

RDDS EPDP Phase 2 Board Advice Questions

Board Advice: <https://community.icann.org/download/attachments/167544761/AL-ALAC-ST-0821-01-01-EN.pdf>

Board Question #1

Can the ALAC please clarify what "GDPR-related regulations in Europe" it is referencing; what "issue" it is recommending that the Board should request the GNSO Council to reconsider; and its expectations regarding potential impacts to the recommended SSAD that would support such Board actions, in light of the fact that the Board must adopt the EPDP's recommendations, unless such recommendations are not in the best interests of the ICANN community or ICANN (see ICANN Bylaws, Annex A-1, Section 6(a))? The Board has noted the other concerns raised in the ALAC's advice, as well as those noted in the ALAC's minority statement to the EPDP Phase 2 report.

"GDPR-related regulations in Europe" is a reference to the Network and Information Security Directive (NIS2) under consideration by the EU Parliament and Council as it pertains to the gTLD RDDS (in particular Article 23 in the early drafts).

The ALAC is very much aware of the Board's obligations and options regarding GNSO Recommendations. To be clear, the ALAC does NOT believe that implementation of the SSAD as described in the EPDP Phase 2 Recommendations is in the best interests of ICANN or the ICANN community.

The ALAC believes that as recommended, the SSAD will not meet the community needs nor will it be affordable. Support of NIS2, if adopted anywhere close to the current proposals, will require radical changes to the standards described in the recommendations with regard to what is openly published, what requires controlled disclosure, and the timing of such disclosures. The ALAC notes that the SSAD recommendations are explicitly not in compliance with the proposed NIS2 European Directive.

Registrars subject to EU regulations will have to adjust their practices, but those registrars not subject to EU regulations will have no such need¹. Moreover, the standards subject to Contractual Compliance (CC) action in respect to the SSAD will be meaningless for those registrars subject to NIS2.

If we want to ensure that CC can effectively monitor registrar activities and to ensure that there is a level playing field so that those contracted parties not subject to EU regulation cannot

¹ Currently, the ALAC is not aware of any other initiatives comparable to NIS2.

become DNS abuse havens, a new PDP will be required. The chances of the Registrar SG deciding to initiate such a PDP are rather slim. The Registry SG, who are largely disinterested parties in this, will be unlikely to oppose their customers, the registrars. Together they have an effective veto in GNSO Council decisions.

The only alternative therefore is to reject (or if possible, defer action on) the recommendations, taking steps to ensure that the matter will be reconsidered once there is clarity on the direction the EU will be taking. This position will be further amplified in the answer to the other Board questions.

Board Question #2

1) Can ALAC please clarify if it is recommending that the Board take this action in lieu of adoption of the EPDP Phase 2 Recommendations, in addition to its adoption of the EPDP Phase 2 Recommendations, or some other action? 2) Can the ALAC please clarify what it means by “having the ticketing/tracking system also apply to Privacy/Proxy providers”? Does ALAC mean that the Privacy/Proxy provider should also be able to receive requests via SSAD to consider disclosing the registration data behind the Privacy/Proxy service?

The ALAC understands that the Board is in a difficult position, and would prefer to not be too prescriptive. The ALAC does not want to see the currently proposed SSAD implemented as it will not meet user needs and will likely not be financially sustainable. If NIS2 is adopted roughly as currently proposed, many of the issues with the SSAD will need to be re-addressed for those parties subject to EU regulation, but other contracted parties will not be similarly constrained, nor will ICANN CC be able to enforce any of these new constraints (even for those subject to EU regulation).

The vast majority of requests submitted to the SSAD will ultimately go to registrars who will each apply their own procedures and standards (belying the term “standardized” in the SSAD name and in the EPDP Charter). Despite significant cost and effort with respect to credentialing, those credentials need not be considered in registrar decisions. Accordingly, the only benefits provided by the SSAD will be logging requests and tracking performance. These can both be provided by a ticketing/tracking system at FAR less cost and effort.

Since some contact information is also kept undisclosed by Privacy/Proxy providers, it makes sense for these parties to be subject to similar disclosure and tracking rules (once these providers are subject to ICANN policy under the Privacy/Proxy PDP). This should apply to the interim ticketing /tracking system and the full SSAD if implemented.

Board Question #3

(1) Can the ALAC please clarify the meaning of “regulations comparable to those related to registration data in the NIS2 proposal”? Does “comparable” mean identical to, or merely concerning the same subject matter as Article 23 of the proposed NIS2 Directive, as adopted by

the European Commission? (2) Is the ALAC recommending that the ICANN Board consider initiating a PDP with the aim of requiring all ICANN-accredited registrars to follow an ICANN policy containing requirements that are similar to the final NIS2 directive, whatever its requirements are when NIS2 is finalized? (3) Is this advice, with respect to providing fairness across jurisdictions, limited to the proposed NIS2 Directive, or does the ALAC believe this principle applies with respect to any other laws, in Europe or elsewhere?

(1) NIS2 is currently subject to ongoing discussions within the EU. The Directive eventually adopted by the EU will need to factor comments received as well as being the result of negotiations between the EU Parliament and Council. Without knowing the exact outcome of all of these processes, we cannot be more definitive. However, by “comparable” the ALAC means to say NIS2 regulations, as eventually adopted, that govern how domain name registration data is processed.

(2) Yes, that is exactly what the ALAC is recommending. It is expected that the implementation of the NIS2 Directive will provide much of what the GAC/SSAC/ALAC and certain GNSO Constituencies were trying to achieve with the EPDP. It is crucial that all contracted parties, not only those subject to EU regulation, meet these new standards. Without that they become havens for domains registered for fraudulent and/or abusive behaviour.

(3) The ALAC is not aware of any other laws/regulations where this is currently applicable. The ALAC notes that the EPDP has effectively already applied EU personal data privacy regulations across the entire ICANN contracted party ecosystem. As an example, GDPR has geographic limitations and its personal privacy regulations only apply to registrants in certain areas and registrars who explicitly target such registrants. The EPDP applied no such geographic limitation, treating all registrants world-wide under the same rules.

To be clear, if in the future, the question arises as to whether some specific regionally applicable law/regulation should be incorporated into ICANN policy, that would have to be considered on a case-by-case basis.