

The Registries Stakeholder Group (“RySG”) has identified several overarching concerns in connection with its review and comment on the Triage Report (the “Report”). We identify and discuss these concerns below.

1. The purpose of the Triage Report is not clear.

- a. The intended use of the Report needs clarification.** Is the intention to simply record those issues from the Temporary Specification where further discussion by the ePDP Working Group (“WG”) is needed? If so, then the high-level summary as presented is understandable. However, if there is another purpose, the RySG is concerned about the loss of nuance from the triage survey responses that has resulted from an effort to generalize the feedback. We are concerned this generalization will result in future discussion overlooking significant issues.
- b. The purpose of including the posed questions is unclear and should be clarified.** As stated during ePDP discussions, the RySG maintains that the GNSO ePDP Team Charter (the “Charter”) questions offer a reasonable roadmap for issue discussion. A discussion of purposes (Section 4 of the Temporary Specification) should then flow into the remainder of the issues. Many sections of the Report consist solely of questions and no reflection of submitted SG/C/SO/AC comments. The Report seems to introduce these new questions without identifying their source, purpose, or goal.
- c. It is important to clarify that the Report does not reflect any substantive discussion of the Temporary Specification.** The RySG is concerned that the Report will be viewed as an initial step of substantive discussion and debate on the issues presented in the Temporary Specification. This is not the purpose of the triage exercise envisioned in the Charter, and the report should clarify that the comments do not reflect substantive deliberations, decisions, or positions of the WG members.

2. The Report exceeds its intended scope.

As per the Charter, the Report is a specific deliverable with a defined scope. This Report does not actually achieve this goal. The deliverable anticipated in the Charter is a triage document of the Temporary Specification which includes: (i) elimination of clauses; and (ii) remaining items that have full consensus for inclusion (and meet four specific criteria).

Although the Report recaps the expectations of the GNSO Council (in the second introductory paragraph), it veers from the scope substantially.

The expected conclusion of the Report should be that there were a small number of consensus points and some suggested eliminations, which have neither been discussed nor achieved consensus.

The Report reads more like a working document than a report.

3. The chart should be clarified and refined to pre-empt negative perceptions.

Per the discussions in the ePDP WG meetings, because of the complexity of the subject area, responses to the survey questions were quite varied and had more subtlety than simple Yes, No, and No with comments. The chart, in addition to the text, should reflect that very few responses were cut and dried and the Yes/No graphic distorts the level of disagreement, which could lead to negative community reaction. One way to achieve greater clarity is to allow a “soft-NO” and a “soft-YES” indication in the chart, i.e., indicate there was a NO or YES in the response with clarifying text using a light-red and a light-green respectively.

4. The Report should adequately reference and attribute the source of statements and questions, and major objections should be sufficiently acknowledged.

As part of the effort to summarize responses, some points that were made by one group have been generalized into a blanket statement. Understandably, the Report can't include every comment, but where comments specifically reflect one or two groups' views, the Report should include attribution. This would further ensure that the text matches what is reflected in the chart.

5. The Report should ensure that references to submitted responses are indeed representative of the submitted responses.

- a. **The portion of the Report covering Section 4 of the Temporary Specification does not adequately represent RySG statements.** The RySG strongly believes that the purposes as defined in Section 4 are not sufficient, specific, or accurate as written. In addition, the RySG noted in its responses that the discussion of purposes for the consensus policy is a foundational issue to every other decision. The ePDP discussion around defining purposes will allow, and require, the ePDP to identify the data under consideration, the specific parties involved in the collection and processing of said data, and the relationship and roles of those parties (e.g. Controller, Processor, Joint Controller). Once the purposes are defined, the ePDP will have established (i) a shared understanding of a foundational issue; (ii) a clear path to follow on issues (i.e. disclosure and access); and (iii) clarity into what items may require post-ePDP efforts (i.e. items outside the picket fence, e.g., development of an industry Code of Conduct). The Report neither refers to nor reflects these RySG statements.

6. The Report should avoid statements interpreting the GDPR.

Throughout the Report, there is a tendency to pose questions that appear to be based on interpretations or misinterpretations of legal concepts relating to data protection. Whereas it is accepted that such understandings will, undoubtedly, be gained through substantive discussion and submissions, their inclusion may give rise to unnecessary early concerns from outside of the ePDP as to the potential legitimacy and legality of the WG's outputs. The Report should therefore avoid making statements that are indirectly interpreting the law, especially where such interpretations are clearly incorrect. For example, the questions under Section 7.1 refer to ICANN's role as a data processor. Whereas this likely refers to a comment whereby it was actually noted that ICANN is not a processor, this context is missing, and therefore seems to be a statement that is broadly incorrect.

In addition, there are comments and statements throughout the Report that ask "should we further define..." regarding concepts and terms that are already assigned meaning in the GDPR. As an ePDP WG, we may further parse how those defined terms and concepts are operationalized in a consensus policy, but the Report should not seek to redefine terms already given meaning by the GDPR.

A further example of this may be found in the review of elements relating to the ability of the policy to future proof.

- In point 1 of the paragraphs referring to Section 4.44.4, 4.4.1-4.4.2, we note a reference to "future legitimate uses of data for any future privacy regimes." Whereas we may make the policy non-specific to any particular privacy regime (e.g. GDPR over reliance) making statements as to possible future "uses" which may be allowed under any such regime would not be so encouraged.
- This is further echoed in point 2, whereby it is suggested that non-specific language may be included so as to allow for "potential for future legitimate purposes" as, one presumes, may be identified. These are not matters which would likely find support with the RySG, as such "future legitimate purposes" are simply not compatible with the concepts of privacy by design, privacy by default and the principle of data minimization (as it is open ended data use).

7. The Report seems to conflate ICANN/Ry/Rr Purposes with Third-Party Purposes

The Report needs to identify and lean into areas where the EDPB provided ICANN with clear guidance on GDPR implementation. For example, the EDPB directed ICANN to "take care not to conflate its own purposes with the interests of third parties, nor with the lawful grounds of processing which may be applicable in a particular case." (EDPB Letter to ICANN, 5 July 2018). This distinction between ICANN's purposes (including contracted parties) and third-party

purposes is vitally important and an overarching consideration when discussing any of the purposes or questions listed under Section 4.4. In some cases, the answer to this fundamental gating question would negate any of the additional questions regarding the purpose. Framing the discussion around settled principles should help clarify and guide the ePDP process and aid in building consensus.

Given the significance of the issue and the clear guidance from the EDPB, the Report must identify this issue as a core question for determining the purposes for processing.

- 8. The Report should distinguish between determining legitimate purpose, on the one hand, and establishing a purpose that may be considered legitimate upon review by those competent to make such a determination, on the other hand.**

The role of the ePDP is not to “determine” whether purposes for processing are legitimate. Those determinations are made by competent authorities responsible for interpreting and enforcing the GDPR (e.g. data protection authorities, European courts). The ePDP is charged with establishing whether the circumstances surrounding ICANN and contracted parties’ processing of personal data tend to suggest that the stated purposes are legitimate. The ePDP must carefully consider, among other things, (i) each data element that is collected, (ii) the purpose for which it is collected, (iii) whether there are valid secondary purposes, (iv) whether the data subject receives appropriate notice of those purposes, (v) if not, whether the lack of notice is justified, and (vi) the effect of the use of data on the data subject. After considering these factors the ePDP must evaluate, given the stated purpose, whether there an appropriate balance between the purpose and the rights of the data subject. This deliberative process helps “establish” whether the stated purpose is likely to be legitimate.

This distinction between determining and establishing legitimate purposes is important as it dictates a fundamentally different process of evaluation. The Report must be mindful to draw that distinction when discussing purposes for processing.

- 9. The Report should “remove” or acknowledge those matters where there was little or no disagreement.**

The Report should highlight for “removal” from the WG’s substantive discussions or acknowledge those matters on which there was little or no disagreement.