EPDP Phase 2A Public Comment Form

This Public Comment forum seeks community feedback on the Initial Report published by the Expedited Policy Development Process (EPDP) Team on the Temporary Specification for gTLD Registration Data - Phase 2A.

This format for collecting public comment seeks to:
-- Clearly link comments to specific sections of the Initial Report
-- Encourage commenters to provide reasoning or rationale for their opinions
-- Enable the sorting of comment so that the EPDP team can more easily read all the comments on any one topic

There is no obligation to complete all sections within this form – respond to as many or as few questions as desired. Additionally, there is the opportunity to provide comments on the general content of the Initial Report or on new issues not raised by the Initial Report.

It is important that your comments include rationale (i.e., by answering the "rationale" question in each section). This is not a vote. The EPDP team is interested in your reasoning so that the conclusions reached and the issues discussed by the team can be tested against the reasoning of others. (This is much more helpful than comments that simply "agree" or "disagree").

Please note that the EPDP Team has (i) reviewed previous comments on both legal v. natural and feasibility of unique contacts and (ii) discussed these issues comprehensively during Phase 2A.

For that reason, please refrain from repeating positions already stated in the Initial Report, as the Team has discussed these positions extensively. The Team is particularly interested in:
- New information and proposals
- Specific edits

To stop and save your work for later, you MUST (to avoid losing your work):

1. Provide your email address above in order to receive a copy of your submitted responses;

2. Click "Submit" at the end of the Google Form (the last question on every page allows you to quickly jump to the end of the Google Form to submit);

3. After you click "Submit," you will receive an email to the above-provided email address; within the email, click the "Edit Response" button at top of the email;

4. After you click the "Edit Response" button, you will be directed to the Google Form to return and complete;

5. Repeat the above steps 2-4 every time you wish to quit the form and save your progress.

NOTES:
--For transparency purposes, all comments submitted to the Public Comment forum will be displayed publicly via an automatically-generated Google Spreadsheet when the commenter hits the "Submit" button. Email addresses provided by commenters will not be displayed.

--To maximize the visibility of your comments to the EPDP Team, please submit your comments via this form only. If you are unable to use this form, alternative arrangements can be made.

--Please note there is a character limit of 2000 characters when submitting a response. In the event you encounter a character limit, you may send an email to policy-staff@icann.org, and the EPDP Support Staff will assist you with your response.

--The final date of the public comment proceeding is 18 July 2021.

Preliminary Recommendation #1 (Phase 1 Rec. 17)	Preliminary Rec. 1: No changes are recommended, at this stage, 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").

1. Question for Community Input: 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?

At this stage, this is NOT a consensus recommendation and it must not be implied that it is.

Preliminary Recommendation #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 decisions by pertinent tribunals and data protection 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.

2. Question for Community Input: 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?

Perhaps is should not be needed, but given the high workload of the GNSO and the importance of this issue to many in the ICANN community and elsewhere, it is prudent to formally require that the GNSO do this.

Preliminary Recommendation #3

The following additions are made to the EPDP Phase I 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:
[Please refer to the Data Elements Tables on pp. 5-6.]

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.

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. 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".

3. Question for Community Input: 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 or problematic?

Yes. It is possible that L/N differentiation may be necessary in the future, and formulating this element now means we will not need another PDP to create it at that time.

A second and equally important reason is that some registrars MAY choose to do differentiation, and having this element allows the SSAD of other tools to know that the distinction is made.

4. Question for Community Input: If yes, what field or fields should be used and what possible values should be included, 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 an asterisk (*), indicating the options that are under consideration.

The field should specify whether the Registrar is a legal or natural entity. If the registrar chooses to not differentiate, or if the value is not known for whatever reason, the field is left blank.

- If the registrar differentiates, the field MUST be used for those registration where differentiation is made.
- The data element MAY be transferred to Registries.
- The data element MUST be transferred to escrow providers if it is used for the particular registration (both registrars and registries).
- The Data element MUST be provided to the SSAD (or equivalent) and MUST be published in the public RDDS (not that these are two separate issues).

5. Question for Community Input: 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?

As noted above, the ALAC believes that if there is an element, it MUST be populated for registrations where a differentiation is made.

Preliminary Recommendation #4

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

1. Registrants should be allowed to self-identify as natural or legal persons. Registrars should convey this option for Registrants to self-identify as natural or legal persons (i) at the time of registration, or without undue delay after registration, and (ii) at the time the Registrant updates its contact information or without undue delay after the contact information is updated.
2. Any differentiation process must ensure that the data of natural persons is redacted from the public RDDS unless the data subject has provided their consent to publish or it may be published due to another lawful basis under the GDPR, consistent with the "data protection by design and by default" approach set forth in Article 25 of the GDPR.
3. As part of the implementation, Registrars should consider using a standardized data element in the RDDS, SSAD or their own data sets that would indicate the type of person it concerns (natural or legal) and, if legal, also the type of data it concerns (personal or non-personal data). Such flagging would facilitate review of disclosure requests and automation requirements via SSAD and the return of non-personal data of legal persons by systems other than SSAD (such as Whois or RDAP). A flagging mechanism may also assist in indicating changes to the type of data in the registration data field(s).
4. Registrars should ensure that they clearly communicate the nature and consequences of a registrant identifying as a legal person. These communications should include:

a. An explanation of what a legal person is in plain language that is easy to understand.
b. Guidance to the registrant (data subject) by the Registrar concerning the possible consequences of:

i. Identifying their domain name registration data as being of a legal person;
ii. Confirming the presence of personal data or non-personal data, and;
iii. Providing consent. This is also consistent with section 3.7.7.4 of the Registrar Accreditation Agreement (RAA).

5. If the Registrants identify as legal persons and confirm that their registration data does not include personal data, then Registrars should publish the Registration Data in the publicly accessible Registration Data Directory Services.
6. Registrants (data subjects) must have an easy means to correct possible mistakes.
7. Distinguishing between legal and natural person registrants alone 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.

6. Question for Community Input: Does this guidance as written provide sufficient information and resources to Registrars and Registry Operators who wish to differentiate? If not, what is missing and why?

Obviously 3. Should be adjusted if based on the results of deliberations on questions 3-5.

7. Question for Community Input: Are there additional elements that should be included in the guidance?

8. Question for Community Input: Are there legal and regulatory considerations not yet considered in this Initial Report, that may inform Registries and Registrars in deciding whether and how to differentiate, and if so, how?

The EU NIS2 may be approved by the EU Council and/or parliament by the time the final report is published. Any such decisions MUST be factored into the report, even if the timing of the report must be altered. For avoidance of doubt, if at the time of publication, there is more specificity on NIS2, it MUST be factored into the report.

9. Question for Community Input: If a Registrar or Registry Operator decides to differentiate, should this guidance become a requirement that can be enforced if not followed ("MUST, if Contracted Party decides to differentiate")?

No.

Preliminary Recommendation #5

The EPDP Team recommends that Contracted Parties who choose to publish a registrant- or registration-based email address in the publicly accessible RDDS should ensure appropriate safeguards for the data subject in line with relevant guidance on anonymization techniques provided by their data protection authorities and the appended legal guidance in this recommendation (see Annex E).

10. Question for Community Input: Does this guidance as written provide sufficient information and resources to Registrars and Registry Operators who wish to publish a registrant-based or registration-based email address? If not, what is missing and why?

No, the report or additional information provided during implementation should give specific examples and best practices.

Additional Input

Please use this section of the form for comments or issues not addressed in the previous questions.

11. Are there any other comments or issues you would like to raise pertaining to the EPDP Phase 2A Initial Report? If yes, please enter your comments here. If applicable, please specify the section or page number in the Initial Report to which your comments refer.

At this point, most registrars use web forms and some such forms do not allow a user to provide sufficient information the registrant. The web form specifically must allow "communication" and not just a very small number of selected tick-options. The communications must include setting the majority of the resultant Subject Field and at the very least provide a minimal (256 characters perhaps) of text. The ALAC understands the need to NOT facilitate spam and these requirements do just that.