NIS 2 is precisely why it is imperative that Registries and Registrars have the flexibility to self-determine their compliance with the shifting legal and regulatory landscape.  The changing and evolving privacy landscape reinforces the Phase 1 recommendation affirming the Contracted Parties’ option to differentiate between legal and natural persons.

1. **Insufficient justification that additional requirements are necessary or even beneficial**

Although the RySG feels strongly about Phase 1 Recommendation 17 on its own merits, we also note that no compelling justification was provided as to why mandatory differentiation would be necessary or even desirable.  Without more information, we do not understand with any precision what problem mandatory differentiation between legal and natural person registrations is attempting to solve.

**III. RySG Trusts the GNSO Process to Determine When Future Policy Work is Required**

The RySG supports flagging NIS 2 to the GNSO Council for ongoing monitoring. However, we do not feel that the current draft NIS 2 necessitates new policy work and hesitate to predetermine an outcome that it does.  The RySG supports and defers to the GNSO Council’s role in determining when policy work is required. GNSO practices and procedures make clear that ICANN policy is not required to direct or duplicate obligations that Contracted Parties are subject to under law. ICANN initiated this EPDP to address the enactment of GDPR, policy work in that instance was necessary because of direct conflicts between the requirements in our agreements with ICANN and the requirements of GDPR. The same cannot be said for potential draft NIS 2 legislation.  In the meantime, data protection laws have been passed or come into effect in California, Virginia, Japan, India, and China (to name a few) that some or all Contracted Parties must follow. No one has suggested (rightfully) that ICANN make policy to ensure compliance with those obligations because there are no direct conflicts with our agreements.  Ultimately the decision of if and when to initiate new policy work must be left to the GNSO Council, following existing processes.

**IV. Recommendation #1 is Out Scope and Raises Significant Implementation Questions**

As a reminder, on the issue of legal vs. natural differentiation in Phase 2A, the GNSO Council instructed the EPDP to answer two plainly narrow questions: (1) 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”); and (2) what guidance, if any, can be provided to Registrars and/or Registries who differentiate between registrations of legal and natural persons.[[6]](#footnote-6)

Adherence to the agreed upon scope of a PDP is fundamentally important in developing good policy. Unfortunately, the Phase 2A work has suffered from constant attempts to expand the scope of our task, ultimately resulting in a recommendation for creating a data element that we have repeatedly flagged as well beyond our instructions from GNSO Council. The mandatory creation of a new data element has no nexus with the Phase 1 Recommendation #17 language, and therefore is not justified as a response to the first part of our task from the GNSO.  Instead of seeking clarification on scope at the outset of the consideration of this issue, the EPDP Chair determined that the creation of a data element relates to guidance within the scope of the EPDP. Moreover, “if the GNSO Council feels like what we are producing is out of scope, that they will communicate that.”[[7]](#footnote-7)

As a result, the RySG respectfully requests that the GNSO council first examine Recommendation #1 from the perspective of whether the proposal is in fact within the scope of the Phase 2A work prior to considering whether to approve the recommendation. As we explain, we believe that it is not. Should the GNSO determine that Recommendation #1 is in scope, the RySG still has significant concerns about the appropriateness and practical implementation of this recommendation.

1. **Recommendation #1 is unrelated to our instructions from Council**

We believe that the proposed mandatory creation of a new data element, which requires engagement with the IETF, and likely additional engagement in other areas, does not qualify as the “guidance” referred to in the GNSO instructions. The existence (or not) of a standardized data element does nothing to assist parties in the process of differentiation, it merely captures the outcome of that process. Focusing on the outcome rather than the process is not guidance, at least not practical guidance that is meaningful and therefore does not conform to the EPDP’s instructions from Council.

Similarly, we do not, in considering the possibility of a standard data element, agree that recommending a new data element is related to guidance simply because the data element is referenced in that guidance. We cannot bootstrap items into the scope of the PDP in this manner. The EPDP should not go beyond the scope of its instructions, and our recommendations must be similarly focused.

1. **Creating a new data element raises significant implementation issues**

If the GNSO determines that Recommendation #1 is in scope of Phase 2A, the RySG still believes that there are significant implementation issues that the GNSO and ICANN must closely consider before adopting this recommendation.

The proposed data element is not something that ICANN can create on its own. The EPP and RDAP Internet Standards (the technical specifications), both of which are the basis for most communication channels used for registration data, are controlled by the IETF. The IETF has a process independent of ICANN within a technical community comprised of more than just ICANN-related parties potentially creating implementation challenges.

Given the significant concerns raised regarding the adoption of this data element, we note that no compelling justification as to why this data element is necessary or beneficial, particularly as part of the public RDDS have been provided. The, rationales put forward, including (i) tracking to what extent Contracted Parties are implementing differentiation; (ii) allowing the public to verify the accuracy of a legal vs. natural designation; (iii) determining compliance with applicable laws, (iv) passing references to “consistency”, and (v) ‘what harm’ is there in adopting the data element?; lack specific benefit, and are likely achievable via existing mechanisms. None of the rationales presented make much practical sense, let alone are necessary or compelling enough to justify such significant and out-of-scope changes to existing policy.

As stated above, the existence (or not) of a standardized data element does nothing to assist Contracted Parties who wish to differentiate between legal and natural person registrations, it merely captures the outcome of that process.  In considering the possibility of a standard data element, Registries did agree that for purposes of integration with a possible future SSAD system, as recommended in Phase 2, it may make sense for a standardized way of indicating if a registration contains personal data or not. While we acknowledge there may be a use case linked to disclosure decisions in the SSAD, we would prefer to defer those decisions, as is appropriate, to the development of the SSAD rather than taking steps now that may limit the utility of this data element once the SSAD is functional.

The recommendation goes far beyond this, requiring ICANN to create this field in coordination with the technical community for use with EPP and the RDDS.  To be clear, the RySG does not support using this field in either EPP or RDDS.  As a compromise, we agreed that this is a completely optional field that Contracted Parties who choose to differentiate between legal and natural persons and/or indicate if a registration contains personal data or not could make use of, but are in no way required to use.

In the interests of collaborating in good faith towards a compromise solution, Registries agreed to the creation of a standardized data element and that Contracted Parties could, if they choose to, make use of that standard data element.  We have considerable misgivings with the use of such a field in either EPP or RDDS and need to make clear that we don’t support its use with either.  We did not hear compelling rationale for why such a field should be used in either case and our support for the creation of such a field does not indicate guidance or a recommendation that it should be used.

**V. The Guidance Developed on Legal vs. Natural Differentiation is Insufficient**

The RySG supports the concept of guidance that helps Contracted Parties navigate the complex legal and technical challenges that Registries and Registrars routinely face in operating our businesses. In our experience, the best guidance is drafted by those with the appropriate expertise and interests to confront complexity and offer clarity on difficult or ambiguous questions. Despite Contracted Parties’ continued objections and suggestions for improvement, the guidance included in this report on legal vs. natural differentiation meets none of these criteria.

In developing the guidance contained in Recommendation #2, the working group agreed that this is optional guidance that Contracted Parties who choose to differentiate between legal and natural person registrations can leverage at their discretion.  However, the final report language for Recommendation #2 says the Contracted Parties who choose to differentiate SHOULD follow this guidance.  The RySG feels that the use of the word SHOULD here does not accurately capture what was agreed to by the working group.  Per RFC 2119, “SHOULD . . . means that that there may exist valid reasons in particular circumstances to ignore a particular item, but the full implications must be understood and carefully weighed before choosing a different course.” Since following this guidance for differentiation is optional, the more appropriate term here is MAY (“an item is truly optional”).  While in the interest of collaborating in good faith towards a compromise solution, Registries chose to support the recommendation, we must note that we don’t agree with the use of SHOULD and that Contracted Parties need to consider if the guidance is useful and applicable to them before deciding if they adopt it.

In short, the guidance included in this report on legal vs. natural differentiation is woefully inadequate if its purpose is actually assisting a Contracted Party who wants to differentiate. The guidance falls short for several reasons. First, the guidance is deliberately and unreasonably outcome oriented. Those who have advocated for the necessity of this guidance minimized the process by which differentiation happens, and the associated legal requirements and considerations.  This approach almost intentionally obscures rather than grapples with the complexities and risks involved in the process of differentiation, which does nothing to assist the user of the guidance in understanding and addressing those complexities and risks.

Second, the guidance is not practical. Again, by failing to grapple with the complexities and risks inherent in differentiation, the resulting guidance is barely more than a restatement of the law and expected outcomes. For example, the guidance states:

*“Registrars should ensure that they clearly communicate the nature and consequences of a registrant identifying as a legal person. These communications should include:*

* *An explanation of what a legal person is in plain language that is easy to understand.*
* *Guidance to the registrant (data subject)35 641 by the Registrar concerning the possible consequences of:*
  + *Identifying their domain name registration data as being of a legal person;*
  + *Confirming the presence of personal data or non-personal data, and;*
  + *Providing consent. This is also consistent with section 3.7.7.4 of the Registrar Accreditation Agreement (RAA).”*

Unfortunately, for a user of this guidance, this brief section raises more questions than it answers. What is a legal person? What if the registrant is not the data subject? What are the consequences to flag for the data subject? What steps are needed to ensure that the data subject understands this messaging (e.g., A/B testing, user panels)? What are the risks if these steps are not followed? How is meaningful consent obtained, especially where the registrant may not be the data subject? Is education of, or notice to the registrant sufficient to mitigate risk? Merely restating obligations that are largely already dictated by law does very little here to actually assist a user of the guidance in navigating these issues.

Similarly, the guidance states in the very last paragraph that:

*Distinguishing between legal and natural person registrants alone may not be dispositive of how the information should be treated (made public or masked), as the data provided by legal persons may include personal data that is protected under data protection law, such as GDPR.*

This is in fact the hardest and riskiest issue in differentiating between legal and natural person registrations. As the EDPB directed ICANN, “[t]he mere fact that a registrant is a legal person does not necessarily justify unlimited publication of personal data relating to natural persons who work for or represent that organization.”[[8]](#footnote-8) This guidance does nothing to contemplate or even minimally explain how a Registrar might begin to approach the issue. Addressing this core challenge almost in passing severely undermines the utility of this guidance and increases our concern about the overall practicality of this advice.

In the interest of collaborating in good faith, the RySG agreed to support the publication of this guidance despite the concerns outlined above, as the recommendation makes clear that the guidance is truly optional and Contracted Parties (even those who choose to differentiate) are in no way required to follow Recommendation #2. We are skeptical that this guidance will be widely adopted, not because guidance on this issue is not wanted, but because these guidelines do nothing to guide practical implementation and do not offer any comfort to the parties that bear the legal risks.

**VI. Conclusion**

 For all the above reasons, given the continued support of the various parties in the EPDP team for the publication of this final report and the recommendations as stated, and notwithstanding our concerns relating to the scope of the recommendations, the RYSG does not object to the passage of this report and the recommendations as stated. It is noted however, that this support is based on the good faith belief that all parties maintain the agreed level of consensus. While, the RYSG does not support a number of aspects of this report, in the spirit, and support, of the multistakeholder model, we have compromised.

1. GNSO Council Instructions for Legal vs. Natural in Phase 2A: “[T]he EPDP Team is expected to review the study undertaken by ICANN org (as requested by the EPDP Team and approved by the GNSO Council

   during Phase 1) together with the legal guidance provided by Bird & Bird as well as the substantive input provided on this topic during the public comment forum on the addendum and answer:

   1. 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“);
   2. What guidance, if any, can be provided to Registrars and/or Registries who differentiate between registrations of legal and natural persons.”

   [↑](#footnote-ref-1)
2. [The EPDP Phase I Final Report](https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf) contains the following recommendationon the legal vs. natural person issue: **Recommendation 17.1:** “The EPDP Team recommends that Registrars and Registry Operators are permitted to    differentiate between registrations of legal and natural persons, but are not obligated to do so.”

   **Recommendation 17.2:** “The EPDP Team recommends that as soon as possible ICANN Org undertakes a study, for which the terms of reference are developed in consultation with the community, that considers:

   * The feasibility and costs including both implementation and potential liability costs of differentiating between legal and natural persons;
   * Examples of industries or other organizations that have successfully differentiated between legal and natural persons;
   * Privacy risks to registered name holders of differentiating between legal and natural persons; and
   * Other potential risks (if any) to registrars and registries of not differentiating.”

   **Recommendation 17.3:** “The EPDP Team will determine and resolve the Legal vs. Natural issue in Phase 2.” [↑](#footnote-ref-2)
3. Recommendation 17.1: “The EPDP Team recommends that Registrars and Registry Operators are permitted to    differentiate between registrations of legal and natural persons, but are not obligated to do so.” [↑](#footnote-ref-3)
4. “Advice on liability in connection with a registrant's self-identification as a natural or non-natural person pursuant to the General Data Protection Regulation (Regulation (EU) 2016/679) ("GDPR"),” by Ruth Boardman & Gabe Maldoff, dated January 25, 2019: [https://community.icann.org/download/attachments/102138857/Natural%20vs.%20Legal%20Memo.docx](https://community.icann.org/download/attachments/102138857/Natural%20vs.%20Legal%20Memo.docx?version=1&modificationDate=1548874825000&api=v2) [↑](#footnote-ref-4)
5. Id [↑](#footnote-ref-5)
6. GNSO Phase 2A Charter, available at https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-2-priority-2-items-10sep20-en.pdf [↑](#footnote-ref-6)
7. “On your point about scope, the leadership team and staff have discussed this. It’s my view that what we are discussing here as it relates to guidance is within the scope of the EPDP charter and guidance that was given to us, the questions that were given to us. And I think that if the GNSO Council feels like what we are producing is out of scope, that they will communicate that. And that we have a liaison here with Philippe, who is also the GNSO chair, who will manage any issue along those lines related to scope.” EPDP Chair, Phase 2A Meeting, August 5, 2021. [↑](#footnote-ref-7)
8. EDPB Letter to Goran Marby, dated July 2018, available at https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-05jul18-en.pdf [↑](#footnote-ref-8)