AT-LARGE ADVISORY COMMITTEE
ALAC Advice to the ICANN Board on the System for Standardized Access/Disclosure to Non-Public Domain Name Registration Information (SSAD)

Introduction

On 30 June 2021, Alan Greenberg, ALAC Member to the to the Expedited Policy Development Process on the Temporary Specification for gTLD Registration (EPDP-TempSpec), noted to the At-Large Consolidated Policy Working Group (CPWG) that it would be in the interest of Internet end users for the ALAC to draft advice to the ICANN Board on the EPDP Phase 2, System for Standardized Access/Disclosure to Non-Public Domain Name Registration Information (SSAD).

On 07 July 2021, both ALAC Members EPDP-TempSpec, Hadia Elminiawi and Alan Greenberg, confirmed that a draft points of consensus for ALAC advice would be presented to the CPWG for their consideration. The same day, ICANN Policy staff in support of the At-Large community created a workspace for the ALAC advice.

On 14 July 2021 and 21 July 2021, Alan Greenberg and Hadia Elminaiwi presented the draft versions of the ALAC advice to the CPWG. The CPWG provided input on the At-Large points of consensus, and ICANN Policy staff in support of the At-Large community issued several calls for comments to the CPWG and ALAC mailing lists, including circulating a Google Doc for comment.

On 27 July 2021, the ALAC Members to the EPDP-TempSpec presented the ALAC advice during the ALAC Monthly meeting. The ALAC Chair and ALAC Members discussed the advice and provided comments in support of the ALAC advice. A final call for comments was issued to the CPWG and ALAC mailing lists.

On 4 August 2021, the advice was presented to the CPWG for final review. Hadia Elminiawi and Alan Greenberg finalized the ALAC advice, and the ALAC Chair, Maureen Hilyard, requested that the statement be ratified by the ALAC before submission to the ICANN Board.

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The ALAC notes with appreciation the hard work of the EPDP Phase 2 team which resulted in producing an initial report outlining a proposed system for standardized access/disclosure to non-public gTLD registration data (SSAD) accompanied by 18 recommendations and an addendum to the initial report addressing priority two items accompanied by four recommendations and two conclusions.

While ALAC acknowledges that the Phase 2 team was successful in arriving at consensus in relation to many of the Phase 2 recommendations and as we ensure our full commitment to ICANN processes and multistakeholder model, we find ourselves obliged to present this advice to the Board to safeguard the interests of the individual Internet end users.

Our advice to the Board relates to five main areas related to the recommendations detailing the proposed SSAD.

1. **The ability of the SSAD to fulfill the requirements of the system's users (Non-public information requestors)**

   The SSAD was initially envisioned in order to allow third parties with legitimate interests and lawful basis to obtain non-public registration data in a timely manner. Many of these legitimate interests and purposes for the use of the SSAD are related to the protection of Internet users; as such, ALAC would like to see the proposed system fulfilling the needs of its users. However, the service level agreements associated with the requests' types, the assigned priorities, and the lack of effective automation make it impossible for the SSAD to fulfill the needs of urgent requests as well as requests related to consumers' protection among others. The reliance on each registrar to make data disclosure decisions ignores prime requirements - predictability and consistency. Moreover, there is a high probability that the costs associated with using the SSAD may deter its usage in many instances[1], ultimately resulting in the inability to meet the self-financing requirement.

2. **The Proposed system in most cases offers a service that does not differ much from the current practice**

   While the system automates the receipt, authentication and transmission of SSAD requests to the relevant contracted party, all disclosure decisions apart from four limited use cases are handled in a manner that does not differ much from the current practices. Those current practices have proven inadequate, and there is little reason to believe that with the SSAD, it will be better. The ALAC does appreciate that IF the system is actually used, it would provide statistics of how requests are handled, and there is merit in that.

3. **The agility of the system and its ability to adapt and evolve**

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[1] A system recently implemented by a large Registrar assigns a price of US$50 per request. The service offered may not be comparable to the SSAD, but it does set an interesting price level that clearly some in the contracted party community feel is reasonable. It has been judged as not reasonable by a number of potential users.

Given the novelty of the proposed solution and possible legal clarity as time passes and more cases are globally addressed, SSAD was expected to be able to adapt and evolve based on new findings and learned experiences. However, the proposed recommendations do not allow for an agile system that could evolve without further PDPs.

4. **The consensus level that some of the recommendations received**

Six[2] out of the 18 recommendations received significant opposition. These six recommendations address the response requirements, contracted party authorization, automation of the SSAD, service level agreements related to non-automated disclosure requests, disclosure requirements, review of implementation using a GNSO standing committee and the ability of the system to adapt and evolve. All of the recommendations lacking consensus are core recommendations to the operation of the proposed system for access/disclosure, which indicates lack of community support for the proposed model. Two of the recommendations did not even receive "strong support" but were classed as "divergent" (Priority Levels and Financial Sustainability).

The ALAC questions the concept of a Consensus Policy based on recommendations that did not have consensus within the PDP WG! To the best of our knowledge, this is the first time that the GNSO Council has passed a non-consensus PDP recommendation to the Board for Consensus Policy approval and implementation.

5. **Legal/Natural differentiation**

At the end of Phase 2, the ALAC was optimistic that future efforts might ensure a Legal/Natural differentiation and that the SSAD recommendations could be amended to allow automated disclosure for Legal Person registrations. It now appears that such a change will not occur. It seems likely that EU NIS2 regulations and legislation will require such differentiation in the near future, but only for those registrars affected by such legislation (resulting in a very uneven playing field). To accommodate such legislation within the SSAD for the entire registrar community would require a further PDP.

The system as currently proposed will require significant time, effort and cost to implement. There is little indication that it will even come close to meeting the needs of the proposed users. Moreover, there is little evidence that the requirement for it to be largely operationally self-funded by the users will result in a pricing level that will be acceptable to those users - making the implementation of the system even more risky.

In summary, if the SSAD is even used, it will provide a very expensive, very complex, glorified ticketing system. And despite the benefits that a ticketing system provides, the likely costs imply that it may be bypassed by its intended users.

In summary, the ALAC still strongly believes that a system such as the SSAD is needed to reveal redacted registration data for those with a legally justified need to know in a timely manner. But the SSAD as specified by the EPDP is not such a system.

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[2] Recommendations number 5, 8, 9, 10, 12 and 18 received significant opposition designation.

The ALAC <u>advises</u> the ICANN Board to:

- Either reject the SSAD recommendations and/or request that the GNSO Council reconsider the issue, perhaps with a suitable delay to fully understand the potential changes to the GDPR-related regulations in Europe.

- Immediately have ICANN Org design and begin implementation of a no-charge ticketing/tracking system to track requests for disclosure of non-public gTLD registration information. Such a system has no need for accreditation, thus simplifying the implementation. This can likely be built upon existing components already in use within ICANN, or commercial solutions readily available.

  If a PDP is required to require that all contracted parties use it, such a targeted GNSO PDP should be initiated by the Board. Consideration should be given to having the ticketing/tracking system also apply to Privacy/Proxy providers.

- Should regulations comparable to those related to domain name registration data in the NIS2 proposal be adopted by the European Union Council and Parliament, the ICANN Board should immediately consider initiating a targeted GNSO PDP to ensure that all ICANN registrars are subject to comparable rules. This will provide fairness within the registrar community and ensure that we do not end up with registrars outside of the EU being able to provide higher levels of anonymity to those registering domains in support of DNS abuse and other fraudulent or illegal activities.

  This last advice is not directly related to the SSAD, but the lack of an SSAD (or equivalent) implies that we need to maximize the amount of information legally published in the non-redacted RDDS. This is in line with ICANN's original intent of "maintaining the existing WHOIS system to the greatest extent possible".

End Note

Although not forming part of this Advice to the Board, the ALAC notes a disturbing trend. We are seeing an increasing number of PDPs that consume very significant ICANN Org and community resources, but ultimately do not have any viable results, or have results very different from those envisioned. Examples include:

- Thick WHOIS: Approved in October 2013 (8 years ago!); largely implemented but now paused and likely to be discarded.
- Privacy Proxy: Approved in December 2015 (approaching 6 years); implementation paused and unclear whether it will continue.
- EPDP Phase 1: Approved in February 2019 and envisioned to be implemented and operationalized by the contracted parties by February 2020. We are now over 2 years into the ICANN Org implementation with more work to do before contracted party implementation even begins.
- EPDP Phase 2: The subject of this Advice.

Further discussion and analysis as to why we are investing so much effort and resources with such disappointing outcomes may be warranted.