

25 February 2021

Bruna Martins dos Santos  
Chair, Non-Commercial Stakeholders Group

**RE: Clarification requested about ICANN org comments on the EPDB Recommendation 01/2020 – SSAD and Content Moderation**

Dear Ms. Martins dos Santos,

Thank you for your [letter](#) concerning ICANN org's recent submission to the European Data Protection Board (EDPB), "ICANN org Comments on the Recommendations 01/2020 on Measures That Supplement Transfer Tools to Ensure Compliance With the EU Level of Protection of Personal Data" (ICANN org's public comment).

The ICANN Board is currently considering the EPDP Phase 2 Final Report and recommendations that were transmitted by the GNSO Council on 29 October 2020, regarding the System for Standardized Access/Disclosure (SSAD) for gTLD registration data. Cross-border data transfers are a critical component of the recommended SSAD (and, more broadly, the day-to-day operations of ICANN org and the gTLD registry operators and registrars). Thus, the need for clarity concerning the applicable requirements for cross-border data transfers is an important issue for ICANN org and the broader ICANN community.

The extent to which requestors, ICANN org, and the contracted parties will be able to transfer GDPR-covered personal data across borders via the recommended SSAD will depend on the level of certainty that can be achieved with respect to the specific steps that must be taken for such transfers to be GDPR-compliant. Particularly in light of the *Schrems II* decision there is a need to address the risks identified by the Court of Justice of the European Union (CJEU) with respect to access by public authorities to the data transferred.

ICANN org therefore submitted its public comment<sup>1</sup> to highlight a critical need for regulatory clarity with respect to data transfers for the SSAD, and to offer its comments.

**SSAD and Content Regulation**

*1. Could you please clarify in what ways the SSAD could be instrumental for stopping and preventing the dissemination of illegal content and in order to avoid related societal harms?*

The purpose of the SSAD is to facilitate access to non-public gTLD registration data for parties with a legitimate interest in accessing that data. Developing and implementing a registration

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<sup>1</sup> <https://www.icann.org/en/system/files/files/icann-org-comments-edpb-recs-21dec20-en.pdf>

data model that will enable “*legitimate uses by relevant stakeholders*” is an expectation the EDPB has expressed, as well.<sup>2</sup> Access to registration data can serve a variety of purposes including tracking down abuse of registered Internet resources, such as via phishing, spam, or fraud, in cases when bad actors register and exploit domain names for malicious and illicit purposes.

That said, the SSAD developed by the ICANN community would be a tool for legitimate seekers to request access to non-public gTLD registration data. What access seekers do with the registration data (if disclosed) to serve these legitimate purposes, which might relate to content regulation, is outside ICANN’s remit.

Registration data and, consequently, the recommended SSAD, can be a tool for those combating illegal activity online, including dissemination of illegal content, and working to prevent the societal harm such activity can cause. As such, the SSAD could be instrumental to that end. But this does not mean that the SSAD would be a “measure related to content regulation” in itself.

The fact that legitimate access to non-public gTLD registration data serves an important role with respect to combating illegal activity online has been noted in a number of communications addressed to the ICANN Board and ICANN org. For instance, the G7 High Tech Crime Subgroup noted that “[s]upporting investigations related to phishing, malware, ransomware, counterfeit products, child sexual abuse material and terrorism, among other offenses, as well as to facilitate the identification of victims and offenders, goes to the essence of providing domestic security for the citizens of the G7 members. As such, Whois constitutes a key element of online accountability.”<sup>3</sup>

*2. When the document mentions the prevention of the dissemination of illegal content and societal harm, does it relate to factors other than the access to information object of legitimate requests by legal authorities and/or related to investigations ?*

Regarding your second question, as noted in the above, prevention of the dissemination of illegal content relates to potential access to gTLD registration data by third parties working to prevent the dissemination of illegal content with a legitimate interest or other legal basis as provided in the GDPR.

## **SSAD Implementation**

- 1. Would ICANN be the central clearing house for dealing with such requests?*
- 2. Who could be the subject of the term “designee(s)”?*
- 3. At the opportunity ICANN is confirmed as the clearing house for this request process, are there any available details on the governance of such a process, as well as a draft set of principles it should abide by?*

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<sup>2</sup> [https://edpb.europa.eu/news/news/2018/european-data-protection-board-endorsed-statement-wp29-icannwhois\\_en](https://edpb.europa.eu/news/news/2018/european-data-protection-board-endorsed-statement-wp29-icannwhois_en)

<sup>3</sup> <https://www.icann.org/en/system/files/correspondence/green-to-chalaby-21jun19-en.pdf>

In anticipation of the SSAD recommendations and other complex policy recommendations, ICANN org recently developed the Operational Design Phase (ODP) concept, with community input. The ODP consists of an operationally focused assessment of GNSO Council-approved policy recommendations such as the EPDP Phase 2 recommendations, by ICANN org.

In order to facilitate the Board's careful review and consideration of the important EPDP Phase 2 recommendations, the Board is requesting that ICANN org conduct an Operational Design Assessment of the SSAD-related recommendations from the Final Report. The purpose of this Operational Design Assessment will be to assess the operational impact of the policy recommendations on ICANN org, and inform the Board of these impacts prior to the Board's consideration of the policy recommendations. The assessment will include, for example, what is needed for operational readiness, systems and tools, resources and staffing, to name a few.

The questions you have posed are complex in nature and will be explored in greater depth during the ODP.

We thank you for your letter regarding the ICANN org public comment and would like to reiterate that the purpose of those comments is to seek clarity on the tools available to transfer personal data internationally within and outside the SSAD. We remain willing to exchange further on the substance of the comments submitted to the EDPB, as well as any further questions regarding the submission and the issue of international data transfers as it relates to the SSAD. International data transfers is an issue the EPDP team did not consider by means of providing specific recommendations, and will impact the implementation of the SSAD.

Sincerely,



Göran Marby  
President and Chief Executive Officer  
Internet Corporation for Assigned Names and Numbers (ICANN)