

## **Comments of the United States to the Initial Report of the Temporary Specification for gTLD Registration Data Expedited Policy Development Process**

The United States of America (U.S.) welcomes the opportunity to provide comments to the Initial Report of the Temporary Specification for gTLD Registration Data Expedited Policy Development Process (EPDP).

In reviewing the following comments, it is important to note the overarching interest of the U.S. is to ensure that ICANN and the community find a way to preserve the WHOIS service to the greatest extent possible while complying with the European General Data Protection Regulation (GDPR) and other data protection regulations. WHOIS is a critical resource for a range of legitimate interests including law enforcement, cybersecurity, and intellectual property protection.

The U.S. recognizes that numerous topics and issues are addressed in the EPDP initial report. However, our comments focus primarily on those issues critical to the objectives and interests of the United States.

### Substantive Comments

- Recommendation #1 & Question #1 (pertaining to processing purposes) – The U.S. is primarily focused on Purpose 2. The U.S. believes this purpose is consistent with the EPDP Charter and European Data Protection Board guidance. Purpose 2 is narrowly tailored to the purpose and processing activities of ICANN and does not address the specific interests and purposes of third parties, subjects to be addressed at a later date. The U.S. strongly believes that for ICANN to meet its fundamental purpose of maintaining the security, stability, and resiliency of the DNS there are legitimate interests internal and external to ICANN necessary for ICANN to achieve this. To reflect this, the U.S. proposes Purpose 2 be edited to include a reference to ICANN’s “commitments and core values.” With this edit, Purpose 2 becomes the baseline necessary for ICANN and the community to develop and implement an access model at a later date that includes legitimate third party interests such as law enforcement, cybersecurity, and intellectual property enforcement.
- Recommendation #4 & Question #2 (pertaining to collection of data elements) – The U.S. believes that registrars should continue to be required to collect information contained in the tech fields in addition to the registrant fields. There are a number of useful reasons for providing the information contained in the tech fields that are distinct from the registrant fields, including when a registrant has specific/distinct contacts responsible for acquiring/maintaining registration and other contacts responsible for ensuring the security of the domain. In this example, being able to reach the informed technical contact responsible for security issues directly and quickly to respond to issues such as the domain being under control of a botnet, may be a matter of urgency. In light of this and other examples, the U.S. does not believe it is appropriate for registrars to unilaterally determine that the information

contained in the tech fields are not necessary to collect. And while contracted parties have expressed concerns that continuing to make it a requirement to collect this information exposes them to increased legal liability risk in cases of third party contacts, the U.S. believes that the European Data Protection Board has already provided guidance on the matter saying it is permissible as long as the individual concerned is informed (see EDPB letter to Goran Marby, July 5, 2018, footnote 15).

- Recommendation #8 & Question #5 (pertaining to data field redaction) – The U.S. wants the organization name and city fields to remain public and not be redacted. There is no evidence that indicates that publication of these fields is in violation of GDPR or is personally identifiable in combination with other published fields. In fact, there are other public online resources that make these fields (and others) available. Most notably are the business registers that are maintained and published by most European countries and consolidated by the European Business Register. The U.S. appreciates that the organization field has been incorrectly filled in by some registrants in the past and that in some cases they have included personally identifiable information. The U.S. does not see previous inaccurate information as justification to stop publication of these fields, but rather an opportunity to better inform registrants for new registrations and to clean up historical records in a phased in manner (e.g., including through annual notices to registrants, etc.).
- Question #7 (pertaining to legal and natural persons) – The U.S. supports making a distinction between legal and natural persons as it pertains to the publication of registration data. Specifically, as GDPR does not apply to legal persons, the U.S. believes that information pertaining to legal persons should be publically displayed. Recognizing that there are challenges in current systems making this distinction from both technical and procedural perspectives, rather than making it an immediate requirement, the U.S. believes that the EPDP should develop a recommendation that the GNSO immediately initiate a process to address this distinction as a future contractual requirement. The U.S. points to the wording proposed by the GAC, which ties the distinction directly to the further development and implementation of RDAP. Specifically:

“the GAC proposes that the EPDP consider the following as a new recommendation:

*Recommendation x: A mechanism be developed within RDAP to differentiate between natural and legal persons. This differentiation is to be implemented within the rollout of RDAP along with a procedure to allow for a phased approach to update legacy registration information.”*

- Recommendation #12 and Question #8 (pertaining to “Reasonable Access”) – The U.S. supports the intent of Recommendation #12, but propose edits. Specifically, the U.S. would like to see these criteria “incorporated” as opposed to “further explored” as part of implementation, consistent with the GAC comments. The U.S. believes the criteria provide much needed predictability and clarity around the obligation of “reasonable access”

including what the process and expectations for requesting and providing access need to be. The criteria are easy to implement as contracted parties have the flexibility to implement them in a manner that works for individual business models with the only obligation being to make the terms publically available and otherwise communicated to the requesting parties. The U.S. wants these criteria incorporated as part of implementation and believes they will streamline the process of requesting and providing access for all parties.

- Preliminary Recommendation #13 (pertaining to Joint Controller Agreement) – The U.S. believes that this recommendation appears to go beyond what is necessary for the EPDP. Proposing a specific legal vehicle (i.e., Joint Controller Agreement) without adequate consideration of how this would impact ICANN and the different types of registries and registrars that are ICANN’s contracted parties is concerning and has the potential to de-rail the work of the group.

#### Other comments

The U.S. is committed to maintaining WHOIS to the greatest extent possible while complying with GDPR and other data protection rules. As such, we continue to actively support and participate in the EPDP as one of the GAC member representatives. The U.S. appreciates the complexity of the issues surrounding GDPR compliance as well as the time pressures associated with the first ever EPDP, however we are concerned with the progress of the EPDP to date and the time left to complete the work. It is time for the EPDP to wrap up its activities so that discussions on the access model can move forward. The U.S. recommends that the EPDP adopt the Temporary Specification with edits reflecting the work of the EPDP to date so that the access model discussion can begin in earnest.