**EPDP Team Preliminary Rec #13.**

Based on the information and the deliberations the EPDP Team had on this topic and pending further input and legal advice, the EPDP Team recommends that ICANN negotiates and enters into a Joint Controller Agreement (JCA) with the contracted parties.

In addition to the legally required components of such agreement, the JCA shall specify the responsibilities of the respective parties for the processing activities as described below. Indemnification clauses shall ensure that the risk for certain data processing is borne by either one or multiple parties that have the primary interest in the processing.

· The EPDP Team understands that a joint controller situation between ICANN Org, Registries and Registrars requires work at a greater level of granularity than in this report. During the further work of the EPDP and negotiations that will subsequently take place between the Registries, Registrars and ICANN in relation to memorializing this relationship when entering into a Joint Controller Agreement (JCA), the parties shall conduct a detailed review of the individual processing activities and the actions to be taken by the respective parties. Note that Art. 26 sec 2 of the GDPR specifies:

"The arrangement referred to in paragraph 1 shall duly reflect the respective roles and relationships of the joint controllers vis-à-vis the data subjects. The essence of the arrangement shall be made available to the data subject."

Based on this, two documents will need to be prepared, one which is published and outlines the roles and responsibility and one private document containing more and potentially confidential information on the collaboration of the joint controllers.

A clear demarcation the processing activities covered by the JCA versus those carried out by either party outside the scope of the JCA shall be documented and reflected both in the private as well as in the public version of the JCA.

The JCA shall ensure that the risks of data processing are shared adequately based on whose interests are concerned. Also, the JCA shall include indemnifications to ensure that no party shall ultimately be liable for another parties’ wrongdoing.

The JCA shall recognize that parties are currently using third parties’ services or otherwise work with third parties, such as

· Data Escrow Agents

· EBEROs

· Registry Service Providers

· Registrar as a Service Providers

· Resellers

· Dispute Resolution Providers

· the TMCH.

This may or may not include processing of personal data by those third parties. Where personal data is processed by third parties, the respective joint controller will need to ensure that the data processing is carried out in a way compliant with GDPR. However, conditional to GDPR compliance, nothing in the JCA shall prevent the respective joint controller from engaging third parties and entering into the required agreements without further authorizations from the other joint controllers.

The EPDP Team considers it out of scope of its work to prepare a JCA or even to prescribe in what form JCAs will be entered into, as long as a set of the minimum requirements as specified in the EPDP Team’s report, are met. It does appear advisable, though, to create one template, which can be amended to reflect situations that are not applicable industry-wide (such as eligibility requirements for registered name holders) and that JCAs are entered into per TLD between ICANN Org, the respective Registry Operator and registrars. A potential way to facilitate contracting would be to make the JCA part of the RRA, so there would be separate tri-partite agreements between ICANN Org, the Registry Operator and each registrar. While ICANN is not a party to the RRA, but ICANN could authorize the registries to enter into JCAs with all registrars on its behalf.