24 January 2022

Dear Philippe,

Thank you for your email dated 18 January 2022.

The ICANN Board of Directors has closely followed the progress of ICANN org's first Operational Design Phase (ODP), including reviewing the proposed design for a System for Standardized Access/Disclosure based on the 18 GNSO Council-approved recommendations in the EPDP Phase 2 Team's Final Report. As you may recall, the ICANN Board requested the ODP to inform its deliberations, including whether the recommendations are in the best interests of the ICANN community and ICANN.

The Board appreciates the community's effort in trying to come to a solution, and recognizes the benefits the proposed SSAD will bring, such as standardization of requests and predictability with regard to the processing and timing of requests and responses. The Board also recognizes that the SSAD will not reverse the impact that GDPR has had on access to registration data. As I and other Board members noted in our 20 December 2021 discussion, the complexity and resources required to implement all or some of the recommendations may outweigh the benefits of an SSAD, and thus may not be in the best interests of ICANN nor the ICANN community.

While the final deliverable for this ODP, the Operational Design Assessment (ODA), is now anticipated to be published this week prior to our consultation call on 27 January 2022, we understand that the Council and the broader community may not have had enough time to review the ODA by the time we meet. We hope that does not prevent us from starting a dialogue. In addition, the Board is very interested to hear the Council's views on the ODA, after you have had the opportunity to review it in detail.

It is important to note that the Board has not come to a decision on the recommendations. The overall picture has raised several questions and concerns for the Board and for many in the community, as well, including the GNSO. The Board also notes that there had been concerns raised about efficacy of the proposed SSAD, through minority statements in the Final Report, correspondence, and advice by other stakeholders such as At-Large Advisory Committee (ALAC), Business Constituency (BC) / Intellectual Property Constituency (IPC), and Security and Stability Advisory Committee (SSAC). Because the Council asked for a consultation to discuss the financial sustainability of the SSAD recommendations, we have outlined some of our concerns here to provide some context for our upcoming conversation. We have also proposed some open-ended questions to help the Board and Council work together on the substantive concerns outlined below, as well as how the Board and Council may work together procedurally to help the Board consider the SSAD recommendations.

- The ICANN org ODP team has determined that the costs and level of effort required to implement the SSAD would be significant, particularly as some recommendations account for a substantial portion of the costs.
- This significant investment in time and resources would not fundamentally change what many in the community see as the underlying problem with the current process for requesting non-public gTLD registration data: There is no guarantee that SSAD users would receive the registration data they request via this system.
- SSAD cannot change existing laws that restrict access to personal data within registration data and that require that the Contracted Parties bear the legal burden of determining whether or not they may disclose the requested data.
- The market demand for an SSAD remains unclear. This makes it difficult to predict the estimated fees for such a system, as lower usage figures would result in higher fees in order to recover operating costs. ICANN org surveyed both contracted parties and potential requestors to assess demand, with inconclusive results. The number of queries requestors claimed to have made outnumbered the number of requests contracted parties reported receiving. Attempts to contract a reputable market research firm to help quantify the demand for the system were stymied, as many large firms turned down the work due to the unknowable nature of the demand for this service.
- ICANN Contractual Compliance receives very few complaints related to non-public gTLD registration data requests. However, some reporters indicated that they do not submit complaints related to the non-disclosure of registration data because they know that Contractual Compliance is unable to compel disclosure, which would remain unchanged under the adoption of an SSAD.

The Board understands that the Annex to the Temporary Specification asked the community to continue work to develop an accreditation and access model that complies with GDPR. Previously, the Board highlighted its perspective on the importance of a single, unified model to ensure a common framework for requesting non-public gTLD registration data. However, in light of what we've learned to date from the ODP, the Board has indicated it may not be able to support the SSAD recommendations as a whole as envisioned by the EPDP. The Board is eager to discuss next steps with the Council, as well as possible alternatives to design a system that meets the benefits envisioned by the EPDP in section 3.1 of its final report.

Below, we have proposed some open-ended questions that we believe could facilitate the Board-Council discussion when we meet on 27 January 2022:

1. What is the Council's reaction to the Board's concerns regarding the estimated time, costs, and level of effort of the proposed SSAD design? If the Council does not share the Board's concerns, the Board is interested to hear the Council's perspective.
2. If the Council shares the Board's concerns, the Board would welcome the Council's input on the next steps for considering the recommendations. For example, would the Council be open to modifying its recommendations before the Board takes action on

them as per GNSO PDP Manual, section 16 "Amendments or Modifications of Approved Policies"?

3. Does the Council have other suggestions that address the cost and complexity concerns we cited above?

We are eager to discuss these questions with you and to continue these discussions about the SSAD recommendations, particularly after the Council has had the opportunity to review the final Operational Design Assessment in detail.

Sincerely,

Maarten Botterman
Chair, ICANN Board of Directors