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AT-LARGE ADVISORY COMMITTEE

Final Report of the Temporary Specification for gTLD Registration Data Phase 2A Expedited Policy Development Process

ALAC Minority Statement

The ALAC recognizes and appreciates the work of the EPDP Phase 2A team, the efforts of the chair, vice chair and the liaison to the GNSO council as well as the dedication and efforts of the ICANN org support staff. Nonetheless, the ALAC believes that the Phase 2A did not properly address its mandate. The net result is that the importance of the registration data to various community members such as consumer protection agencies, law enforcement authorities and cybersecurity investigators and the crucial role they play in protecting everyday Internet users, registrants, customers, businesses and the entire online population will not be properly addressed.

It is important to strike a balance between the protection of registrants' personal information and users' experience, safety and security. Redacting data that is not protected by data protection laws does not allow the right balance to occur.

In this Minority statement, the ALAC is concerned about the following aspects of the recommendations of the Phase 2A final report and their impact on the security and safety of everyday Internet users:

- Not mandating differentiation between legal and natural person data,
- Not mandating the usage of the common data element by all contracted parties,
- Lack of means to contact registrants
- "Process"

Not mandating differentiation between legal and natural person data

GDPR does not protect the non-personal data of legal persons. Moreover, the EU GDPR recital number 14 which says "this regulation does not cover the processing of personal data, which concerns legal persons, and in particular, undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person."

The EPDP received legal guidance that it was reasonable to allow registrants to self-designate and with proper cautions, disclaimers and correction capabilities, there was low risk to contracted parties to do so. This position was supported by the July 2018 EDPB letter to Göran Marby. This advice was ignored by the EPDP. Although the installed base of 200M registrations would take time to address (such as at renewal time), the EPDP did not even recommend that differentiation of new registrations be made. More

to the point, even the discussion of taking such action (as formally proposed by GAC EPDP Members) was summarily dismissed early in Phase 2A, instead focusing only on “guidance” which could be ignored.

Taking into consideration all of the above and that the Registration Data Directory Service (RDDS) is a public good that protects global online users and the GDPR and similar privacy laws are a public good that protects the registration data of registrants, a right balance needs to occur. This right balance cannot be achieved if more data than what is required by law and legislation is redacted, and the EPDP made virtually no effort to achieve that balance.

Not mandating the usage of the common data element by all contracted parties

The proposed common data element(s) in Recommendation # 1, allows for eight possible different values including “the legal status distinction was not made” and “the presence of personal data wasn’t determined”. Those statuses allow for contracted parties who do not differentiate to make use of the newly defined field. However, the EPDP failed to recommend that the fields must be used, even by those registrars who voluntarily choose to make a legal/natural distinction or identify the presences/absence of personal data. By not requiring the use of the fields, EVEN WHEN valid and useful data is available makes no sense. Moreover, the EPDP did not designate these fields as eligible for public disclosure, even though they contain NO personal information.

According to the EPDP phase 1 and phase 2 final reports recommendations, the contracted parties (CPs) must update their current registration data directory service (RDDS)

Mandating the use of the common data element by all contracted parties would allow similar processes to be followed by all CPs across the globe, whether they differentiate or not and whether they are subject to EU regulations or not.

As a result, we are creating a common element that no one is required to use, defeating the purpose behind the creation of common ways of doing things and opening the door to fragmentation.

Lack of means to contact registrants

The ALAC regrets that the EPDP failed to reach closure on methodologies to better address anonymization or pseudonymization of contact e-mail addresses. That being the case, we are left with the Phase 1 recommendations allowing anonymization but in the absence of that, allowing web forms for contact. Since the completion of Phase 1, it has become apparent that some (major) registrars use a type of web form that effectively does not allow any useful communications with a registrant. Addressing this apparent gap in the regulations was ruled to be out of scope, despite the GNSO instructions to revisit this Phase 1 recommendation. The net effect is that for a significant part of the gTLD registration base, there is no effective way to achieve registrant communications.

“Process”

The ALAC is concerned that throughout this EPDP, the focus has been exclusively on the projected processes and stated time-schedules with severe impact on the ability to determine and recommend good policy.

Examples include:

- Timelines which do not allow sufficient deliberation of consultation with the groups supporting this EPDP
- Scope determinations that rule some things out of scope because they are not explicitly mentioned in GNSO instructions, but allowing other diversions to proceed (such as the recommendation on Code of Conduct)
- Suspension of discussion on differentiation in favor of “guidance”, with the promise of return, but never doing so.
- Inconsistent standards of “proof” which allow some arguments to be dismissed while others stand.

It appears that there is an increasing reluctance of contracted parties to accept ANY new obligations, regardless of the benefits to other parties or the public good. This is troubling for direction.

Summary

The EPDP Phase 1 determined that Phase 2 would “determine and resolve the Legal vs. Natural issue in Phase 2”. This was deferred to Phase 2a. Clearly, we have not achieved this. Moreover, while we have recommended the creation of critical RDDS elements, we are allowing them to be completely ignored. The ALAC has great difficulty in labeling this effort as a success.