

Note to reviewers: This is a working document used to draft the policy language. Please note that the section number referenced to the policy and the language may have been changed.

## Rationale Doc: Tech Contact

### Background

**EPDP Phase 1 Recommendation 5:** *“For the purpose of the technical contact, which is optional for the Registered Name Holder to complete (and if the Registrar provides this option), Registrars are to advise the Registered Name Holder at the time of registration that the Registered Name Holder is free to (1) designate the same person as the registrant (or its representative) as the technical contact; or (2) provide contact information which does not directly identify the technical contact person concerned.”*

**EPDP Phase 1 Recommendation 6:** *“Registrars must provide the opportunity for the Registered Name Holder to provide its Consent to publish redacted contact information, as well as the email address, in the RDS for the sponsoring registrar.”*

The original draft Registration Data Policy language included the following, which was drawn from the language in Recommendation 6 above:

*“The registrar MUST provide the opportunity for the Registered Name Holder to provide its Consent to publish redacted contact information, as well as the email address, in the RDS for the sponsoring registrar.”*

Early input from the IRT indicated that the draft Registration Data Policy language was not clear because EPDP Phase 1 Recommendation 6 did not distinguish between the RNH and the technical contact, rather it states that the RNH must be given the opportunity to consent to “redacted contact information.” In addition, jurisdiction requirements vary and not all redactions being applied are subject to GDPR. Options for obtaining consent to publish Registration Data also vary and are not limited to obtaining consent directly from the individual. Therefore, the draft Registration Data Policy language was revised to (1) separate consent of publication of the RNH and technical contact and (2) include the option for the “relevant contact” to provide consent for the technical contact as follows:

*“9.3.2.1 If a Registrar collects Technical Contact data from the Registrant under Section 6.2 and Redacts the data element values listed in Sections 8.3.1.10 through 8.3.1.12, Registrar MAY provide the opportunity for the relevant contact to provide Consent to Publish the data element values. Registrar MAY Publish the data element value(s) for which the relevant contact has provided its Consent. [Rec 6]”*

However, since the EPDP Phase 1 recommendations do not specifically mention consent to the publication of the technical contact details and the above provision would allow the RNH to give

consent to the registrar to publish someone else's contact information, the above provision was removed so that the draft Registration Data Policy language focuses on the requirement for the RNH as identified in the EPDP Phase 1 recommendations. Nevertheless, the draft Registration Data Policy does not prohibit a registrar from obtaining consent from the technical contact to publish the data elements values listed in Sections 8.3.1.10 through 8.3.1.12 if those were collected. To help clarify this point, the following language was added to the "Implementation Notes" Section A of the draft Registration Data Policy:

*"c. If a Registrar collects additional contact data, it may Publish the relevant contact data in the RDDs as long as it has a lawful basis to do so. For example, if a Registrar collects technical contact data from the Registrant under Section 6.2 and Redacts the data elements values listed in Sections 8.3.1.10 through 8.3.1.12, Registrar MAY provide the opportunity for the relevant contact to provide Consent to Publish the data element values. Registrar MAY Publish the data element value(s) for which the relevant contact has provided its Consent."*

## Inputs from IRT

There are currently diverging interpretations within the IRT as to whether a registrar may obtain consent to publish the technical contact information, and, if so, whether a registrar may obtain consent where the technical contact and the Registered Name Holder ("RNH") are not the same person (i.e. whether only the technical contact can provide consent or if the RNH may also provide consent for the technical contact).

Inputs from the IRT fall into five main categories:

1. It is possible to obtain consent for the technical contact, but only if the RNH is the same as technical contact. [Provision stays as MAY]
2. It is possible to obtain consent for the technical contact, but only from the technical contact. [Provision stays as MAY]
3. It is possible to obtain consent for the technical contact by either the RNH or the technical contact. [Provision stays as MAY]
4. If the registrar collects technical contact data, it MUST provide the opportunity for the technical contact to provide consent. [Provision changes to MUST]
5. Obtaining consent for the technical contact is **not** contemplated in the recommendations; therefore, there should be no language in the Registration Data Policy specifically addressing the technical contact. [Provision does not exist]

*(1) It is possible to obtain consent for the technical contact, but only if the RNH is the same as technical contact.*

Some IRT members stated that consent is possible only if the RNH is the same as the technical contact, interpreting that the language from EPDP Phase 1 Recommendations 5 and 6 implies that the RNH and technical contact should not be able to consent to publication of technical data if the technical contact is not the same as the Registrant contact.

In addition, IRT members have stated the act of requesting such consent in and of itself would require impermissible processing of the technical contact information. Thus, consent to

disclosure of information for the technical contact could apply only if the technical contact is the same as the Registrant contact.

(2) It is possible to obtain consent for the technical contact, but only from the technical contact.

Some IRT members have stated that consent is possible if the technical contact is the person to provide consent to the publication of their information. As such, registrars should not be able to publish technical contact information without obtaining consent from the same technical contacts. Even though EPDP Phase 1 Recommendation 6 is unclear as to which set of contact information the RNH should provide consent to publish, these IRT members have pointed out that typically, one data subject cannot provide consent to processing of another data subject's information. For example, permitting the RNH to consent to the publication of the technical contact details would allow the RNH to give consent to the registrar to publish someone else's contact information, which concerns these IRT members.

Other members of the IRT understand EPDP Phase 1 Recommendation 6 to mean that the RNH will be given the opportunity to have their personal data published in the RDS when registrars have developed a technical mechanism that complies with applicable data privacy laws for such disclosure. It does not, however, prescribe that RNH can consent to disclosure of personal data that doesn't pertain to them.

(3) It is possible to obtain consent for the technical contact by either the RNH or the technical contact.

Some IRT members suggested their interpretation of the EPDP Phase 1 recommendations is that it is possible to obtain consent for the technical contact by either the RNH or the technical contact, indicating that the intent of EPDP Phase 1 Recommendation 6 was to include the opportunity to consent to publication for all contact fields. As such, the obligation to implement a consent mechanism for technical fields is dependent on whether registrars collect these fields. Therefore, if registrars decide to collect technical fields, the intent is clear that registrars must then allow the RNH to consent to its publication.

Some IRT members have suggested that it may be possible under certain circumstances and in certain jurisdictions for one person to consent on behalf of another. If registrars decide not to implement a consent mechanism for the publication of technical fields, they can choose not to collect these fields in the first place. As such, some IRT members do not support removing Section 9.3.2.1 from the draft Registration Data Policy language (as indicated in category 4).

(4) If the registrar collects technical contact data, it MUST provide the opportunity for the technical contact to provide consent.

Another IRT member noted that the use of MAY is inaccurate with the requirements of EPDP Phase 1 Recommendation 6. Instead, MAY should only refer to the collection of the technical contact info. If technical contact info is collected, this results in a mandatory obligation where the registrar MUST allow for consent to be published. Therefore, the text of the current draft Registration Data Policy language should be updated to replace any use of MAY with MUST.

In reaction to this argument, some IRT members noted that "most registrars would simply opt out of allowing a Tech contact to be entered if this statement becomes policy." However, the IRT member in support of this Provision requirement as a MUST requirement stated that "this was exactly our intent of the MAY obligation to collect tech contact data in the first place. But, just

because some registrars will choose to not implement the policy doesn't mean that the MUST obligations for those that chose to implement do not apply. (e.g. they should not be watered down or removed).”

*(5) Obtaining consent for the technical contact is not contemplated in the EPDP Phase 1 recommendations; therefore, there should be no Registration Data Policy language specifically addressing the technical contact.*

Some members of the IRT have stated that consent of technical contact is not contemplated by the EPDP Phase 1 recommendations; therefore, there should be no language in the Registration Data Policy with regard to the technical contact consenting to publication.

Furthermore, some IRT members have suggested that EPDP Phase 1 recommendations do not specifically mention consent if the technical contact and the RNH are not the same person and as such, Section 9.3.2.1 should be removed from the Policy.

### **Summary of Hintze Law PLLC Memo:**

Based on conflicting input and ongoing discussions, one IRT member secured outside legal counsel, Hintze Law PLLC, to analyze the issue of publication of the technical contact information (Hintze Memo). The Hintze Memo concluded that there are two lawful mechanisms for publication of technical contact information, including consent and legitimate basis. Where a registrar offers and obtains consent for the publication of the technical contact information, consent may be solicited in conjunction with providing information to the technical contact under GDPR Art. 14, but to comply with GDPR Art. 7, the consent must be separately presented and would need to be truly optional; separately recorded; and able to be withdrawn at any time.

The memo also states that appropriate notice should be provided to technical contacts upon receipt of their contact information (and in no case later than 30 days afterwards) in accordance with GDPR Art. 14. This notice can also make clear the technical contact's options for correction of personal data and rights to object to processing, substitution of non-personal contact information, choices for publication, and other disclosures.

Members of the IRT referenced that Bird & Bird LLP also provided legal guidance, finding that registrars, which are also considered data controllers by Hintze, may not reasonably rely on RNHs to provide this information to technical contacts on their behalf, suggesting instead that registrars provide this information directly. Hintze believes this is a somewhat conservative, but not an unreasonable, conclusion.

## **Rationale for Current Registration Data Policy Language/Requirement**

EPDP Phase 1 Recommendation 6 specifies the Registrars must provide the opportunity for the Registered Name Holder to provide its Consent to publish redacted contact information, but the recommendation does not specifically mention consent to the publication of the technical contact details. Accordingly, the Registration Data Policy language was further revised to remove Section 9.3.2.1 above in order to limit the consent to publish redacted contact

information to the Registered Name Holder only. Ultimately, Section 9.3.2.1 was eliminated to avoid a situation where the RNH would be allowed to give consent to the registrar to publish someone else's contact information.

However, the draft Registration Data Policy does not prohibit a registrar from obtaining consent from the technical contact to publish the data elements values listed in Sections 8.3.1.10 through 8.3.1.12 if those were collected. To help address this point, the following language was added to the "Implementation Notes" Section A of the draft Registration Data Policy to clarify that additional contact data collected by a registrar, such as the technical contact data, may still be published if the relevant contact has provided consent:

*"c. If a registrar collects additional contact data, it may Publish the relevant contact data in the RDDS as long as it has a lawful basis to do so. For example, if a Registrar collects technical contact data from the Registrant under Section 6.2 and Redacts the data elements values listed in Sections 8.3.1.10 through 8.3.1.12, Registrar MAY provide the opportunity for the relevant contact to provide Consent to Publish the data element values. Registrar MAY Publish the data element value(s) for which the relevant contact has provided its Consent."*

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#### CPH Comment

Thank you to Dennis and the IPT for providing this rationale document. The CPH members of the IRT team do not believe this implementation note is needed, but in the interest of moving forward together will support this implementation note regarding the Tech Contact consent to publication, with two comments:

1. The text in the rationale doc of the Implementation Note "c" does not match the Note where it appears in the OneDoc. In the rationale doc, the first sentence of that Note "c" ends with "as long as it has a lawful basis to do so," while the OneDoc version ends with "as long as it has obtained the appropriate Consent." We suggest that the rationale doc version (lawful basis) should be used in the OneDoc.
2. Regarding the "Summary of Hintze Law PLLC Memo" section, while interesting, we disagree that outside legal guidance should be included in an official IRT work product. Legal guidance from Bird & Bird, and the expertise of our team, should suffice.

Thank you,

The CPH IRT Team.