



## Coalition for Online Accountability

[www.onlineaccountability.net](http://www.onlineaccountability.net)

May 14, 2019

Dear Cherine and ICANN Board Members and Liaisons:

In light of the Public Comments from the European Commission dated April 17, 2019 on the Phase 1 Final Report of the EPDP ("Report") and the follow-up letter from the European Commission dated May 3 and signed by Pearse O'Donohue, we are writing to the Board to suggest guidance with respect to its consideration of the Report. As the Board is aware, Section 6 of the ICANN Bylaws that address the Board Approval Processes with respect to an EPDP permits the Board to determine that a policy "is not in the best interests of the ICANN community or ICANN."<sup>i</sup>

Given the Commission's specific guidance on Purpose 2 from Recommendation #1 of the Report, it would seem that the Purpose 2 language from the Final Report needs to be modified. It does NOT appear to be "in the best interests of the ICANN community or ICANN" for the Board to adopt language that the Commission has deemed faulty. Therefore, we recommend that the Board vote to modify the Purpose 2 language as follows:

***"Enabling ICANN to maintain the security, stability, and resiliency of the Domain Name System in accordance with ICANN's mission and Bylaws through the controlling and processing of gTLD registration data."***

In addition, we urge the Board to address the important categories of purposes that were covered in the Temporary Specification under paragraph 4.4.8 which states, "Supporting a framework to address issues involving domain name registrations, including but not limited to: consumer protection, investigation of cybercrime, DNS abuse, and intellectual property

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protection.” Given the guidance received from the Commission, including its negative reaction to imprecise wording such as “including but not limited to,” we suggest that the language be re-formulated so as to comply with the Commission guidance as follows:

***“Provide mechanisms for addressing consumer protection, cybersecurity, intellectual property and DNS abuse in the Domain Name System.”***

The above language tracks the formulation of Purpose 4 from Recommendation #1 of the Report that received consensus from the EPDP Team and generated no criticism or comment from the Commission.

In addition, we also recommend that the Board refer Recommendation #7 concerning the transmission of gTLD registration data from Registrar to Registry back to the EPDP Team in light of the legal analysis and guidance prepared by Bird & Bird for EPDP Team and dated March 9, 2019, which was received after the finalization of the Report on February 20, 2019.<sup>ii</sup>

Finally, with respect to Recommendation #16 concerning geographic differentiation, the Report noted that consensus was not reached by the EPDP Team. Instead the Report notes Divergence concerning this Recommendation. Therefore, we urge the Board to refer Recommendation #16 back to the EPDP Team with guidance that it be addressed further and include a study in the same fashion as Recommendation #17 concerning the differentiation of legal and natural persons. We suggest the following second and third paragraphs be added to the current paragraph set forth in Recommendation #16 (the language suggested below is modeled on the language of Recommendation #17 for which consensus by the EPDP Team was reached):

***2) The EPDP Team recommends that as soon as possible ICANN Org undertakes a study, for which the terms of reference are developed in consultation with the community, that considers:***

- ***The feasibility and costs including both implementation and potential liability costs of differentiating between between registrants on a geographic basis;***
  - ***Examples of industries or other organizations that have successfully differentiated based on geography;***
  - ***Privacy risks to registered name holders of differentiating based on geography of the registered name holder; and***
  - ***Other potential risks (if any) to registrars and registries of not differentiating.***

***3) The EPDP Team will determine and resolve the geographic distinction issue in Phase 2.***

Thank you for your consideration of this letter. My Coalition for Online Accountability (“COA”) colleagues and I would be happy to discuss any of these issues with you at your convenience.

Kind regards,



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**Executive Director and Legal Counsel**  
**Coalition for Online Accountability (“COA”)**

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<sup>i</sup> Section 6. Board Approval Processes

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

a. Any EPDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than a GNSO Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN community or ICANN.

b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN community or ICANN (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN community or ICANN. For any Supplemental Recommendation approved by less than a GNSO Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN community or ICANN.

<sup>ii</sup> Memo from Bird & Bird to ICANN and EPDP Team dated March 8, 2019 on the transfer of Thick Whois data is available at this link: <https://community.icann.org/download/attachments/102138857/ICANN%20-%20Memo%20on%20thick%20Whois%5B1%5D.docx?version=1&modificationDate=1552176734000&api=v2>