

13 May 2021

RE: SSAD and NIS2

Heather Forrest
IPC President

Dear Heather,

Thank you for your [letter dated 9 March 2021](#), on behalf of the Intellectual Property Constituency (IPC), regarding the new Operational Design Phase (ODP), the proposed System for Standardized Access/Disclosure (SSAD), and the proposed NIS2 Directive on measures for a high common level of cybersecurity across the European Union that was issued by the European Commission in December 2020. The Board thanks the IPC for taking the time to share your views in the letter concerning these topics and for your constructive dialogue on these matters with the Board and the broader community. A clear understanding of the spectrum of ICANN stakeholders' perspectives is important as the Board proceeds to consider the Consensus Policy recommendations concerning the SSAD.

On 25 March, the ICANN Board [directed](#) ICANN org's President & CEO, Göran Marby, to proceed with the ODP for [GNSO Council-approved recommendations \(#1-18\) from the EPDP Phase 2 Final Report on the SSAD](#). The Board directed ICANN org's President & CEO to conduct the ODP by addressing the questions outlined in the [System for Standard Access/Disclosure to Non-Public Registration Data Operational Design Phase Scoping Document](#). The Operational Design Assessment, which is the output of the ODP, is expected to be delivered to the Board in six months, provided that there are no unforeseen legal or other matters that could affect the timeline. Following a transparent ODP process that includes mechanisms for soliciting and receiving community feedback, the ICANN Board will then consider the output of the ODP, alongside the public comments on the policy recommendations, as they consider the policy recommendations.

The ODP is intended to provide the Board with relevant and timely operational information relating to implementation that can help the Board determine whether the SSAD policy recommendations #1-18 are in the best interests of the ICANN community and ICANN. Implementation of these recommendations is expected to be both costly and complex. The Board believes the scope of the SSAD-ODP contains a comprehensive list of topics and includes most of those noted by the GNSO Council in its [22 January letter](#) to the Board and in your letter, including expected costs; potential legal, business, and reputational risks; and expected time-to-market. Operational readiness and identification of the required system tools will be included in the resulting Operational Design Assessment.

We understand your concern that the proposed SSAD “maintains a fragmented rather than centralized disclosure system.” As you know, ICANN org diligently sought assurances from

the European Commission, the European Data Protection Board, and individual Data Protection Authorities that liability for the decision to disclose personal information via a centralized disclosure system would rest on the decision-maker and not contracted parties. Unfortunately, despite ICANN org's efforts, actionable guidance on this question was not forthcoming. Rather, legal input received to date strongly suggests that contracted parties would remain liable for a third party's decision to disclose such information under GDPR. While many would have preferred a uniform approach to disclosure, under the circumstances we do not see how ICANN Contractual Compliance could overturn a contracting party's application of the GDPR balancing test where, as here, legal liability for non-compliance with unclear requirements of the law will fall to the contracted party. If you believe that our analysis of this situation is incorrect, we would welcome more information about the basis for your interpretation of GDPR.

With regard to the proposed registration data-related provisions in the NIS2 Directive, the Board notes that the proposed provisions would require the collection and maintenance of complete and accurate registration data. Depending on the final text, NIS2 has the potential to provide a clear legal basis under the General Data Protection Regulation (GDPR) for disclosure of personal data within registration data to legitimate access seekers, though as noted in ICANN org's comment on the proposal, [it does not do so today](#). As proposed, the NIS2 registration data-related provisions do not appear to be in conflict with the SSAD recommendations approved by the GNSO Council. However, uncertainties exist under the GDPR that would impact the implementation of the SSAD, such as the international data transfers issue. In its current form, NIS2 does not address these uncertainties. In addition, there are uncertainties under the NIS2 itself, including how a registrar would be expected to address a scenario in which a legal person's registration data contains personal data.

In any event, it's important to note that the NIS2 Directive is a legislative proposal; it may take several years to become law, be implemented, and then become enforceable. Therefore, the impact on a potential SSAD or other consensus policy is not yet fully understood. As such, the Board will continue to follow the development of the proposed NIS2 and other future legislation as work on the SSAD continues, including through the ODP.

The Board very much appreciates IPC's continued commitment 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, and looks forward to further conversations on these important matters.

Regards,



Maarten Botterman
Chair, ICANN Board of Directors