

## 3 EPDP Team Responses to Council Questions & Preliminary Recommendations

The EPDP Team will not finalize its responses to the Council questions and recommendations to the GNSO Council until it has conducted a thorough review of the comments received during the public comment period on this Initial Report. At the time of publication of this Report, no formal consensus call has been taken on these responses and preliminary recommendations. This Initial Report did receive the support of the EPDP Team for publication for public comment, mainly as a tool to solicit community input on areas where there remains significant divergence which have been identified below.<sup>1</sup> Where applicable, differing positions have been reflected in the Report. Furthermore, specific questions that the EPDP Team is looking for input on have been called in relation to each of the preliminary recommendations identified below. Commenters are encouraged to focus their input on these questions as well as specific proposals for what changes or additions the EPDP Team should consider as it finalizes its report.

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### 3.1 Legal vs Natural

The EPDP Team was tasked by the GNSO Council to address the following two questions:

- i. Whether any updates are required to the EPDP Phase 1 recommendation on this topic (“Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”);
- ii. What guidance, if any, can be provided to Registrars and/or Registries who differentiate between registrations of legal and natural persons.

In addressing these questions, the EPDP Team started with a review of all relevant information, including (1) [the study](#) undertaken by ICANN org,<sup>2</sup> (2) the [legal guidance](#) provided by Bird & Bird, and (3) the substantive input provided on this topic during [the public comment forum on the addendum](#). Following the review of this information, the

<sup>1</sup> Following a review of public comments, the EPDP Team will take a formal consensus call before producing its Final Report.

<sup>2</sup> As part of its Phase 1 Policy Recommendation #17, the EPDP Team recommended, “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 legal and natural persons;
- Examples of industries or other organizations that have successfully differentiated between legal and natural persons;
- Privacy risks to registered name holders of differentiating between legal and natural persons; and
- Other potential risks (if any) to registrars and registries of not differentiating.

ICANN or delivered the [study](#) to the EPDP Team in July 2020.

32 EPDP Team identified a number of clarifying questions, that, following review by the EPDP  
33 Team's legal committee, were submitted to the Bird & Bird (see  
34 <https://community.icann.org/x/xQhACQ>). The EPDP Team reviewed [the responses from](#)  
35 [Bird & Bird](#) and applied the advice received in its recommendations below.

### 36 EPDP Team response to Question i.

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38 The EPDP Team discussed this question extensively. As a starting point, the EPDP Team  
39 notes that the GDPR<sup>3</sup> and many other data protection legislations set out requirements for  
40 protecting personal data of natural persons. It does not protect the non-personal data of  
41 legal persons. At the same time, the EPDP Team recognizes that the European Data  
42 Protection Board ("EDPB") has advised ICANN in a July 2018 letter that "the mere fact that a  
43 registrant is a legal person does not necessarily justify unlimited publication of personal  
44 data relating to natural persons who work for or represent that organization," and that  
45 "personal data identifying individual employees (or third parties) acting on behalf of the  
46 registrant should not be made publicly available by default in the context of WHOIS"<sup>4</sup>.

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48 The EPDP Team recognizes that there are different perspectives within the EPDP Team on  
49 this question:

50 - Some EPDP Team members are of the view that differentiation should be required  
51 for many reasons that benefit the public. First, a significant percentage of domain  
52 names are registered by legal entities and the GDPR generally does not protect their  
53 domain name registration data. Further, to the extent that personal information is  
54 included in such registration data, the legal guidance received<sup>5</sup> indicates that it is  
55 likely to be "low sensitivity" because it relates to an employee's work details rather  
56 than their private life. Given the surge in internet-based crimes (including  
57 ransomware demands that cripples public infrastructure), publishing the registration  
58 data of legal entities would aid law enforcement, consumer protection, and  
59 cybersecurity professionals' ability to quickly and more effectively investigate illicit  
60 activities facilitated by the DNS. Second, requiring registrars to publish the domain  
61 name registration data of legal entities would also significantly reduce the  
62 challenges associated with obtaining responses to disclosure. Third, publishing legal  
63 persons' data based on differentiation instead of consent significantly reduces the  
64 [Contracted Parties'](#) liability. Hence, publishing legal persons' data based on  
65 differentiation rather than consent could be considered a best practice. Finally, the  
66 legal guidance<sup>6</sup> received stated that if the proper safeguards are followed, the legal

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<sup>3</sup> "This Regulation does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person."

<sup>4</sup> Andrea Jelinek, European Data Protection Board, Letter to Goran Marby dated 5 July 2018, available at <https://www.icann.org/en/system/files/correspondence/jelinek-to-marby-05jul18-en.pdf>

<sup>5</sup> See paragraph 14.3 of the Bird & Bird Memorandum - March 2021 questions regarding legal personhood, consent etc.

<sup>6</sup> See paragraph 14.1 – 14.6 of the Bird & Bird Memorandum - March 2021 questions regarding legal personhood, consent etc

68 risks associated with such publication, even in the event of inadvertent mistakes,  
69 seem low. Hence, on balance, the public interest favors differentiating between  
70 registrations of legal and natural persons. In their view, no evidence has been put  
71 forward that confirms or quantifies claims that operational or financial burdens  
72 would result from such a practice

- In contrast, others EPDP Team members are of the view that the existing Phase 1 recommendation, which already permits those who wish to differentiate to do so, strikes the appropriate balance by (i) allowing parties to control and mitigate their own legal risk, and (ii) ensuring that parties have the flexibility to quickly respond to changes in future laws impacting the publication of legal person data without requiring additional policy making. Moreover, these EPDP Team members assert that there have not been sufficient reasons demonstrated justifying a change in the Phase 1 recommendation making differentiation between legal and natural person registrants mandatory for Contracted Parties. In their view, no evidence has been presented identifying the problems that mandatory differentiation would solve, or indeed if mandatory differentiation would solve them at all. Such a change would likely result in operational and financial burdens, which would need to be borne by Contracted Parties that do not have a uniform capacity to bear them. Additionally, these EPDP Team members are of the view that such a change would result in increasing their legal risk as controllers of the data, particularly with regard to the issues specifically identified by the EDPB regarding natural person data that may exist in a legal person registrant's registration data. In the absence of a sufficient purpose to change the phase 1 recommendation, these EPDP Team members believe that Contracted Parties need to maintain the flexibility to choose whether they will bear the costs and potential legal risk associated with differentiation. Some members of the EPDP Team agree that there are a number of factors that may affect these viewpoints over time such as possible legislative changes which relate to the processing of personal data used in domain names (including, for example, the [Revised Directive on Security of Network and Information Systems](#) (NIS2)). Additionally, some EPDP Team members note the possible adoption of the System for Standardized Access/Disclosure to non-public registration data (SSAD) or alternative differentiated access models may also affect viewpoints over time.

100 For the purpose of obtaining community input, the EPDP Team is putting forward the  
101 following preliminary recommendations:

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104 **Preliminary Rec #1.**

105 No changes are recommended to the EPDP Phase 1 recommendation on this topic  
106 ("Registrars and Registry Operators are permitted to differentiate between registrations of  
107 legal and natural persons, but are not obligated to do so").  
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Deleted: As a result, the EPDP Team recommends that:

**EPDP Team Question for Community Input #1**

Is there new information or inputs that the Phase 2A team has not considered in assessing whether to make changes to the recommendation that Registrars and Registry Operators may, but are not obligated to, differentiate between legal and natural persons?

**Preliminary Rec #2.**

The EPDP Team recommends that the GNSO Council monitors developments in relation to the adoption and implementation of relevant legislative changes (for example, NIS2), relevant authorities, as well as the possible adoption of the SSAD to determine if/when a reconsideration of this question (whether changes are required to the EPDP Phase 1 recommendation “Registrars and Registry Operators are permitted to differentiate between registrations of legal and natural persons, but are not obligated to do so”) is warranted. The GNSO Council is expected to consider not only input on this question and any new information from GNSO SG/Cs but also ICANN SO/ACs to help inform a decision on if/when this question is expected to be reconsidered.

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**EPDP Team Question for Community Input #2**

Is this recommendation necessary for the GNSO Council in considering future policy work in this area? If yes, in what ways does this monitoring assist the Council?

The EPDP Team does recognize that there may be a need to facilitate and harmonize practices for those Contracted Parties who do decide to differentiate between legal and natural persons.

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To facilitate differentiation, the EPDP Team has developed the [guidance](#) that can be found in the section below.<sup>7</sup> In this guidance, the EPDP Team suggests that Registrars may consider the use of a standardized data element that would indicate the type of registrant concerned (legal/natural) and the type of data of legal registrants it concerns (personal/non-personal). This concept of identifying the type of domain name registration data involved is also referenced in EPDP Phase 2 recommendation #9.9.4 (automated response to disclosure requests), which indicates that a Contracted Party needs to have a mechanism to identify that a registration record does not contain any personal data.

In the following recommendation, the EPDP Team outlines how a CP that wants to differentiate can do so by using a standardized data element. While the EPDP Team is seeking specific feedback on a number of questions in relation to such a possible standardized data element, the EPDP Team has not foreclosed the option of having additional options added to the field in the future, e.g., legal person - personal information

<sup>7</sup> Note, the NCSG members believe that the EPDP Team should not be providing guidance as such. These members are of the view that it is best for the Contracted Parties to develop guidance on their own and provide the same to their peers.

present, etc. In other words, the EPDP Team recommends that the additional data element be extensible, in principle.

Do note that some EPDP Team members are of the view that the use of such a standardized data element should be obligatory for those Contracted Parties that decide to differentiate, while other EPDP Team members are of the view that because there is no requirement to differentiate, there should not be a requirement to use a standardized data element, and a Contracted Party should be able to determine itself how to implement such a differentiation<sup>8</sup>.

For the purpose of obtaining community input, the EPDP Team is putting forward the following preliminary recommendation:

**Preliminary Rec #3.**

The following additions are made to the EPDP Phase 1 recommendations:

Recommendation #5

The following optional data element (optional for the Registrar to offer to the Registrant and collect) is added to the data elements table:

Data Elements (Collected & Generated*)	Collection Logic
Registrant Legal Person (Yes/No/Unspecified <sup>9</sup> )	MAY / MUST, IF Contracted Party chooses to differentiate* <sup>1</sup>

For the purpose of the Legal person and non-personal data field, which is optional for the Registrar to provide to the Registrant to self-designate, Registrars should advise the Registered Name Holder at the time of registration what the consequences are of self-designating as a legal or a natural person and to provide non-personal data only (or provide appropriate consent if personal data is involved), consistent with preliminary recommendation #3, point 4.

<sup>8</sup> The Registry Stakeholder Group team members have expressed a specific objection to the inclusion of this preliminary recommendation. In their view, the more acceptable option is to include such a suggestion relating to consistent labelling and handling of potential flags within the body of the voluntary guidance (e.g. Preliminary Recommendation #3.3).

<sup>9</sup> “Unspecified” means that no self-designation has been indicated by the Registered Name Holder or determined by the Contracted Party, that the status of self-designation is unknown, or that the status may be in the process of being confirmed. It does not imply that the information provided is inaccurate. The value of unspecified is the default until either the RNH or Contracted Party perform a procedure at the discretion of the Contracted Party, that would change the value to a YES or a NO.

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Moved down [1]: The EPDP Team hopes to obtain further input on this question during the public comment period of whether 1) a standardized data element MUST be available for a Contracted Party to use, and 2) such a standardized data element MUST be used by those that want to differentiate. Aspects of the recommendation that the EPDP Team is looking for specific input on having been marked with \*, indicating the options that are under consideration. ¶

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Recommendation #7<sup>10</sup>

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Transfer of Data Elements from Registrar to Registry:

Data Elements (Collected & Generated*)	Transfer Logic
Registrant Legal Person (Yes/No/Unspecified)	MAY

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Recommendation #8

Transfer of Data Elements by Registries and Registrars to data escrow providers

For Registrars:

Data Elements (Collected & Generated*)	Transfer Logic
Registrant Legal Person (Yes/No/Unspecified)	MAY

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For Registries:

Data Elements (Collected & Generated*)	Transfer Logic
Registrant Legal Person (Yes/No/Unspecified)	MAY

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Recommendation #10

The EPDP Team recommends that redaction must be applied as follows to the data element IF collected:

Data Elements (Collected & Generated*)	Redacted	Disclosure Logic

<sup>10</sup> Do note that the implementation of this recommendation is still pending Board/GNSO Council resolution of the intent in relation to the Thick Whois Consensus Policy".

Registrant Legal Person (Yes/No/Unspecified)	NO / YES**	[MUST / MAY**]
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\*\*There are different views within the EPDP Team on whether this data element would need to be redacted in the public RDDS. Some members, for example, believe this data element should be redacted in public RDDS but provided via the SSAD. Other members believe this data element should be published in the public RDDS. As a result, the EPDP Team invites those providing input during the public comment period to provide their view on this question and, in particular, the rationale for why this data element should be redacted or not and whether the choice to redact or not should be left to the Contracted Party.

The EPDP Team recommends that the applicable updates are made to the [Registry Registration Data Directory Services Consistent Labeling and Display Policy](#) and the RDAP profile consistent with this recommendation. The EPDP Team expects ICANN org to consult with the EPDP Phase 2a IRT, or the IRT that has been assigned the responsibility for implementing this recommendation, and if applicable the GNSO Council, about these changes.

For clarity, the existence of this standardized data element does not require a Contracted Party to differentiate between legal / natural person type or personal / non-personal data.<sup>11</sup> As part of the implementation, it should be considered whether for those Contracted Parties that choose not to differentiate, the data field is not visible in RDDS or automatically set to 'unspecified'.

**EPDP Team Question for Community Input #3**

1. Should a standardized data element be available for a Contracted Party to use? If yes, why? If no, why not? Why is harmonization of practices beneficial?
2. If yes, what field or fields should be used and what possible values should be included in the guidance, if different from the ones identified above? Aspects of the recommendation that the EPDP Team is looking for specific input on having been marked above with \*, indicating the options that are under consideration.
3. If such a standardized data element is available, MUST a Contracted Party who decides to differentiate use this standardized data element or should it remain optional for how a Contracted Party implements this differentiation?

**EPDP Team response to Question ii.**

The Working Group approached its task by first considering what guidance would be useful to Registrars and Registry Operators who choose to differentiate between registrations of legal and natural persons.

Definitions (note, these are derived from previous EPDP-related work, as indicated below):

<sup>11</sup> The personal/non-personal distinction only applies/is relevant for registrants who have self-identified as legal persons.

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- EPDP-p1-IRT<sup>12</sup>: “Publication”, “Publish”, and “Published” means to provide Registration Data in the publicly accessible Registration Data Directory Services.
  - EPDP-p1-IRT<sup>13</sup>: “Registration Data” means the data element values collected from a natural or legal person or generated by Registrar or Registry Operator, in either case in connection with a Registered Name in accordance with Section 7 of this Policy.
  - EPDP-P1 Final Report<sup>14</sup>: Disclosure: The processing action whereby the Controller accepts responsibility for release of personal information to third parties upon request.

### 277 Background Information and EPDP Team Observations

278 In developing the guidance below, the EPDP Team would like to remind the Council and  
279 broader community of the following:

#### 280 *Scope of GDPR and other data protection legislation*

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- A. GDPR and other data protection legislation set out requirements for protecting personal data of natural persons. It does not protect personal data of legal persons and non-personal data.
  - B. GDPR does not cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person. However, when a natural person's information is used in relation to a legal person, e.g. as a representative of a business, that natural person's data does remain protected as personal data under the GDPR.
  - C. Distinguishing between legal and natural person registrants may not be dispositive of how the information should be treated (made public or masked), as the data provided by legal persons may include personal data that is protected under data protection law, such as GDPR.
  - D. Although the GDPR does not cover the processing of personal data which concerns legal persons, the following GDPR principles may still apply if personal data is processed as part of the differentiation process and should be factored in as appropriate by Contracted Parties:
    - a. Lawfulness, Fairness and Transparency: Controller must identify their legal basis (or bases) for processing data and ensure the data subject is aware of the processing prior to when it occurs. If the legal basis is consent, then consent must be obtained prior to the processing.
    - b. Purpose Limitation: Controller must ensure that data is not processed beyond the purposes disclosed to the data subject
    - c. Data Minimization: Controller must ensure that no data is collected / processed beyond what is required to achieve the identified purpose(s)

<sup>12</sup> See [https://docs.google.com/document/d/1SVFkol6RmrVVz--RrVLSO1bmz1qLb7\\_JTuv7At4Uo/edit](https://docs.google.com/document/d/1SVFkol6RmrVVz--RrVLSO1bmz1qLb7_JTuv7At4Uo/edit)

<sup>13</sup> Idem

<sup>14</sup> See <https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-2-20feb19-en.pdf>



- 307 d. Accountability: Controller must be able to demonstrate that they comply  
308 with GDPR Principles.

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310 *Relevant EPDP Phase 1 Recommendations*<sup>15</sup>

- 311 E. Per EPDP Phase 1<sup>16</sup> Recommendation #6, “as soon as commercially reasonable,  
312 Registrar must provide the opportunity for the Registered Name Holder to provide  
313 its Consent to publish redacted contact information, as well as the email address, in  
314 the RDS for the sponsoring registrar”.
- 315 F. Per the EPDP Phase 1 recommendation #17 “Registrars and Registry Operators are  
316 permitted to differentiate between registrations of legal and natural persons, but  
317 are not obligated to do so”.

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319 *Relevant EPDP Phase 2 Recommendations*

- 320 G. Per Phase 2<sup>17</sup> Final Report Recommendation #9.4.4, which addresses automation of  
321 SSAD processing: “the EPDP Team recommends that the following types of  
322 disclosure requests, for which legal permissibility has been indicated under GDPR for  
323 full automation (in-take as well as processing of disclosure decision) MUST be  
324 automated from the time of the launch of the SSAD (...) No personal data on  
325 registration record that has been previously disclosed by the Contracted Party.” This  
326 Recommendation 9.4.4 focuses generally on automating disclosure for registration  
327 records that do not include personal data.<sup>18</sup>
- 328 H. Per Phase 2 Final Report Recommendation #8.7.1, if the Contracted Party receives a  
329 request from the SSAD Central Gateway Manager and the Contracted Party has  
330 determined this to be a valid request, “if, following the evaluation of the underlying  
331 data, the Contracted Party reasonably determines that disclosing the requested data  
332 elements would not result in the disclosure of personal data, the Contracted Party  
333 MUST disclose the data, unless the disclosure is prohibited under applicable law”.

334  
335 *Registrar Business Models*

- 336 I. Registrars operate different business models (Retail, Wholesale, Brand Protection,  
337 Others), and one-size-fits-all or overly prescriptive guidance may not properly  
338 consider the range of registrar business models and the various process flows the  
339 different business models may require. Instead, any guidance should provide  
340 Registrars the flexibility to implement differentiation in a manner that best suits  
341 their business model and reduces the risks associated with differentiation to an  
342 acceptable level for that particular Registrar. For example, differentiation at the time

<sup>15</sup> Note, EPDP Phase 1 recommendation #12 concerning the Organization field may, once implemented, also assist Contracted Parties in differentiating between legal and natural persons, should they choose to.

<sup>16</sup> For further information about the status of implementation of the EPDP Phase 1 recommendations, please see <https://www.icann.org/resources/pages/registration-data-policy-gtlds-epdp-1-2019-07-30-en>.

<sup>17</sup> Note that the EPDP Phase 2 recommendations are with the ICANN Board for its consideration / approval.

<sup>18</sup> Please note that the exact details of how this recommendation will be implemented are to be determined by ICANN org in collaboration with the Implementation Review Team, once the ICANN Board has approved the recommendations.

343 of registration may not be practical in all circumstances, including for certain  
344 registrar business models.

345  
346 **Proposed Guidance**<sup>19 20</sup>

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348 For the purpose of obtaining community input, the EPDP Team is putting forward the  
349 following preliminary recommendation:

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351 **Preliminary Rec #4.**

352 The EPDP Team recommends that Contracted Parties who choose to differentiate based on  
353 person type SHOULD follow the guidance<sup>21</sup> below and clearly document all data processing  
354 steps. However, it is not the role or responsibility of the EPDP Team to make a final  
355 determination with regard to the legal risks, as that responsibility ultimately belongs to the  
356 data controller(s).

- 357
- 358 1. Registrants should be allowed to self-identify as natural or legal persons. Registrars  
359 should convey this option for Registrants to self-identify as natural or legal persons  
360 (i) at the time of registration, or without undue delay after registration,<sup>22</sup> and (ii) at  
361 the time the Registrant updates its contact information or without undue delay after  
362 the contact information is updated.
  - 363 2. Any differentiation process must ensure that the data of natural persons is redacted  
364 from the public RDDS unless the data subject has provided their consent to publish  
365 or it may be published due to another lawful basis under GDPR, consistent with the  
366 “data protection by design and by default” approach set forth in Article 25 of the  
367 GDPR.
  - 368 3. As part of the implementation, Registrars should consider using a standardized data  
369 element in the RDDS, SSAD or their own data sets that would indicate the type of  
370 person it concerns (natural or legal) and, if legal, also the type of data it concerns  
371 (personal or non-personal data). Such flagging would facilitate review of disclosure  
372 requests and automation requirements via SSAD and the return of non-personal  
373 data of legal persons by systems other than SSAD (such as Whois or RDAP). A  
374 flagging mechanism may also assist in indicating changes to the type of data in the  
375 registration data field(s).

<sup>19</sup> Note, the NCSG members believe that the EPDP Team should not be providing guidance as such. These members are of the view that it is best for the Contracted Parties to develop guidance on their own and provide the same to their peers. At the same time, the IPC, ALAC and GAC members have advocated that there should be mandatory requirements i.e. consensus policy, not merely guidance/best practices.

<sup>20</sup> Some EPDP Team members have indicated a preference for using the term “best practices”, while other EPDP Team members have indicated that the development of “best practices” is typically reserved for industry bodies. ICANN org in its response (see hereunder) has indicated that from an implementation perspective, there would not be a difference whether this is called “guidance” or “best practice”. Commenters on the Initial Report are encouraged to weigh in on what terminology is deemed most appropriate and why.

<sup>21</sup> Please note that the ICANN org liaisons provided the EPDP Team with the following feedback on how this guidance would be implemented once adopted: <https://mm.icann.org/pipermail/gnso-epdp-team/2021-May/003904.html>.

<sup>22</sup> For clarity, registrars should ensure that if the Registrant is not given the option to self-identify at the time of registration, the option should be provided no later than 15 days from the date of registration.

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- 377 4. Registrars should ensure that they clearly communicate the nature and  
 378 consequences of identifying as a legal person. These communications should  
 379 include:  
 380 a. an explanation of what a legal person is in plain language that is easy to  
 381 understand;  
 382 b. guidance to the registrant (data subject)<sup>23</sup> by the Registrar concerning the  
 383 possible consequences of:  
 384 i. identifying their domain name registration data as being of a legal person,  
 385 ii. confirming the presence of personal data or non-personal data, and  
 386 iii. providing consent<sup>24</sup>. This is also consistent with section 3.7.7.4 of the  
 387 Registrar Accreditation Agreement (RAA).  
 388 5. If the Registrants identify as legal persons and confirm that their registration data  
 389 does not include personal data, then Registrars should publish the Registration Data  
 390 in the publicly accessible Registration Data Directory Services.  
 391 6. Registrants (data subjects) must have an easy means to correct possible mistakes.  
 392 7. Distinguishing between legal and natural person registrants alone may not be  
 393 dispositive of how the information should be treated (made public or masked), as  
 394 the data provided by legal persons may include personal data that is protected  
 395 under data protection law, such as GDPR.  
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397 **EPDP Team Question for Community Input #4**

- 398 1. Does this guidance as written provide sufficient information and resources to Registrars  
 399 and Registry Operators who wish to differentiate? If not, what is missing and why?  
 400 2. Are there additional elements that should be included?  
 401 3. How useful is the legal guidance (see Annex E), substance and format, in assisting  
 402 Registrars and Registry Operators in differentiating?  
 403 4. If a Registrar or Registry Operator decides to differentiate, should this guidance become  
 404 a requirement that can be enforced if not followed (“MUST, if Contracted Party decides  
 405 to differentiate”)? If yes, why, if not, why not?  
 406

407 **Example scenarios** (note, these scenarios are intended to be illustrations for how a  
 408 Registrar could apply the guidance above. These scenarios are NOT to be considered  
 409 guidance in and of itself).

410 The EPDP Team has identified three different high-level scenarios for how differentiation  
 412 could occur based on who is responsible and the timing of such differentiation. It should be  
 413 noted that other approaches and/or a combination of these may be possible.

- 414 1. Data subject self-identification at time of data collection / registration  
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<sup>23</sup> Note, the Registrant may not be always be the data subject, but in all circumstances appropriate notice / consent needs to be provided to and by all parties as per applicable data protection law.

<sup>24</sup> See also [https://edpb.europa.eu/sites/edpb/files/files/file1/edpb\\_guidelines\\_202005\\_consent\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/file1/edpb_guidelines_202005_consent_en.pdf)

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- 419 a. The Registrar informs the Registrant (per guidance #3 above) and requests the  
 420 Registrant (data subject) at the moment of Registration data collection to designate  
 421 legal or natural person type. The Registrar must also request the Registrant to confirm  
 422 whether only non-personal data is provided for legal person type.<sup>25</sup>
- 423 b. If the Registrant (data subject) has self-identified as a legal person and has provided a  
 424 confirmation that the registration data does not include any personal data, the  
 425 Registrar should (i) contact the provided contact details to verify the Registrant claim<sup>26</sup>  
 426 (ii) set the registration data set to automated disclosure in response to SSAD queries  
 427 and (iii) publish the data (to provide Registration Data in the publicly accessible  
 428 Registration Data Directory Services).
- 429 c. If the Registrant (data subject) has self-identified as natural person or has confirmed  
 430 that personal data is present, the Registrar does not set that registration data to  
 431 automated Disclosure and Publication, unless the data subject consents to  
 432 Publication.<sup>27</sup>
- 433
- 434 2. Data subject self-identification at time when registration is updated<sup>28</sup>
- 435 a. The Registrar collects Registration Data and provisionally redacts the data.
- 436 b. The Registrar informs the Registrant (per guidance #3 above) and requests the Registrant  
 437 (data subject) to self-identify as a legal or natural person type. The Registrar should also  
 438 request a Registrant self-identified as a legal person to confirm that no personal data has  
 439 been provided.<sup>29</sup>
- 440 c. Registrant (data subject) self-identifies as legal or natural person type and confirms that  
 441 no personal data has been provided after update is completed. For example, the  
 442 Registrant may confirm person type at the time of initial data verification, in response to  
 443 its receipt of the Whois data reminder email for existing registrations, or through a  
 444 separate notice requesting self-identification.<sup>30</sup>
- 445 d. If the data subject self-identifies as a legal person and confirms that the registration data  
 446 does not include personal data, the Registrar should (i) contact the provided contact

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<sup>25</sup> Note that the confirmation that only non-personal data is provided could also happen at a later point in time. However, until the Registrant confirms that no personal data is present in the registration data, the Registrar does not set the registration data to automated disclosure.

<sup>26</sup> Per the [guidance](#) provided by Bird & Bird, “this verification method is advisable, and will help reduce risk. That risk reduction will be greatest if there is a reasonable grace period within which the objection can be lodged, before the data in question is published in the Registration Data” and “requiring an affirmative response to verification mailings seems over-cautious, unless and until studies show that the measures adopted are failing to keep very substantial amounts of personal data out of published Registration Data. However, if a verification email “bounces” (i.e. a Contracting Party knows it was not delivered), then it would be better if publication does not proceed”.

<sup>27</sup> Note that the data subject may not be the party executing the process but may have requested a third party to do so. In such circumstance consent may not be possible to document.

<sup>28</sup> It is the expectation that for this scenario a similar timeline is followed as currently applies in the WHOIS Accuracy Specification of the Registrar Accreditation Agreement (see <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#whois-accuracy>).

<sup>29</sup> Note that the confirmation that only non-personal data is provided could also happen at a later point in time. However, until the Registrant confirms that no personal data is present in the registration data, the Registrar does not set the registration data to automated disclosure.

<sup>30</sup> Note, the implementation of EPDP Phase 1, recommendation #12 (Organization Field) may facilitate the process of self-identification.

- 459 details to verify the Registrant claim<sup>31</sup> (ii) set the registration data set to automated  
 460 disclosure in response to SSAD queries and (iii) publish the data.  
 461  
 462 3. Registrar determines registrant's type based on data provided  
 463 a. The Registrar collects Registration Data and provisionally redacts the data.  
 464 b. The Registrar uses collected data to infer legal or natural person type.<sup>32</sup>  
 465 c. If legal person is inferred by the Registrar and subsequently the Registrant (data subject)  
 466 is informed (per guidance #3 above) and confirms that no personal data is present, the  
 467 Registrar should (i) contact the provided contact details to verify the Registrant claim<sup>33</sup>  
 468 (ii) set the registration data set to automated disclosure in response to SSAD queries and  
 469 (iii) publish the data.  
 470 d. If the Registrar has inferred that the Registrant is a natural person or has detected  
 471 personal data, the Registrar should not disclose registration data unless the Registrant  
 472 provides consent for publication or the Registrar Discloses the data in response to a  
 473 legitimate disclosure request.

474  
 475 The EPDP Team recognizes that in all of the above scenarios, there is the possibility of  
 476 misidentification, which may result in the inadvertent disclosure of personal data. In this  
 477 regard, the EPDP Team encourages review of the Bird & Bird memo which can also be found  
 478 in Annex E, especially sections 11.11.1-2, 13, 14.3 and 18.  
 479

### 480 3.2 Feasibility of Unique Contacts

481  
 482 The EPDP Team was tasked by the GNSO Council to address the following two questions:  
 483

- 484 i. Whether or not unique contacts to have a uniform anonymized email address is  
 485 feasible, and if feasible, whether it should be a requirement.  
 486 ii. If feasible, but not a requirement, what guidance, if any, can be provided to Contracted  
 487 Parties who may want to implement uniform anonymized email addresses.  
 488

<sup>31</sup> Per the [guidance](#) provided by Bird & Bird, “this verification method is advisable, and will help reduce risk. That risk reduction will be greatest if there is a reasonable grace period within which the objection can be lodged, before the data in question is published in the Registration Data” and “requiring an [affirmative](#) response to verification mailings seems over-cautious, unless and until studies show that the measures adopted are failing to keep very substantial amounts of personal data out of published Registration Data. However, if a verification email “bounces” (i.e. a Contracting Party knows it was not delivered), then it would be better if publication does not proceed”.

<sup>32</sup> Some EPDP Team members have noted that there may be risks for the Registrar to infer a differentiation without involvement of the Registrant (data subject).

<sup>33</sup> Per the [guidance](#) provided by Bird & Bird, “this verification method is advisable, and will help reduce risk. That risk reduction will be greatest if there is a reasonable grace period within which the objection can be lodged, before the data in question is published in the Registration Data” and “requiring an [affirmative](#) response to verification mailings seems over-cautious, unless and until studies show that the measures adopted are failing to keep very substantial amounts of personal data out of published Registration Data. However, if a verification email “bounces” (i.e. a Contracting Party knows it was not delivered), then it would be better if publication does not proceed”.

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Deleted: has noted the following:

11.11.1 If the (person representing the) Registrant incorrectly characterises personal data as non-personal, then the verification process this triggers should confer reasonable protection against GDPR Accuracy Principle liability for Contracted Parties, as explained at paragraph 11.7 above, as might the legal argument set out at paragraph 11.8 above.  
 11.11.2 Alternatively, if the (person representing the) Registrant incorrectly characterises non-personal data as personal data, then whether or not they subsequently consent to its publication, the data would still not actually be personal data, so GDPR liability cannot arise.

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(...)

13. However, in our view the risk to Contracted Parties seems low, if they take the measures described in the question presented, to avoid personal data being (or if reported, staying) published in Registration Data.

(...)

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14.3 The data in question is likely to be low sensitivity. The scenario being envisaged here (mistaken inclusion of personal data in published Registration Data) seems to be most likely to occur when a legal entity (e.g. a company or non-profit organisation) is registering / maintaining its own domains. In those scenarios, we assume the personal data that could be disclosed would ordinarily relate to an employee's work details (e.g. a company email address), not an individual's private life. Although the GDPR confers protection even in the workplace, the data in question here may arguably be less capable of causing harm to an individual than data relating to the data subject's private life.<sup>34</sup>

(...)

18. We cannot exclude the possibility of some courts or regulators seeing things differently. Even then, an order to correct the issue (likely accompanied by a reasonable period in which to implement changes), rather than a fine, seems most likely, having regard to the GDPR Article 83(2) factors discussed at paragraph 8 above. Having checked in a selection of Member States, we can find no examples of enforcement in relation to this. Accordingly, there is little guidance available besides what is set out in the GDPR itself.

539 The Council also indicated that “Groups that requested additional time to consider this  
540 topic, which include ALAC, GAC and SSAC, will be responsible to come forward with  
541 concrete proposals to address this topic”<sup>35</sup>.

542  
543 In addressing these questions, the EPDP Team started with a review of the [legal guidance](#)  
544 received during Phase 1 and considered possible proposals that could provide sufficient  
545 safeguards to address issues flagged in the legal memo.

546  
547 The EPDP Team noted how an anonymized email address was utilized had an impact on the  
548 safeguards needed and the possible impacts on the data subjects and thus the feasibility.  
549 The team considered the effects and benefits of two uses of such a contact, in line with the  
550 two distinct goals stated by those advocating for unique contacts, namely 1) the ability to  
551 quickly and effectively contact the Registrant, and 2) correlation between registrations  
552 registered by the same registrant.

553  
554 The EPDP Team also observed that the terminology used in the context of this discussion  
555 could benefit from further precision. The EPDP Team tasked the legal committee with  
556 proposing both updated terminology and reviewing clarifying questions to send to Bird &  
557 Bird. The legal committee proposed a set of working definitions, which it submitted to the  
558 EPDP Team on 23 February 2021 (see [here](#)). In addition, the legal committee developed a  
559 set of follow up questions which it submitted to Bird & Bird, and Bird & Bird provided a  
560 [response](#) on 9 April 2021. The EPDP Team considered this legal guidance in the  
561 development of its response to the Council’s questions.

#### 562 **Definitions**

563  
564  
565 Following the initial review of the first charter question, the EPDP Team noted the term  
566 anonymous was misapplied in this question. The EPDP Team noted that for data to be truly  
567 anonymized under the GDPR, the data subject could not be identifiable "either by the  
568 controller or by any another person" either directly or indirectly. (See, GDPR Article 26)  
569 With this understanding, the EPDP Team chose to focus its question on the  
570 pseudonymization of data and further refined the definitions in its follow-up questions to  
571 Bird & Bird.  
572

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<sup>35</sup> <https://gnso.icann.org/sites/default/files/file/field-file-attach/epdp-2-priority-2-items-10sep20-en.pdf>

573 "Registrant-based email contact", means "an email for all domains registered by a unique  
574 registrant [sponsored by a given Registrar] OR [across Registrars],<sup>36</sup> which is intended to be  
575 pseudonymous<sup>37</sup> data when processed by non-contracted parties.<sup>38,39</sup>

576  
577 "Registration-based email contact", means "a separate single use email for each domain  
578 name registered by a unique registrant, which is intended to be anonymous data when  
579 processed by non-contracted parties."<sup>40</sup>

580  
581 Note, however, that even adopting these definitions, Bird & Bird advised that either  
582 Registrant-based or Registration-based email contacts create "a high likelihood that the  
583 publication or automated disclosure of such email addresses would be considered to be the  
584 processing of personal data".

#### 585 586 **Background Information and EPDP Team Observations**

587  
588 In developing its response to the Council questions, the EPDP Team would like to remind  
589 the Council and broader community of the following:

590  
591 *Annex to the Temporary Specification ("Important Issues for Community Consideration")*

- 592  
593 ● The [Temporary Specification for gTLD Registration Data](#), as adopted by the ICANN  
594 Board on 17 May 2018, included the following language in the Annex titled  
595 "Important Issues for Community Consideration":  
596 "Addressing the feasibility of requiring unique contacts to have a uniform  
597 anonymized email address across domain name registrations at a given  
598 Registrar, while ensuring security/stability and meeting the requirements of  
599 Section 2.5.1 of Appendix A."

<sup>36</sup> The Legal Committee was tasked with reviewing the legal guidance received during Phase 2 and determining if additional legal guidance was necessary. As an initial matter, the Legal Committee chose to refine the terminology used in its [Phase 2 question](#); specifically, instead of referring to "anonymization" and "pseudonymization," the Legal Committee agreed to use the terms "registration-based email contact" and "registrant-based email contact" because the EPDP Team noted the previous use of "anonymization" was inconsistent with the GDPR definition of anonymous. In its formation of new definitions, the Legal Committee noted a registrant-based contact might exist within the sponsoring registrar OR across all registrars. The Legal Committee determined, however, that the question of whether the registrant-based contact should exist within the sponsoring registrar or across registrars was a policy question for the EPDP Team, not a legal question for the Legal Committee or Bird & Bird. Accordingly, the Legal Committee chose to leave both options in brackets, and Bird & Bird opined on the legality and associated risks of both options with the [Phase 2A memo](#).

<sup>37</sup> Some EPDP Team members believe that pseudonymous should be changed to anonymous. It should be noted, however, the definition provided above was included in the question to and guidance from Bird & Bird.

<sup>38</sup> Some EPDP Team members believe "by non-contracted parties" should be changed to "by parties other than the controller". It should be noted, however, the definition provided above was included in the question to and guidance from Bird & Bird.

<sup>39</sup> Some EPDP Team members have suggested expanding the definition to include "OR [across TLDs operated by the same Registry Service Provider]". It should be noted, however, the definition provided above was included in the question to and guidance from Bird & Bird.

<sup>40</sup> Some EPDP Team members believe "by non-contracted parties" should be changed to "by parties other than the controller". It should be noted, however, the definition provided above was included in the question to and guidance from Bird & Bird.

600 For reference, Appendix A, Section 2.5.1 states that: “Registrar MUST provide an  
601 email address or a web form to facilitate email communication with the relevant  
602 contact, but MUST NOT identify the contact email address or the contact itself”.

603  
604 *Relevant EPDP Phase 1 Recommendations*

605  
606 **EPDP-P1 Recommendation #6**

607 The EPDP Team recommends that, as soon as commercially reasonable, Registrar must  
608 provide the opportunity for the Registered Name Holder to provide its Consent to publish  
609 redacted contact information, as well as the email address, in the RDS for the sponsoring  
610 registrar.

611  
612 **EPDP-P1 Recommendation #13**

613 1) The EPDP Team recommends that the Registrar MUST provide an email address or a web  
614 form\* to facilitate email communication with the relevant contact, but MUST NOT identify  
615 the contact email address or the contact itself, unless as per Recommendation #6, the  
616 Registered Name Holder has provided consent for the publication of its email address.  
617 2) The EPDP Team recommends Registrars MUST maintain Log Files, which shall not contain  
618 any Personal Information, and which shall contain confirmation that a relay of the  
619 communication between the requestor and the Registered Name Holder has occurred, not  
620 including the origin, recipient, or content of the message. Such records will be available to  
621 ICANN for compliance purposes, upon request. Nothing in this recommendation should be  
622 construed to prevent the registrar from taking reasonable and appropriate action to  
623 prevent the abuse of the registrar contact process.<sup>41</sup>

624  
625 \*Note, during the deliberations, some EPDP Team members raised the issue of web  
626 forms and potential issues with the use of such web forms. It was noted that even  
627 though the option of a web form is part of EPDP Phase 1 recommendation #13, this  
628 requirement is the same as in the Temporary Specification which has been in force  
629 since 25 May 2018. Consultations with ICANN org indicated that web forms have not  
630 been a significant source of complaints nor has this been raised as an issue in the  
631 context of the Implementation Review Team which is tasked to implement the  
632 phase 1 recommendation<sup>42</sup>. Some members are of the view that even if there are  
633 issues, these are not within scope for the EPDP Team to address, considering its  
634 limited remit. The EPDP Team was not able to come to an agreement on how to  
635 proceed on this topic. Nevertheless, if further evidence concerning issues with web  
636 forms is received during the public comment period as well as specific proposals for  
637 why and how the issues identified should be addressed, the EPDP Team will, at a  
638 minimum, pass on this information to the GNSO Council and ICANN org to see

<sup>41</sup> Examples of abuse could include, but are not limited to, requestors purposely flooding the registrar’s system with voluminous and invalid contact requests. This recommendation is not intended to prevent legitimate requests.

<sup>42</sup> See <https://community.icann.org/x/14GBCQ>

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641 if/how the issues identified can be further considered. This could result in the GNSO  
642 Council directing further policy work on this topic.

643  
644 **EPDP-P1 Recommendation #14**

645 In the case of a domain name registration where an "affiliated"<sup>11</sup> privacy/proxy service  
646 used (e.g. where data associated with a natural person is masked), Registrar (and Registry  
647 where applicable) MUST include in the public RDDS and return in response to any query full  
648 non-personal RDDS data of the privacy/proxy service, which MAY also include the existing  
649 privacy/proxy pseudonymized email.

650  
651 *EPDP Phase 2 consideration of this topic*

652  
653 The EPDP Phase 2 Final Report noted that:

654  
655 “Feasibility of unique contacts to have a uniform anonymized email address: The  
656 EPDP Team received legal guidance that indicated that the publication of uniform  
657 masked email addresses results in the publication of personal data; which indicates  
658 that wide publication of masked email addresses may not be currently feasible  
659 under the GDPR. Further work on this issue is under consideration by the GNSO  
660 Council.”

661  
662 **EPDP Team Proposed Responses to Council Questions**

- 663  
664 i. Whether or not unique contacts to have a uniform anonymized email address is  
665 feasible, and if feasible, whether it should be a requirement.  
666 ii. If feasible, but not a requirement, what guidance, if any, can be provided to Contracted  
667 Parties who may want to implement uniform anonymized email addresses.  
668

669 **EPDP Team response to Question i.**

670  
671 The EPDP Team recognizes that it may be technically feasible to have a registrant-based  
672 email contact or a registration-based email contact.<sup>43</sup> Certain stakeholders see risks and  
673 other concerns<sup>44</sup> that prevent the EPDP Team from making a recommendation to require  
674 Contracted Parties to make a registrant-based or registration-based email address publicly  
675 available at this point in time. The EPDP Team does note that certain stakeholder groups  
676 have expressed the benefits of 1) a registration-based email contact for contactability

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<sup>43</sup> Some EPDP Team members note that even though it is technically possible, other factors related to the efforts required to implement such a feature would need to be considered to determine overall feasibility.

<sup>44</sup> Such as 1) It is not clear that the work involved to implement such a concept is justified by the potential benefit. 2) It is furthermore not clear that the goals, as presented, are either effectively or even best met by requiring registrant-based or registration-based email addresses.

677 purposes as concerns have been expressed with the usability of web forms and 2) a  
678 registrant-based email contact for registration correlation purposes.<sup>45</sup>

679 **EPDP Team response to Question ii.**

680 For the purpose of obtaining community input, the EPDP Team is putting forward the  
681 following preliminary recommendation:

682 **Preliminary Rec #5.**

683 [The EPDP Team encourages Registrars to publish the following in the publicly accessible  
684 Registration Data Directory Services (RDDS):

685 A Registrant-based email contact where the Registrar can ensure appropriate safeguards for  
686 the data subject in line with relevant guidance on anonymisation techniques provided by  
687 their data protection authorities and the appended legal guidance in this recommendation.]

688 [The EPDP Team recommends that those Registrars which choose to publish a registrant- or  
689 registration-based email address in the publicly accessible RDDS MUST ensure appropriate  
690 safeguards for the data subject in line with relevant guidance on anonymization techniques  
691 provided by their data protection authorities and the appended legal guidance in this  
692 recommendation (see Annex E). ]

693 **EPDP Team Question for Community Input #5**

- 694 1. Does this guidance as written provide sufficient information and resources to Registrars  
695 and Registry Operators who wish to publish a registrant- or registration based email  
696 address? If not, what is missing and why?
- 697 2. Are there additional elements that should be included?
- 698 3. [How useful is the legal guidance (see Annex E), substance and format, in assisting  
699 Registrars and Registry Operators in publishing a registrant- or registration-based email  
700 address?]

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Commented [MOU4]: Staff support team: Awaiting resolution by GAC & RySG Team

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Commented [MOU5]: EPDP Team to discuss what this question is expected to contribute to the deliberations.

Deleted: For those Contracted Parties who choose to provide a registrant-based or registration-based email address, either publicly or upon request, the EPDP Team recommends that those Contracted Parties review the guidance provided by Bird & Bird on this topic (see Annex E). ¶

<sup>45</sup> The ability to identify what domains a particular registrant has registered is important for law enforcement and cyber-security investigations of bad actors who often register many domains for malicious purposes.