



**Comment on Priority 2
Policy Recommendations
for ICANN Board
Consideration from EPDP
Phase 2**

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Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

General Comment on the Context of these EPDP Recommendations

The Business Constituency (BC) is pleased to provide this comment on Priority 2 Policy Recommendations for ICANN Board Consideration from EPDP Phase 2.¹

Before commenting on the specifics of Phase 2 Priority 2 items, the BC believes it is important to reiterate and support the concerns detailed in the EPDP Phase 2 minority statements from the BC, IPC, ALAC, GAC and SSAC, as well as the concerns of NTIA sent to United States Senator Wicker on 23-Dec-2020, arguing the policy in the Phase 2 Final Report fails to meet the needs of users of WHOIS data. As such the BC strongly urges the Board to carefully consider these concerns in their future deliberations and ensure that any future SSAD, and any related consensus policy, is fit for purpose and meets the needs of its users.

We also want to remind the ICANN Board of the 24-Nov-2020 Letter sent to the EC on the need to restore urgently needed access to WHOIS data. This letter (attached) is signed by 21 organizations and supports our views that ICANN's Phase 2 policy is not fit for purpose and dangerously out of balance. Further action from EU Governments will be needed to not only clarify but rectify this situation.

In fact, the European Commission has now adopted [a formal proposal for a revised Directive on Security of Network and Information Systems \(NIS 2\)](#) that calls on Member States to ensure that TLD registries maintain accurate and complete WHOIS data and provide timely and lawful access to this data for the purpose of contributing to the security, stability, and resilience of the DNS. The NIS 2 Proposed Directive has completed public consultation and an impact assessment and has been transmitted to the EU co-legislators (the European Parliament and Council of Ministers of the EU).

Additionally, the United States Congress has taken an increased interest in the issue of access to WHOIS data. In a [Joint Explanatory Statement \[p12\]](#) attached to the historic FY 2021 Omnibus Spending and COVID Relief bill, the NTIA is directed "through its position within the Governmental Advisory Committee, to work with ICANN to expedite the establishment of a global access model that provides law enforcement, intellectual property rights holders, and third parties with timely access to accurate domain name registration information for legitimate purposes."

This congressional directive was spurred, in part, by NTIA's own outreach to the Commerce Committee Chair, Senator Wicker, regarding the "failures" of the EPDP recommendations to address

¹ ICANN Public comment page at <https://www.icann.org/public-comments/policy-recommendations-epdp-phase-2-2020-12-03-en>

basic issues impacting WHOIS access and the need “to explore alternate approaches to providing federal and local law enforcement, cybersecurity industries, the business and the IP communities...prompt and effective access to information they need to build a safe, secure, and trustworthy internet.”

These two government directives, which involve and implicate GAC member bodies and are clearly authored with a failing WHOIS access model in mind, have already garnered ICANN’s close attention and the BC recommends a re-evaluation of the EPDP before moving forward.

For those who say that these documents and developments be disregarded and suggest instead that Recommendation 18 of the EPDP Final Report provides the best mechanism for this proposed legislation to be addressed at a future date, we point out that there is no implementation timeline defined for Recommendation 18. Ignoring long-awaited and pending legislation in this fashion is unnecessarily reckless, when ICANN can take action now to ensure a global access model that provides law enforcement, intellectual property rights holders, and third parties with timely access to complete and accurate domain name registration information for legitimate purposes.

Specifically, the Phase 1 and Phase 2 policies should be reviewed recommendation-by-recommendation, to determine how they are expected to be impacted by these developments. For illustrative examples, consider these recommendations:

- Phase 2 report related to the SSAD (Recs #1-18) should not be approved.
- Phase 1 recommendations that affect Thick WHOIS (Rec# 7) should be suspended.
- Phase 1 recommendations that standardize the request templates (Rec # 18) should be reviewed and implemented, with updated timelines and disclosure requirements that track the NIS2 proposals.
- Phase 1 recommendations that fail to improve the accuracy requirements applicable to WHOIS (Rec #4) need to be revisited.
- Phase 1 recommendations that do not require non-personal data to be published (Rec# 12) should be suspended.

Listed above are non-exhaustive examples. Until such a review of Phase 1 & 2 is conducted, EPDP proposed policies and related implementation should be halted and the Temporary Specification should be continued – coupled with actual enforcement by ICANN contractual compliance.

Finally, we would like to highlight the text of NIS 2 Article 23 where it is recognized that “TLD registries and the entities providing domain name registration services ... are required to provide efficient access to domain name registration data for legitimate access seekers” and “respond without undue delay to requests from legitimate access seekers”² [emphasis added].

² European Commission, Directive on Security of Network and Information Systems. NIS2 mandates that “TLD registries and the entities providing domain name registration services for the TLD should establish policies and procedures to collect and maintain accurate and complete registration data, as well as to prevent and correct inaccurate registration data in accordance with Union data protection rules” and “should make publicly available domain name registration data that fall outside the scope of Union data protection rules, such as data that concern legal persons” and “have policies and procedures in place to ensure that the databases include accurate and complete information.”

This statement from the European Commission reinforces the BC belief that 3rd party purposes should be added to EPDP Team Phase 1 purposes, which form the basis of new ICANN policy. As the status of the policy agreed to in the Phase 2 EPDP Final Report is unclear and the timing of any implementation is many years away, all third-party purposes defined in Recommendation #7 in the EPDP Phase 2 Final Report must also be added to the EPDP Team Phase 1 purposes, which form the basis of the new ICANN policy. Not doing so would result in a Phase 1 policy that is incomplete, underspecified, and ultimately unenforceable.

Specific Comments on Phase 2 Priority 2 Items

Rec #19 - Privacy/Proxy

BC supports the updated Rec #19 and believes it should be incorporated into the Phase 1 IRT documents. Moreover, as emphasized by the BC in prior public comments to ICANN, it is critical that community consensus initiatives, including the PPSAI, Thick WHOIS, and cross field validation, are un-paused and recommenced immediately.

Rec #20 - City Field

BC supports the updated Rec #20 and believes it must be incorporated into the Phase 1 IRT documents.

Rec #21 - Data Retention

BC supports the updated Rec #21 and believes it must be incorporated into the Phase 1 IRT documents.

Rec #22 - Purpose 2

BC supports the updated "Purpose 2" as defined in the EPDP Phase 2 Final Report and agree it should be added to the EPDP Team Phase 1 purposes, which form the basis of the new ICANN policy. In addition, and as stated above, all third-party purposes defined in Recommendation #7 in the EPDP Phase 2 Final Report must also be added to the EPDP Team Phase 1 purposes and be included as the basis of ICANN's new policy.

This comment was drafted by Alex Deacon, Andy Abrams, Drew Bennett, Vivek Goyal, and Mark Svancarek.

It was approved in accord with our charter.