

Feedback from the Non-Commercial Stakeholder Group on the Draft Questions by the Small Team on the Legal Committee Framework (EPDP Phase 2 Legal Questions, Batch 2):

After having reviewed the draft questions prepared by the Small Team on the Legal Committee Framework, members of the EPDP Team representing the NCSG have the following feedback:

1. Priority 1 - SSAD Questions:

This question asks for legal guidance on a potential feature of SSAD allowing for reverse lookups of domain names using gTLD Registration Data. Representatives of the NCSG on the EPDP Team believe this topic to be out-of-scope of this EPDP. This scope is determined by two principal documents:

- a. The Temporary Specification for gTLD Registration Data¹
- b. The Charter for the EPDP on the Temporary Specification for gTLD Registration Data²

Additionally, Annex 4 of the GNSO Operating Procedures (Expedited Policy Development Process Manual) clarifies the limited circumstances by which topics may be included within the scope of an EPDP, effectively allowing for these topics to be considered in the absence of an issues-scoping phase in a traditional Policy Development Process (ie: the preliminary and final issues reports of a GNSO PDP)³:

- a. to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO policy recommendation by the ICANN Board or the implementation of such an adopted recommendation; or
- b. to provide new or additional policy recommendations on a specific policy issue that had been substantially scoped previously, such that extensive, pertinent background information already exists.

The EPDP, and the circumstances by which it can be used to develop policy recommendations, was the result of recommendations developed by the GNSO Policy and Implementation Working Group and published in its final report⁴.

In neither of the documents determining the scope of the EPDP are reverse lookups referenced, nor do we believe they should be. Reverse lookups, as a potential issue subject to development of policy recommendations by the GNSO, do not meet either of the above criteria allowing it to be addressed by any EPDP (including the EPDP on the Temporary Specification for gTLD Registration Data).

¹ <https://www.icann.org/resources/pages/gtld-registration-data-specs-en/#temp-spec>

² <https://gns0.icann.org/sites/default/files/file/field-file-attach/temp-spec-gtld-rd-epdp-19jul18-en.pdf>

³ <https://gns0.icann.org/sites/default/files/file/field-file-attach/annex-4-epdp-manual-24oct19-en.pdf>

⁴ https://gns0.icann.org/sites/default/files/file/field_47703/policy-implementation-recommendations-01jun15-en.pdf

Having never been the topic of a previous PDP, nor having been previously scoped as a potential topic for policy development, policy recommendations concerning reverse lookups should be addressed by a GNSO PDP in which a preliminary issues report has been published, and subjected to a public comment period in which as many potential issues relevant to the topic may be identified, and deliberated upon. We note that there are a number of such topics, which the now terminated GNSO Next Generation gTLD Registration Directory Services to Replace Whois PDP Working Group was meant to address. It would be appropriate for whatever PDP succeeds this terminated PDP to address the topic of reverse lookups, and as such, any legal questions concerning privacy and data protection regulation should be developed by that PDP, and any costs incurred as a result of external legal advice should be borne by it.

2. Priority 2 Questions:

a. Privacy/Proxy and Pseudonymized Emails:

No objections to this question being sent to Bird & Bird.

b. Legal vs. Natural

Members of the EPDP Team representing the NCSG do not support sending any more questions on this topic for external legal advice (noting that the EPDP Team has already received legal input from Bird & Bird on the topic in the Legal vs. Natural legal memo as part of its Phase 1 considerations). The reasons why we do not want this topic to be further investigated by Bird & Bird is that there are outstanding policy questions, independent of legal certainty, which have not yet been answered.

These policy questions (not limited to legal issues) will influence the NCSG's views on whether or not the NCSG will support a recommendation mandating differentiation of processing of gTLD Registration Data containing personal information of legal persons and natural persons.

Until recommendation #17 of Phase 1 of the EPDP⁵ has been implemented, the NCSG believes that policy recommendations resulting in binding obligations on Contracted Parties should not be included in the Phase 2 final report. This recommendation involves ICANN undertaking a study to determine the feasibility and costs - including both implementation and potential liability costs - of differentiating between legal and natural persons, as well as the privacy risks to registered name holders of differentiating between legal and natural persons.

The NCSG proposes that any further work on differentiating the processing of the gTLD Registration Data of natural and legal persons be deferred until recommendation #17 of

⁵ <https://gns0.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf>

Phase 1 of the EPDP is implemented, which will likely mean deferral of any further deliberations on this topic to another policy development process.

c. Territorial Scope

Members of the EPDP Team representing the NCSG do not support sending the question on territorial scope to Bird & Bird. Similar to the issue of legal vs. natural persons, the NCSG has policy concerns (not limited to legal ones), which have been expressed during Phase 1 of the EPDP.

The NCSG believes that ICANN Consensus Policies should be uniform across all affected parties, including both Contracted Parties and Registrants. The establishment of global governance that would eliminate jurisdictional fragmentation of the DNS was the main reason for the creation of ICANN. The NCSG does not believe that Registrants located in jurisdictions in which legal privacy protections are not as strong as those applicable to the European Union or European Economic Area should be discriminated against in ICANN Consensus Policies. The privacy and data protection standards adopted by the EU and other applicable jurisdictions should be considered best practices applicable to all registrants of gTLD domain names within ICANN's purview.

Furthermore, the NCSG does not believe that ICANN should adopt Consensus Policies that provide competitive advantages for one Contracted Party over another. A policy recommendation in favor of geographic differentiation would not only apply to Registrants, but also gTLD Registry Operators and Registrars, possibly making them less appealing in their local markets as providers of domain name registration services.

To that end, requesting legal guidance on this issue would be redundant, seeing that irrespective of the answer, it is likely that there will be no consensus on a policy recommendation requiring geographic differentiation.

d. Whois Accuracy

Members of the EPDP Team representing the NCSG do not support sending the question on Whois Accuracy. The NCSG believes that the legal advice that has been previously provided, as well as guidance available by the UK's Information Commissioner's Office⁶ is sufficient to have a clear understanding of issues concerning accuracy, including the accuracy principle required by the GDPR.

The NCSG is concerned that further clarifications being requested are more the result of some stakeholders within the ICANN community being unhappy with the scope of accuracy requirements in privacy and data protection law, as opposed to a lack of understanding them. The NCSG's reading of the proposed questions is that they are

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<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/accuracy/>

leading questions, with a purpose of yielding an expanded interpretation of the responsibilities of Data Controllers regarding Whois Accuracy.