

# Registries Stakeholder Group Statement



## Public Comment\* : **Initial Report of the Expedited Policy Development Process (EPDP) on the Temporary Specification for gTLD Registration Data Team – PHASE 2A**

Date statement submitted: **19 July 2021**

Reference url: <https://www.icann.org/public-comments/epdp-phase-2a-initial-report-2021-06-03-en> .

### Background<sup>1</sup>

This Public Comment forum seeks community feedback on the Initial Report published by the Expedited Policy Development Process (EPDP) Team on the Temporary Specification for gTLD Registration Data - Phase 2A.

Direct link: [EPDP Phase 2A Initial Report](#) (.pdf)

### Related RySG comments

- [RySG comment on the Addendum to the Initial Report of the Expedited Policy Development Process \(EPDP\) on the Temporary Specification for gTLD Registration Data Team – Phase 2](#) ( 5 May 2020 )
- [RySG comment on the GNSO Expedited Policy Development Process \(EPDP\) on the Temporary Specification for gTLD Registration Data Policy Recommendations for ICANN Board Consideration](#) (17 April 2019)
- [RySG comment on the Initial Report of the Expedited Policy Development Process \(EPDP\) on the Temporary Specification for gTLD Registration Data Team](#) (21 Dec 2018)

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## Registries Stakeholder Group comment\*

*This comment was submitted via google forms and can be viewed [here](#) .*

### **Preliminary Recommendation #1 (Phase 1 Rec. 17)**

No changes are recommended, at this stage, 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

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\* *Registries Stakeholder Group (RySG) Comment - In the interest of time, we did not conduct a vote on these comments. We did discuss them on our mailing list and during a biweekly conference call, and no member opposed their submission.*

<sup>1</sup> *Background: intended to give a brief context for the comment and to highlight what is most relevant for RO's in the subject document – it is not a summary of the subject document.*

obligated to do so“).

1. Question for Community Input:

*Is there new information or inputs that the Phase 2A team has not considered in assessing whether to make changes to the recommendation that Registrars and Registry Operators may, but are not obligated to, differentiate between legal and natural persons?*

RySG Comment:

The RySG agrees with this recommendation. The RySG finds that its review of the [study](#) conducted by ICANN Org on differentiation between Legal and Natural Persons in the Domain Name RDDS, the [Bird & Bird memo](#) on Legal vs Natural Persons and the substantive input provided during the [public comment forum on the addendum to the EPDP Phase 2 Initial Report](#) has not yielded any compelling reasons to amend Recommendation #17 in the Phase 1 Final Report.

Moreover, the RySG continues to observe that Recommendation #17 in the Phase 1 Final Report, permitting but not requiring differentiation, is the most appropriate approach given legislative developments with NIS2 and the Digital Services Act. Rather than create an unnecessary potential conflict between law and ICANN policy, existing Recommendation #17 allows Registries the necessary flexibility to determine compliance with their applicable laws.

**Preliminary Recommendation #2**

The EPDP Team recommends that the GNSO Council monitors developments in relation to the adoption and implementation of relevant legislative changes (for example, NIS2), relevant decisions by pertinent tribunals and data protection authorities, as well as the possible adoption of the SSAD to determine if/when a reconsideration of this question (whether changes are required to the EPDP Phase 1 recommendation “Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so“) is warranted. The GNSO Council is expected to consider not only input on this question and any new information from GNSO SG/Cs but also ICANN SO/ACs to help inform a decision on if/when this question is expected to be reconsidered.

2. Question for Community Input:

*Is this recommendation necessary for the GNSO council in considering future policy work in this area? If yes, in what ways does this monitoring assist the Council?*

RySG Comment:

The RySG does not agree with this recommendation and believes it is out-of-scope of the EPDP Team’s mandate. First, it is important to note that the EPDP on the Temporary Specification for gTLD Registration Data had a narrow scope of bringing gTLD Registration Data Policies at ICANN into compliance with the European Union’s General Data Protection Regulation. Limiting the scope so narrowly to the topic of compliance with EU data protection regulation and using the Temporary Specification as a starting

point allowed for the use of an Expedited Policy Development Process as opposed to a more traditional PDP in which an issues scoping phase would have been required. [Annex 4 of the GNSO Operating Procedures](#) allows for very specific conditions under which the use of an Expedited PDP is permitted, none of which are fulfilled by addressing the EU's draft Revised Directive on Security of Information Systems (NIS2).

As the draft legislation stands, NIS2 does not present the same conflict for contracted parties that GDPR did. The requirements of GDPR forced contracted parties into conflict with either the law or their ICANN Agreements. As law cannot require a party to act in conflict with law, the EPDP work was necessary to address data processing. The same cannot be said for NIS2.

The RySG understands the concerns expressed by colleagues within the EPDP Team regarding their belief that GNSO processes are not agile enough to deal with a changing legislative environment that impacts the domain name space. However, we do not believe that this concern, if true, is best addressed by developing out-of-scope policy recommendations in order to seek some form of mitigation against this.

Furthermore, the RySG does not consider this recommendation to add any substantive value. ICANN Org is currently already monitoring draft legislation that is relevant to its policies and how they are implemented by its Contracted Parties. The draft NIS2 is, in fact, already listed in its currently published [report](#) as a relevant draft proposed legislation in-progress that ICANN should follow closely. Adding a recommendation to that same effect is not only out-of-scope, but redundant.

We must also note that it is not the task of any PDP team to criticize, directly or indirectly, or otherwise suggest any recommendation which is aimed, not at the task the GNSO has set, but at changing established GNSO processes. Such matters should be raised in the appropriate fora, of which the EPDP is not one.

### **Preliminary Recommendation #3**

The following additions are made to the EPDP Phase 1 recommendations: Recommendation #5

The following optional data element (optional for the Registrar to offer to the Registrant and collect) is added to the data elements table:

[Please refer to the Data Elements Tables on pp. 5-6.]

For the purpose of the Legal person and non-personal data field, which is optional for the Registrar to provide to the Registrant to self-designate, Registrars should advise the Registered Name Holder at the time of registration what the consequences are of self-designating as a legal or a natural person and to provide non-personal data only (or provide appropriate consent if personal data is involved), consistent with preliminary recommendation #3, point 4.

The EPDP Team recommends that the applicable updates are made to the Registry Registration Data Directory Services Consistent Labeling and Display Policy and the RDAP profile consistent with this recommendation. The EPDP Team expects ICANN org to consult with the EPDP Phase 2a IRT, or the IRT that has been assigned the responsibility for implementing this recommendation, and if applicable the GNSO Council, about these changes.

For clarity, the existence of this standardized data element does not require a Contracted Party to differentiate between legal / natural person type or personal / non-personal data. As part of the implementation, it should be considered whether for those Contracted Parties that choose not to differentiate, the data field is not visible in RDDS or automatically set to “unspecified”.

3. Question for Community Input:

*Should a standardized data element be available for a Contracted Party to use? If yes, why? If no, why not? Why is harmonization of practices beneficial or problematic?*

RySG Comment:

The RySG believes that an obligation of adding new data elements to the RDDS in this manner is also out-of-scope of the EPDP. On the topic of Legal vs Natural, the EPDP team was specifically tasked with reviewing recommendation #17 from Phase 1, to determine if this recommendation should be amended following a review of the ICANN Org study, Bird & Bird’s legal advice and substantive input on the topic submitted during the public comment forum on the addendum to the Phase 2 Initial Report. Further instructions were given by the GNSO Council to consider developing guidance for Contracted Parties that choose to differentiate.

The introduction of a binding policy recommendation, as is being done in recommendation #3, does not address either of the 2 sets of instructions by the GNSO Council. If adopted, this recommendation would however potentially require amendments to Phase 1 recommendations #5, #7, #8 and #10, none of which the GNSO Council tasked the EPDP Team with amending. These recommendations have already been adopted by the ICANN Board and are currently in the process of being implemented by an Implementation Review Team.

Finally, the RySG does not believe that there is any added value in requiring Contracted Parties to differentiate between the Registrant type (Legal Person vs Natural Person), as this is not in any way determinative in how gTLD Registration Data is processed. It is the nature of the data itself that is more crucial and whether or not this data might result in the identification of a Natural Person, not the Registrant type.

This is already demonstrated in various sections of the Phase 2 Final Report and Recommendations, such as in Recommendation #9, section 9.4.4, where disclosure of gTLD Registration Data must be automated where there is *“No personal data on registration record that has been previously disclosed by a Contracted Party”*.

Those parties proposing the addition of this data element have put forward several rationales for its necessity as a publically available field: (i) tracking to what extent Contracted Parties are implementing differentiation; (ii) allow the public to verify the accuracy of a legal vs. natural designation. Neither of these rationales make practical sense, let alone are compelling enough to justify such significant and out-of-scope changes to existing policy. What is the purpose of tracking implementation of a voluntary action? Wouldn’t the existence of unredacted legal person data demonstrate

that the party is implementing differentiation without the data element? And how does this data element alone provide any additional value for accuracy efforts? The RySG cannot support significant mandatory changes on such thin rationales.

Notwithstanding our observations outlined above, and with due regard to the RySG comments relating to Recommendation 4 'guidance' outlined below; we do believe the inclusion of a suggested 'standardized data elements' may be more acceptable an option were it to be included, for the purpose of encouraging consistent labelling and handling of potential flags, not as a mandatory recommendation, but as a practical voluntary element contained in truly voluntary guidance (e.g. Preliminary Recommendation 4.3).

For the avoidance of doubt, the RySG also notes that were any contracted party to decide to engage in voluntary differentiation under the existing recommendation 17 (EPDP Phase 1), then any reliance on 'guidelines', MUST equally remain voluntary. We would caution the EPDP team to consider the consequence of making any 'guidance' mandatory. Mandatory expectations cannot be considered 'guidance', but rather a factual and unequivocal determination of 'legality', adherence to which will be enforced by ICANN compliance, under the relevant contracts. Noting our concerns with the guidance itself (Question 6 below), where we do not believe the guidance to be comprehensive, or practical enough for such purpose at this juncture, we must insist that any guidance issued by the EPDP Phase 2A team MUST remain voluntary as per the GNSO instructions i.e. 'guidance' not 'mandatory enforced procedure'.

4. Question for Community Input:

*If yes, what field or fields should be used and what possible values should be included, if different from the ones identified above? Aspects of the recommendation that the EPDP Team is looking for specific input on having been marked above with an asterisk (\*), indicating the options that are under consideration.*

RySG Comment:

The RySG does not agree with the recommended amendments to the fields for the reasons stated in our response to Question 3 above. For the avoidance of doubt, we will restate that the RySG does not agree that the creation of such a mandatory field is in the scope of the EPDP Phase 2A team; we reiterate the only GNSO established task for the team was to identify whether a change to recommendation 17 was likely to receive consensus (i.e. that the Registry / Registrar MAY differentiate between natural and legal persons). The creation of such a field is not envisaged in the GNSO instructions, and such instructions certainly did not include, explicitly or impliedly, the creation of a new mandatory data element for RDDs. Such a data element relating to the RDDs has no bearing, nor is it necessary to answer the query as to whether consensus to change an existing recommendation is likely to exist.

5. Question for Community Input:

*If such a standardized data element is available, MUST a Contracted Party who decides to differentiate use this standardized data element or should it remain optional for how a Contracted Party implements this differentiation?*

RySG Comment:

The RySG does not agree with the recommended amendments to the fields for the reasons stated in our response to Question 3 above. Should this recommendation be adopted, the RySG firmly believes that the collection/generation of the field concerning the “*Registrant Legal Person (Yes/No/Unspecified)*” should be optional for the applicable Contracted Party to collect/generate.

We would also like to remind the EPDP team, that where a contracted party specifies either ‘yes’ or ‘no’ in such a field, a substantial set of additional processing of data, personal or otherwise, is required. The guidance does not provide standard, practical and reliable means of arriving at such a predictable conclusion as expecting mandatory publication of the outcome of such data processing operations. This places a large number of Contracted Parties at an elevated, if not substantial risk, were they to voluntarily choose to delineate. If it is the intention of the EPDP to encourage voluntary delineation, then we must advise that all aspects of the guidance must remain voluntary, as intended.

**Preliminary Recommendation #4**

The EPDP Team recommends that Contracted Parties who choose to differentiate based on person type SHOULD follow the guidance below and clearly document all data processing steps. However, it is not the role or responsibility of the EPDP Team to make a final determination with regard to the legal risks, as that responsibility ultimately belongs to the data controller(s). 1. Registrants should be allowed to self-identify as natural or legal persons. Registrars should convey this option for Registrants to self-identify as natural or legal persons (i) at the time of registration, or without undue delay after registration, and (ii) at the time the Registrant updates its contact information or without undue delay after the contact information is updated.

2. Any differentiation process must ensure that the data of natural persons is redacted from the public RDDS unless the data subject has provided their consent to publish or it may be published due to another lawful basis under the GDPR, consistent with the “data protection by design and by default” approach set forth in Article 25 of the GDPR.

3. 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 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).

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

a. An explanation of what a legal person is in plain language that is easy to understand.

b. Guidance to the registrant (data subject) by the Registrar concerning the possible consequences of:

- i. Identifying their domain name registration data as being of a legal person;
- ii. Confirming the presence of personal data or non-personal data, and;
- iii. Providing consent. This is also consistent with section 3.7.7.4 of the

Registrar Accreditation Agreement (RAA).

5. If the Registrants identify as legal persons and confirm that their registration data does not include personal data, then Registrars should publish the Registration Data in the publicly accessible Registration Data Directory Services.

6. Registrants (data subjects) must have an easy means to correct possible mistakes.

7. 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.

6. Question for Community Input:

*Does this guidance as written provide sufficient information and resources to Registrars and Registry Operators who wish to differentiate? If not, what is missing and why?*

#### RySG Comment:

The RySG submits that the guidance, although certainly welcome in principle, ultimately falls short, in form, of what is actually necessary to be of specific operational use to a registry operator. The RySG appreciates the effort in the intention to provide legal clarity to the contracted parties; however, unfortunately upon review and reflection this ultimately provides little or no actual practical guidance as to how to achieve such compliance.

The RySG is supportive of guidance for contracted parties, but we must conclude that noting the very nature of the concept, such guidance, to be actionable and effective, should be created by the Contracted Parties themselves, to aid those Contracted Parties who may choose to delineate, and who may find the guidance useful, in part, or in full, in their efforts to carry out the delineation as they deem appropriate for their business. The Contracted Parties retain the necessary practical knowledge applicable to create and trace the implications of such practices. Therefore, to be clear, the RySG does not support practices, best, good or otherwise, which are not created with deference to the specific expertise and practical understanding of the underlying processes being proposed. We have not benchmarked, user tested, or evaluated this guidance in any way sufficient to determine its real world efficacy, and are in no position to deem it superior to any other practices. We believe that publication of any such practices, without the full agreement of the affected controllers, serves minimal purpose. We are not convinced that the practices as drafted meet this standard.

More specifically, the proposed guidance (in section 5) states that Registrars should publish the Registration Data of a Registrant in the publicly accessible RDDS should the

Registrant self-identify as a Legal Person. Despite the proposed guidance also stating that Registrars should clearly communicate to Registrants the consequences of self-identifying as a Legal Person, the responsibility (and legal liability associated with that responsibility) remains with the Controller(s) of the data despite any “education” or knowledge of the Registrant. Effectively, the proposed guidance is encouraging Registrars to process personal information of a potential natural person without conducting the due diligence required of them. Ironically, section 7 of the proposed guidance points this out, which places it in conflict with the guidance in section 5.

7. Question for Community Input:

*Are there additional elements that should be included in the guidance?*

RySG Comment:

Notwithstanding the answer to Q6 above, the RySG does not believe that additional elements for inclusion in this guidance will be helpful.

8. Question for Community Input:

*Are there legal and regulatory considerations not yet considered in this Initial Report, that may inform Registries and Registrars in deciding whether and how to differentiate, and if so, how?*

RySG Comment:

For the purpose of guidance on differentiation between Legal and Natural Person Registrants, the RySG believes that each Contracted Party must take into account any legal and regulatory considerations that are applicable to it. These might not be uniform across all Contracted Parties, further demonstrating how the proposed guidance may, or indeed may not be helpful to those it is meant to assist.

9. Question for Community Input:

*If a Registrar or Registry Operator decides to differentiate, should this guidance become a requirement that can be enforced if not followed (“MUST, if Contracted Party decides to differentiate”)?*

RySG Comment:

The RySG firmly believes that this guidance must not become an enforceable requirement to implement. It is very likely that it would be harmful to both ICANN and Contracted Parties, should it become a requirement as well as potentially harmful to

Natural Person Registrants whose personal information might inadvertently be published as a result of following the guidance.

Even if the EPDP Team is able to achieve consensus on substantive guidance for Contracted Parties, it is still important that any guidance be optional for Contracted Parties to implement. Not only to allow Contracted Parties the flexibility to comply with applicable law as appropriate but to implement changes in a way that makes operational sense to each one of them individually. This will very likely vary across Contracted Parties depending on multiple factors such as applicable laws, size of operations, availability of resources, Contracted Party business model, etc..

### **Preliminary Recommendation #5**

The EPDP Team recommends that Contracted Parties who choose to publish a registrant- or registration-based email address in the publicly accessible RDDS should ensure appropriate safeguards for the data subject in line with relevant guidance on anonymization techniques provided by their data protection authorities and the appended legal guidance in this recommendation (see Annex E).

10. Question for Community Input:

*Does this guidance as written provide sufficient information and resources to Registrars and Registry Operators who wish to publish a registrant-based or registration-based email address? If not, what is missing and why?*

### **RySG Comment:**

The RySG appreciates that the recommendation is well intentioned, and we support efforts to provide any additional clarity and aid to the contracted parties, but again we find the recommendation to be lacking in practical and functional aspects of guidance, noting that the guidance ultimately restates legal expectation, whilst providing no practical means or guidance on how to achieve this. We refer again to our statements in response to Q6 above.

Moreover, we are concerned that the wording of this guidance implies that anonymization of email address contacts is possible, when the guidance from Bird & Bird very clearly concludes that this data is pseudonymous, not anonymous, even from the perspective of third parties. Rather than provide clarity, this appears to muddle the issue for parties attempting to implement this guidance.

## Additional Input

11. Are there any other comments or issues you would like to raise pertaining to the EPDP Phase 2A Initial Report? If yes, please enter your comments here. If applicable, please specify the section or page number in the Initial Report to which your comments refer.

### RySG Comment:

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