

GAC ICANN70 Virtual Community Forum Communiqué: Actions and Updates (25 March 2021)

GAC Consensus Advice Item	Consensus Advice Text	Board Understanding following Board-GAC Call	Board Response
<p>§1.a.i EPDP Phase 2 Final Report</p>	<p>Phase 2 EPDP is a step forward but the GAC has serious concerns relating to certain Recommendations and gaps in the Final Report of Phase 2 of the EPDP on gTLD Registration Data, as set forth in the GAC Minority Statement of 24 August 2020 (in Annex).</p> <p>a. The GAC advises the Board to:</p> <p>i. to consider the GAC Minority Statement and available options to address the public policy concerns expressed therein, and take necessary action, as appropriate.</p> <p><u>RATIONALE:</u></p> <p>In its GAC Minority Statement, the GAC provides input on its public policy concerns regarding the ways that the Recommendations contained in the Final Report of Phase 2 of the EPDP on gTLD Registration Data:</p> <ol style="list-style-type: none"> 1. currently conclude with a fragmented rather than centralized disclosure system; 2. do not currently contain enforceable standards to review disclosure decisions; 3. do not sufficiently address consumer protection and consumer trust concerns; 4. do not currently contain reliable mechanisms for the System for Standardized Access/Disclosure (SSAD) to evolve in response to increased legal clarity; and 5. may impose financial conditions that risk an SSAD that calls for disproportionate costs for its users including those that detect and act on cyber security threats. <p>The GAC is of the view that certain key recommendations and unaddressed topics in the Final Report of Phase 2 of the EPDP on gTLD Registration Data require further work and that the Board should assess how best to address them.</p> <p>The GAC is also of the opinion that the Operational Design Phase (ODP) can focus the Board on some of the practical implementation challenges especially those involving cost apportionment.</p> <p>The GAC looks forward to continued engagement with the Board and the community on these important issues.</p>	<p>The Board understands the GAC advises the Board to consider the GAC’s minority statement on the EPDP Phase 2 final report. The Board also understands that the GAC’s minority statement does not constitute the GAC’s advice on the EPDP Phase 2 policy recommendations.</p> <p>The Board understands the GAC’s minority statement to highlight the GAC’s concerns with the EPDP Phase 2 team’s policy recommendations.</p>	<p>The Board accepts the GAC’s advice to consider the GAC’s Minority Statement to the EPDP Phase 2 Final Report and available options to address the public policy concerns expressed therein, and to take necessary action, as appropriate. Two points are important in this regard: First, we recognize that, standing on its own, the GAC’s Minority Statement does not constitute consensus advice that triggers various obligations under the Bylaws. Second, in fulfilling its duties under the Bylaws, the Board must consider all community input bearing on whether or not a particular policy recommendation is in the public interest.</p> <p>The Board is concerned that the issuance of consensus advice to consider the Minority Statement and take necessary action could be interpreted as the GAC’s adoption of the Minority Statement as consensus advice, triggering the Bylaws mandated process in an effort to identify a mutually acceptable solution. Such advice would be problematic in several respects discussed below.</p> <p>The GAC clarified during the Board-GAC meeting on 21 April 2021, this advice was simply intended to draw the Board’s attention to the GAC’s Minority Statement, and for the Statement to be factored into the Board’s review of the EPDP Phase 2 recommendations along with other factors the Board must consider, including compliance with applicable laws. The Board’s acceptance of the advice based on this understanding.</p> <p>That said, because of the possibility of misunderstandings about the import of this GAC advice and as highlighted in ICANN CEO & President Göran Marby’s 10 September 2020 letter to the GAC, the Board thinks that it must better understand the GAC’s rationale for the positions taken in the Minority Statement, particularly in light of GAC members’ unique position as governments and the need to ensure that a Standardized System for Access and Disclosure that may be developed also complies with data protection laws.</p> <p>The Board would like to thank the GAC for the constructive discussions that have ensued to date. The Board notes that its role under the Bylaws in relation to GNSO policy recommendations is to consider whether they are in the best interests of ICANN and the ICANN community. In this regard, the Board will consider all relevant public policy concerns, including those raised by the GAC, along with available legal guidance. The Board, however, cannot substitute, alter or add to the specific recommendations as submitted by the GNSO Council.</p> <p>Having considered the public policy concerns expressed in the GAC’s Minority Statement, the Board would like to highlight certain issues raised in that Statement for consideration:</p> <p><i>Please see attached Annex to the ICANN Board Response to the GAC advice concerning the EPDP Phase 2 Final Report.</i></p>

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<p>1. CCT Review and Subsequent Rounds of New gTLDs</p>	<p>The GAC is seeking a coordinated approach on the implementation of the specified Recommendations from the CCT Review ahead of the potential launch of a new round of gTLDs.</p> <p>Pursuant to GAC advice issued in Montréal (ICANN66), related correspondence with the ICANN Board and subsequent discussions, the latest on 23rd March during ICANN70, the GAC looks forward to be periodically updated on the ongoing consideration of the above mentioned advice, and, in particular, the Recommendations marked as "prerequisite" or "high priority", namely: 1, 5, 7, 9, 11, 12, 14, 15, 16, 17, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35; for example through a tracking tool that identifies the status of each Recommendation in terms of who is taking it forward, how it will be implemented and when it is expected to be completed, particularly in regard to Recommendations attributed to the Organisation and the ICANN Community (in addition to the Board).</p> <p>The GAC also recalls its advice to the Board in the Helsinki Communiqué that "<i>An objective and independent analysis of costs and benefits should be conducted beforehand, drawing on experience with and outcomes from the recent round.</i>" Such analysis has yet to take place. In this regard, the GAC notes that the Operational Design Phase may provide the opportunity for this analysis to assist the Board as it considers whether a second round of New gTLDs is in the interest of the community as a whole.</p>	<p>The Board understands that the GAC is seeking a coordinated approach, ahead of the potential launch of a new round of gTLDs, on the implementation of the CCT Recommendations that were marked as "prerequisite" or "high priority" (namely, 1, 5, 7, 9, 11, 12, 14, 15, 16, 17, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35) as well as periodic updates (potentially through a tracking tool to be prepared by ICANN org) on the Board's ongoing consideration of the GAC Consensus Advice from the Montreal Communiqué.</p> <p>The Board further understands that the GAC notes the opportunity that an Operational Design Phase for the SubPro PDP recommendations may provide for a cost-benefit analysis to assist the Board in its consideration of whether the PDP recommendations are in the best interests of the community.</p>	<p>The Board thanks the GAC for its follow up on previous GAC advice concerning the CCT Review and subsequent rounds of New gTLDs. The Board agrees with the utility of adopting a coordinated approach on implementing the CCT recommendations highlighted by the GAC as well as periodic updates to the GAC.</p> <p>In this regard, the Board notes that its consideration of these follow-up items from previous GAC advice is being done in conjunction with its review of other relevant community work. In particular, the Board refers the GAC to the correspondence exchanged following the ICANN66 Montreal Communiqué, including: (1) the GAC's January 2020 acknowledgment that certain recommendations can only be implemented when a new round of gTLDs is launched; and (2) the Board's February 2020 letter that noted its inability to act on the GAC advice until it has completed its consideration of all the CCT recommendations as well as those from the GNSO's New gTLD Subsequent Procedures ("SubPro") and Review of All Rights Protection Mechanisms ("RPM") PDPs. Since that letter, the GNSO Council has approved both the RPM and SubPro PDP Final Reports, and these are currently pending before the Board.</p> <p>Regarding a status update, the Board updated the GAC at ICANN70 on the status of the CCT Recommendations highlighted by the GAC as follows:</p> <p>March 2019: The Board accepted six of the CCT Review Team's recommendations, including #1 (promote ongoing data collection), #17 (collect data about the chain of parties responsible for domain registrations), #21 (enhance Compliance reporting), #22 (engage stakeholders on best practices regarding security of health and financial information), #30 (expand outreach into the global south) & #31 (pro bono assistance program for new gTLDs).</p> <ul style="list-style-type: none"> • The Board understands that ICANN org has since completed implementation of #17 and that implementation is in progress for the other accepted recommendations as feasible with existing resources and budget. • For those which require additional resourcing to implement, these will be subject to the prioritization and planning process under development for the community to consider the numerous recommendations from review teams and other efforts such as Work Stream 2, and how to organize and resource the work. <p>October 2020: The Board further accepted an additional 11 recommendations, including #7 (collect information on parking practices), #11 (conduct periodic end-user surveys), #23 (collect data on highly-regulated sectors) and #26 (study cost of trademark protections in expanded gTLD space).</p> <ul style="list-style-type: none"> • The Board understands that ICANN org has begun implementation planning for these accepted recommendations, including considerations of the resources that will be required to implement them.

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			<p><u>#9, #12, #16, #25, #27, #28, #29, and #32-35</u> were passed through to the GNSO as they concern gTLD policy development within the GNSO's remit.</p> <ul style="list-style-type: none"> The Board has just received the GNSO Council's Recommendations Report on RPMs and SubPro. As part of its consideration of the final recommendations from these PDPs, the Board will review the extent to which they address the relevant CCT recommendations. <p>The final three recommendations highlighted by the GAC remain in pending status: #5 (collecting secondary market data), #14 & #15 (recommendations relating to negotiating and amending ICANN's contracts with registries and registrars relating to anti-abuse measures and to prevent systemic use of Contracted Parties for DNS security abuse).</p> <ul style="list-style-type: none"> The Board understands that ICANN org is continuing with preparatory implementation planning for #5 along with other data collection recommendations. For #14 & #15, the Board had directed ICANN org to facilitate community efforts to develop a definition of "abuse" to inform further action on this recommendation. The Board has continued to follow the community's discussions on this and other aspects of DNS abuse mitigation, including the recommendations from the SSR2 Review Team and the recently issued advice from the SSAC. <p>Regarding a cost-benefit analysis, the Board expects that, in delivering recommendations to the Board, the community will have reached consensus utilizing the multistakeholder policy development process. The Board carefully follows the community's policy-making processes and, where appropriate, engages with PDPs via liaisons. With the new Operational Design Phase (ODP), the community will have additional visibility into the Board's assessment of policy recommendations before it takes action on those recommendations. The Bylaws obligate the Board to consider the best interests of ICANN and the ICANN community when taking action on PDP recommendations.</p> <p>The Board accepted the GAC's advice from the Helsinki Communique, noting that the Board is not in a position to manage the content and timeline of ongoing community reviews. The Board recognized at the time that the CCT Review Team was concluding its work and understood that the Review Team was looking at the issues noted in the GAC's advice, and anticipated that such recommendations from the Review Team could be incorporated into the policy development work on subsequent rounds of the New gTLD Program.</p> <p>Many of these recommendations from the CCT review were passed through to community groups and have now been considered by the Subsequent Procedures PDP Working Group, as detailed in the Final Report.</p>
<p>2. IGO Identifiers</p>	<p>While the GAC welcomes the new GNSO Work Track on Curative Rights, the GAC recalls prior GAC Advice (e.g., from Johannesburg and Panama) and ICANN agreement on a moratorium for new registrations of IGO acronyms ahead of a final resolution of this issue.</p>	<p>The Board understands that the GAC welcomes the work being done by the ongoing GNSO Work Track on IGO Curative Rights and that the GAC wishes to recall its previous advice, including (from the Johannesburg Communique) for</p>	<p>The Board thanks the GAC for its follow up on previous GAC advice concerning IGO curative rights protections. The Board also thanks the GAC and IGO representatives for their participation in the ongoing IGO Work Track and looks forward to receiving and considering any policy outcomes that may be developed through Work Track consensus and approved by the GNSO Council. As noted in the Board's 23 February 2021 letter to the GAC that followed the Board-GAC Consultation Process call held on 1 February, the Board will</p>

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		<p>a dispute resolution procedure to (i) be modeled on, but separate from, the existing Uniform Dispute Resolution Policy (UDRP); (ii) provide standing based on IGOs' status as public intergovernmental institutions and (iii) respect IGOs' jurisdictional status by facilitating appeals exclusively through arbitration; and (from the Panama Communique) for the Board to work with the GAC and the GNSO to ensure that GAC advice, including the IGO "small group" proposal, is adequately taken into account by the Board when considering the outcomes of the Curative Rights PDP that preceded the current IGO Work Track.</p>	<p>maintain the interim reservations currently in place for IGO acronyms until the permanent post-registration notification system that the Board intends to direct ICANN org to develop for IGOs is in place. This proposed mechanism will form part of the totality of IGO protections when combined with the existing Consensus Policy that protects IGO full names and the final outcomes of the GNSO's IGO Work Track.</p> <p>The Board notes, additionally, that ICANN org is currently doing further analysis on the potential implications for trademark law should specific protections be developed and approved that are based on a defined list of IGO names and acronyms.</p>

ANNEX - GAC ICANN70 Virtual Community Forum Communiqué: Actions and Updates (25 March 2021)

The following text acts as an Annex to the ICANN Board's response to the GAC advice regarding the EPDP Phase 2 Final Report, noted above on page 1 of this scorecard.

Fragmented Disclosure System

The GAC noted in its Minority Statement that granting contracted parties full discretion in reviewing disclosure requests “may undermine the obligation to ensure the continued viability of domain name registration data as a tool to vindicate the rights and interests of the public, agencies tasked with protecting the public, and commercial and intellectual property constituencies.” At the same time the GAC acknowledges “that under applicable data protection rules, including the GDPR, contracted parties would likely remain responsible for the decision whether to disclose domain name registration data, and they may face certain liability risks related to that decision.”

The Board understands that the EPDP Phase 2 team proposed a non-centralised disclosure model system, the SSAD, given that for practical purposes the law effectively prevents a centralized model. This is because contracted parties would be responsible and liable for disclosure decisions and contracted parties should be the ones making that decision. As a result, the system proposed by the EPDP Phase 2 team foresees that ICANN Contractual Compliance would not be in a position to evaluate the substance of a contracted party's decision nor would it have the regulatory or governmental authority to compel a different disclosure decision than the one taken by a contracted party.

Accuracy

The GAC noted in the Minority Statement that the accuracy of registration data is an essential requirement of GDPR, and that “[d]isclosure of inaccurate data would defeat the purpose of the SSAD and risk violating data protection rules.” The Board would like to highlight that this statement by the GAC indicates that, in the GAC's view, inaccuracy of data disclosed via the SSAD could result in liability vis a vis data subjects and even toward third parties relying on the accuracy of the data disclosed.

The Board has a different understanding of this principle, and offers the following for additional consideration. As noted in legal guidance provided as part of the EPDP Phase 2¹, the accuracy principle under the GDPR should be considered in the light of the GDPR's risk-based approach, taking into account, among other things, the purpose and impact of processing. Relevant to this analysis is the fact that registrants (data subjects) directly provide the registration data that is published in the RDDS, and ICANN, through its contracts with registrars, has in place binding and enforceable obligations for registrars to help confirm the accuracy of registration data. Failure to comply with these affirmative obligations could lead to a registrant having its domain name suspended. It could also lead to a breach of the Registrar Accreditation Agreement if a registrar is not complying with its [obligations](#) to verify and validate registration data at certain points in the lifecycle of a domain name registration. In light of the facts and circumstances, the Board is of the mind that the existing measures and mechanisms in place are sufficient to satisfy the legal requirement of the accuracy principle under the GDPR and would not violate data protection rules as noted in the GAC's Minority Statement.

The Board would, however, like to highlight that it has concerns that the mechanisms ICANN has in place to confirm and enforce accuracy of registration data have been hampered because of the GDPR. Specifically, the redaction of registration data containing personal data from the RDDS has diminished ICANN Contractual Compliance's ability to check compliance and obtain access to non-public registration data. Additionally, there has been a decrease in the number of valid WHOIS accuracy complaints handed by ICANN Contractual Compliance, which is attributed to the unavailability of public contact information in RDDS.² As well, the unavailability of some public contact information in RDDS has hampered ICANN org's ability to continue with the original framework for the WHOIS Accuracy Reporting System (ARS) program, which was another tool to help confirm the accuracy of RDDS data. Overall, it is possible that the GDPR has diminished the accuracy of RDDS data given that ICANN and other reporters who previously contributed to improving the accuracy of the data published in the RDDS can no longer view the data. This context is important to factor in when discussing ICANN policies concerning accuracy as in practice it might be difficult to implement such policies due to the restrictions on access to registration data as a result of the GDPR.

Anonymized Email Address

The Board notes the GAC's Minority Statement suggestion that further feasibility analysis should be conducted concerning the use of anonymized email. As discussed in ICANN CEO & President Göran Marby's [10 September 2020 letter](#) to the GAC, it is also the Board's understanding that requiring the use of an email address uniquely relating to an individual registrant would not meet the definition of “anonymized” as contemplated under applicable data protection law, and in fact, might be considered personal data that should not be published in the RDDS.

Next Steps/ Possible Actions

In its advice, the GAC advised the Board to “take necessary action, as appropriate.” The Board has identified the following next steps to address the GAC's advice:

¹ See 9 April 2020 Memo from Bird & Bird regarding Advice on Accuracy Principle under the General Data Protection Regulation (Regulation (EU) 2016/679) (“GDPR”): follow up queries on “Legal vs. Natural” and “Accuracy” memos <https://community.icann.org/display/EOTSFGRD/EPDP+-P2+Legal+subteam?preview=/111388744/132941800/ICANN%20memo%209%20April%202020.pdf>

² See <https://www.icann.org/en/system/files/correspondence/swinehart-to-fouquart-26feb21-en.pdf>

Operational Design Phase

Some of the GAC's concerns as outlined in the rationale, including cost considerations and enforcement standards, will be further explored during the Operational Design Phase (ODP) for the System for Standardized Access/Disclosure (SSAD). As noted in the Board's [resolution](#) on the SSAD ODP, "Due to the resource investment and complexity that would likely be required to implement the SSAD-related policy recommendations in a timely and predictable manner, initiating an ODP is essential to inform the Board's deliberations, including whether the recommendations are in the best interests of the ICANN community or ICANN."

In particular, the scope for the ODP includes the following:

- Operational readiness as it relates to the operation of the SSAD itself; what and how ICANN org needs to implement and operate the SSAD.
- Contractual compliance and the process workflow for SSAD-related complaints.
- Staffing and resourcing, including whether additional staff and/or vendors are required to operationalize the SSAD.
- Financial analysis, including revisiting org's May 2020 cost estimate of the SSAD, that was produced at the request of the EPDP Phase 2 team.
- Risks assessment, including legal and reputational risks.

Additional Engagement with Data Protection Authorities

With respect to the concerns expressed in the Minority Statement about a fragmented disclosure system, the Board notes that ICANN org elevated the question whether shifting decision-making would impact liability of the contracted parties to the level of the Data Protection Authorities with the submission of the proposed Unified Access Model or Strawberry model for its consideration. The Belgian authority did not provide any actionable guidance. Neither did the European Commission, which did not take action to elevate the issue at the level of the EDPB. The Board understands that the GAC would like ICANN org to continue to pursue this question and a concrete answer on the viability of a centralized model that would ensure that the contracted parties are not liable for decisions they do not make.

Consensus Policy Development

The Board notes that the GAC urged the GNSO Council to ask the EPDP to further address the issue of controllership. However, the GDPR determines which party is a controller and which a processor. The issue of controllership of the processing of personal data cannot be determined as a matter of policy. Instead, it is determined by the application of the law to the facts of a given processing operation.

Also, the GAC proposed that "distinguishing legal from natural persons during the registration process could include assigning legal persons into the category of persons whose data should be automatically processed" given that "[i]nformation concerning legal persons is not considered personal data under personal data protection regulations, including the GDPR[.]" The issue of distinguishing between registrations of legal and natural persons is the subject of ongoing policy discussions as part of the EPDP Phase 2A.