



9 March 2021

Maarten Botterman  
ICANN Board Chair

**Re: SSAD and NIS2**

Dear Maarten,

I write on behalf of the Intellectual Property Constituency to request that the ICANN Board direct ICANN Org to pause the development and deployment of the new Operational Design Phase (“ODP”) and any further work on the Standardized System of Access and Disclosure (“SSAD”) proposed in the Final Recommendations<sup>1</sup> of the EPDP Phase 2 adopted by the GNSO Council on September 24, 2020. In the interest of clarity, as noted in our public comment, we support the adoption of the EPDP Phase 2 Priority 2 policy recommendations.

While the proposed SSAD recommendations are not yet fit for purpose, we remain committed to participating through the multistakeholder process to develop a workable system for accessing domain name registration data which respects data subjects’ rights in compliance with data protection law. Accordingly, constructive suggestions follow in the conclusion below.

**A. Lack of consensus**

Of the 18 SSAD-related Phase 2 recommendations approved by the GNSO Council, eight lacked consensus. While the package includes consensus on benign recommendations such as “Acknowledgement of receipt” and “Logging,” it lacks consensus on the most important SSAD recommendations, including “Disclosure requirements” and Recommendation 18 on improving the SSAD as legal clarity increases over time. This significant lack of consensus is a problematic basis for establishing *consensus* policy. This shaky foundation is further weakened by the fact that the EPDP team indicated that the recommendations were interdependent in accordance with the PDP Manual,<sup>2</sup> yet failed to agree on nearly half of them, including the most important recommendations. While the GNSO Council is free to approve any recommendations presented to it by a PDP or EPDP, recommendations that are not supported by consensus should be a source of concern to and inquiry by the Board. We caution that ICANN may find it

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<sup>1</sup> <https://gns0.icann.org/sites/default/files/file/field-file-attach/epdp-phase-2-temp-spec-gtld-registration-data-2-31jul20-en.pdf>

<sup>2</sup> Section 13, Page 8 <https://gns0.icann.org/sites/default/files/file/field-file-attach/annex-2-pdp-manual-24oct19-en.pdf>

difficult or impossible to enforce policies which are not sufficiently consensus-based, an outcome which might set dangerous precedent in undermining ICANN's ability to carry out its Mission.

ICANN's Bylaws dictate that its Mission is, in relevant part, to “coordinate the development and implementation of policies ... [t]hat are developed through a bottom-up **consensus-based** multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.”<sup>3</sup> The SSAD recommendations do not reflect valid community consensus given the opposition by a substantial portion of the multi-stakeholder community. In fact, the very entities and individuals responsible for policing the DNS and addressing abusive activity have said that the proposed SSAD will not meet their needs. Accordingly, the Board should not adopt these SSAD-related recommendations because they simply lack the required consensus.

## **B. Not in the Public Interest**

Similarly, the Core Values enumerated in the Bylaws dictate that ICANN decision-making and actions should be guided by “[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.” The SSAD recommendations do not reflect the “global public interest” as this term is used in the Core Values as discussed in more detail below.

From the Minority Statements submitted by the ICANN community Advisory Committees and Constituencies with respect to the Phase 2 Final Report, it is clear that the intended users/requestors with respect to the SSAD: (i) do not think the SSAD is fit for purpose; and (ii) are unlikely to use it. As noted in the Governmental Advisory Committee (GAC) Minority Statement, which was expressly endorsed by the At-Large Advisory Committee (ALAC), the Business Constituency (BC), and the Intellectual Property Constituency (IPC), intended users of SSAD do not support the proposed SSAD because it:

- 1) Maintains a fragmented rather than centralized disclosure system;
- 2) Does not currently contain enforceable standards to review disclosure decisions;
- 3) Does not sufficiently address consumer protection and consumer trust concerns;
- 4) Does not currently contain reliable mechanisms for the SSAD to evolve in response to increased legal clarity; and
- 5) May impose financial conditions that place disproportionate costs on its users including those that detect and act on cyber security threats.

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<sup>3</sup> Article 1, Section 1.1(a)(i) <https://www.icann.org/resources/pages/governance/bylaws-en/> (emphasis added)

The Security and Stability Advisory Committee (SSAC) similarly could not endorse the Phase 2 Final Report, noting that, in its view, “a much better system is possible within the limitations imposed by the general data protection regulation (GDPR), and that the EPDP has not provided outcomes that are reasonably suitable for security and stability.”<sup>4</sup> We agree.

Collectively, these groups represent all intended users/requestors of the SSAD. Considering the points above, the Board should find that adoption of the SSAD recommendations would not be in the “global public interest” as this term is used in the ICANN Bylaws. The current SSAD recommendations do not provide for a system of reasonable disclosure of data for legitimate third-party purposes in furtherance of the security and stability of the DNS and its users. This is not consistent with ICANN’s Mission or Core Values, nor consistent with the purposes for processing domain name registration data as stated in the EPDP Phase 1 Final Report and Phase 2 Final Report. Accordingly, the Board should not adopt these SSAD-related recommendations because they simply are not in the global public interest.

### **C. New information since EPDP Phase 2**

Furthermore, the proposed Directive on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148, (“NIS2”), issued by the European Commission (“Commission”) recognizes that the data protection rights set forth in the GDPR need not conflict with public safety and cybersecurity needs. Thus, in NIS2 the Commission has taken important steps towards addressing shortfalls in the current DNS on a range of issues, including access to accurate domain name registration data. We therefore believe it is inadvisable for the Board to permit further work and the expenditure of resources on policy recommendations that may be inconsistent with the further guidance provided within NIS2.

A clear example concerns the issue of domain registration data accuracy. The GDPR is a regulation that was proposed by the Commission. As such, the Commission has a significant role in determining how the GDPR may be applied in particular contexts. Therefore, the mandates set forth in the NIS2 concerning accuracy of domain name registration data and, in particular, the clear requirements that such data must be complete and accurate and that registries and registrars must “guarantee the integrity” of such data, simply cannot be ignored. While some members of the ICANN community assert that accuracy is solely something to be determined by (and function only as a right of) the domain name registrant--the data subject--this is not supportable under the GDPR. Indeed, such an assertion, at least in the DNS context, has been directly contradicted by the clearly articulated perspectives of the government institution that proposed the GDPR in the first place: the Commission. Indeed, in its December 18, 2020 letter to Göran Marby, the Commission stated: “On the issue of data accuracy, the Commission has repeatedly underlined that the accuracy of domain name registration data is of prime importance for the purpose of maintaining a secure and resilient DNS – a purpose that is also stated in ICANN’s bylaws. This is now also explicitly recognized in our recent proposal for a revised Directive on Security of Network and Information Systems (NIS2 Directive).”<sup>5</sup> This view

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<sup>5</sup> <https://www.icann.org/en/system/files/correspondence/viola-et-al-to-marby-18dec20-en.pdf>

is consistent with the language of the GDPR itself, which states that personal data shall be “accurate and, where necessary, kept up to date; [and] every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay...”.<sup>6</sup> The EPDP has already recognized that a purpose for processing domain name registration data, including any personal data contained therein, is to “[c]ontribut[e] to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN’s mission through enabling responses to lawful data disclosure requests.” Thus, data must be accurate in order to facilitate this purpose, which indicates that the data accuracy requirements of the GDPR extend beyond the data subject’s right. Some of the examples provided by authorities interpreting the data accuracy principle of GDPR also make clear that the principle is not an unfettered right of the data subject to determine the accuracy of their own data, and that other parties, including the data controller, processor, or third parties, may also have a separate interest in determining or adjusting the data to meet the purposes of processing.<sup>7</sup> This must be the case, otherwise the deliberate supply of inaccurate data by the data subject to frustrate purposes of processing could never be properly rectified under the GDPR. This would be an untenable interpretation. Accuracy is but one example of a substantive issue with respect to which the NIS2 may provide guidance in relation to the work of the EPDP.

Some members of the ICANN community have asserted that because NIS2 is a proposed Directive and has not yet been adopted, no weight or consideration should be given to its provisions and their potential impact on ICANN’s policies. Such an assertion is dangerously dismissive and fails to take proper account of the Commission’s role.

The Commission has four main roles in the EU’s institutional architecture:

1. to propose legislation to the European Parliament and the European Council (i.e., the sole right of initiative, since neither the Parliament nor the Council can initiate their own legislative proposals);
2. to manage and implement EU policies and the budget (jointly with national authorities and under the ultimate control of the EU’s Court of Auditors);
3. to enforce European law (jointly with the European Court of Justice); and

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<sup>6</sup> (GDPR, art. 5, emphasis added)

<sup>7</sup> See, e.g., Data Protection Commission (Ireland), Quick Guide to the Principles of Data Protection (Oct. 2019), available at [https://www.dataprotection.ie/sites/default/files/uploads/2019-11/Guidance%20on%20the%20Principles%20of%20Data%20Protection\\_Oct19.pdf](https://www.dataprotection.ie/sites/default/files/uploads/2019-11/Guidance%20on%20the%20Principles%20of%20Data%20Protection_Oct19.pdf) (“Controllers should take every reasonable step to ensure that personal data which are inaccurate are erased or rectified without delay, having regard to the purposes for which they are processed.... [A]ll personal data collected, stored, or otherwise processed by a controller must be accurate and up to date.... In general, the reasonable steps controllers are required to take to ensure the accuracy of personal data will depend on the circumstances and in particular on the nature of the personal data and of the processing.”)

4. to represent the EU on the international stage, for example by negotiating agreements between the EU and other non-EU countries.<sup>8</sup>

Role 3 above is of particular relevance to ICANN as it seeks to craft and implement policies that comply with the GDPR. In enforcing European law, the Commission acts as “guardian of the Treaties”. This means that the Commission, together with the European Court of Justice, is responsible for making sure EU law is properly applied in all the Member States. If, for instance, the Commission finds that an EU Member State is not properly applying an EU law, the Commission has the authority to take steps to correct the situation. Thus, having put forward the NIS2 proposal, the Commission cannot be narrowly viewed as only fulfilling its right to initiate EU legislation (Role 1). Rather, the Commission is simultaneously undertaking its role as enforcer of the law—including the GDPR—as set forth in Role 3. Therefore, while we need to await the completion of the legislative process to know what the final text of the NIS2 Directive will be, the current text of NIS2 must be understood as providing guidance concerning how the GDPR obligations apply today and are to be understood in the context of processing domain name registration data.

In light of such guidance, it would be ill-advised for the Board to move forward with the SSAD recommendations without first understanding the implications of NIS2 on these recommendations. It may also be appropriate to remand the SSAD recommendations to the EPDP to assess whether any of the SSAD recommendations should be modified in light of this guidance from the European Commission.

Accordingly, the Board should not adopt these SSAD-related recommendations before fully understanding the impacts of these new legal developments.

#### **D. Conclusion**

Given that ICANN has repeatedly sought guidance from EU institutions as to how the GDPR should be applied to the DNS and domain name registration data, we encourage ICANN to embrace NIS2 as a valuable source of such guidance. We respectfully request and advise that the Board and ICANN Org pause any further work relating to the SSAD recommendations in light of NIS2 and given their lack of community consensus and furtherance of the global public interest. In light of these issues, the Board should remand the SSAD recommendations to the GNSO Council for the development of modified SSAD recommendations that meet the needs of users, with the aim of integrating further EU guidance.

We believe a more adequate solution in this regard is readily achievable. For example, Bird & Bird advice noted that a centralized decision-making model “offers the least risk of liability to

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<sup>8</sup> These roles and functions are set forth in the Treaty on European Union, particularly Article 17 and the Treaty on the Functioning of the European Union, in a number of Articles, including Article 258 that establishes the Commission’s role as enforcer/guardian of the Treaties with respect to the EU Member States. See: <https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html> See also: <https://www.europarl.europa.eu/factsheets/en/sheet/25/the-european-commission> for a succinct fact sheet from the European Parliament’s website that describes the various roles and authorities of the Commission.

CPs [contracted parties],” yet this model, which is preferred by the members of the ICANN community who would use the SSAD, remains entirely unexplored by the EPDP.<sup>9</sup> Fortunately, the community has already developed multiple templates based on the centralized decision-making model from which the EPDP could resume its work, including the UAM<sup>10</sup> and the Accreditation and Access Model (AAM)<sup>11</sup>.

The IPC remains committed to working to develop a system for accessing domain registration data that meets the needs of the broader community, while protecting data subjects’ rights in compliance with data protection law. For all the reasons listed above, in the interest of doing so, we respectfully request the Board to reject and remand the SSAD recommendations to the GNSO Council for further development of a centralized access model.

Sincerely yours,

Heather Forrest

IPC President, on behalf of the IPC

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<sup>9</sup> Section 6.2.2(a)

[https://community.icann.org/download/attachments/111388744/ICANN\\_Automation%20memo%2023%20April%202020%5B1%5D.pdf](https://community.icann.org/download/attachments/111388744/ICANN_Automation%20memo%2023%20April%202020%5B1%5D.pdf)

<sup>10</sup> <https://www.icann.org/en/system/files/files/unified-access-model-gtld-registration-data-25oct19-en.pdf>

<sup>11</sup> <https://www.ipconstituency.org/accreditation>