

Via e mail: comments-epdp-2-policy-recs-board-08feb21@icann.org

March 30, 2021

Maarten Botterman
Chair of the Board
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: INTA Comments on EPDP Phase 2 Recommendations for Board Consideration

Dear Chairperson Botterman and Members of the Board:

INTA is pleased to submit its comments to you regarding the Expedited Policy Development Process (EPDP) Phase 2 Final Report. Please note that INTA's comments generally pertain to the EPDP Phase 2 Recommendations 1-18 (relating to the proposed Standardized System for Access/Disclosure ("SSAD")), but not Recommendations 19-22. INTA supports EPDP Phase 2 Recommendations 19-22.

Accordingly, please find our comments below regarding the SSAD related recommendations as well as some additional comments on high-level concerns regarding the sufficiency of the Phase 2 Final Report.

1. Procedural Issues

a. Key SSAD Recommendations Lack Community Consensus

The multistakeholder model requires ICANN policies to be developed through a bottom-up consensus-based process. It is clear from the Minority Statements submitted to the EPDP by the ICANN community Advisory Committees and Constituencies that the SSAD-related Phase 2 recommendations lack such community consensus.

INTA is particularly concerned that this lack of community consensus, firstly, relates to the recommendations which are most critical to the successful operation of SSAD and, secondly, that the dissenting voices come from the very stakeholders that would be users of the SSAD.

SSAD in the form currently proposed would not meet the needs of key intended third-party users such as law enforcement officials, intellectual property rights holders and cybersecurity practitioners. Consequently, this impacts the ability of the community to quickly investigate and address a myriad of consumer harms. Our fear is that the shortcomings of the SSAD will

dissuade those who are intended to benefit from the system from using the system altogether. Without sufficient uptake in the community, the continuing operation of the SSAD will not be financially sustainable. With that in mind, the SSAD-related recommendations should not be adopted in their current form.

Further work must be undertaken to achieve the community consensus required under the multistakeholder model, as distinct from the mandatory minimum level of approval achieved within the GNSO Council. The Board's adoption of policy recommendations that so clearly lack community consensus would set a dangerous precedent for ICANN and its policy development and implementation role.

INTA encourages the Board to remand the SSAD recommendations back to the EPDP for further work in this spirit, given that adoption of the current recommendations does not reflect consensus within the multistakeholder community as demonstrated by the multiplicity of minority statements which include the views of end users, security experts, and governments as well as intellectual property rights holders and the general business community.

b. The SSAD Recommendations as a Whole are not in the Global Public Interest

ICANN's Core Values include a requirement that the multistakeholder model of policy development is carried out in furtherance of the "global public interest". INTA has already expressed its concerns that the SSAD, if approved in its current form, would be ineffective and avoided by most intellectual property rights holders altogether. The inability of intellectual property owners, as well as other classes of intended users including law enforcement and cybersecurity practitioners, to legitimately obtain domain registrant data in a timely and cost-effective manner would only diminish ICANN's efforts to ensure the safety, security, and stability of the DNS.

Where effectively every group of intended SSAD user has objected to the vast majority of key SSAD recommendations and indicated it is not fit for purpose, it seems clear to INTA that the proposed SSAD would not be in the global public interest.

The decision to move forward in spite of the clearly expressed objections and interests of all SSAD users will serve as acknowledgement to those users, as well as their national regulators and legislators, that only the interests of the contracted parties truly matter to ICANN, particularly in light of legal guidance and community input suggesting that there are other paths forward for a workable SSAD that more optimally meets the needs of the broader community.

INTA encourages the Board to remand the SSAD recommendations back to the EPDP for further work in this spirit, given that adoption of the current recommendations would not be in the global public interest.

c. New Regulatory Guidance (e.g., NIS2) Militates in Favor of Further Community Policy Development

As a further reason that the SSAD-related recommendations should not be adopted in their current form, new regulatory guidance out of the European Union makes clear that there are issues that need to be reconsidered by the community policy development efforts. Specifically, the proposed Directive on Measures for a High Common Level of Cybersecurity Across the

Union, repealing EU Directive 2016/1148, (“NIS2”),¹ issued by the European Commission recognizes that the data protection rights set forth in the GDPR need not conflict with public safety and cybersecurity needs.

In issuing this guidance, the Commission has taken important steps toward addressing shortfalls in the current DNS on a range of issues, including access to accurate domain name registration data by reaffirming the duty of registrars and registries to maintain accurate and complete domain name registration data.

NIS2 is directly relevant to the proposed SSAD model, which purports to address registrant data access (albeit in a manner already objected to by INTA and other stakeholders as riddled with shortcomings). Importantly, NIS2 presents new information that was not available at the time of EPDP Phase 2 discussions. INTA, therefore, believes further community policy development work is warranted, rather than moving ahead with the implementation and expenditure of resources on policy recommendations that may be inconsistent with the further guidance provided within NIS2.

As discussed in greater detail in the subsequent sections, the Phase 2 recommendations and the SSAD model fail to provide adequate access to registrant data to legitimate requestors. To the extent prior justification for lack of access to accurate information was tied to an interpretation of GDPR requirements, NIS2 serves to highlight those as *misinterpretations*. This necessitates further community policy development efforts in keeping with the Commission’s commitment to access to accurate domain name registration data.

The SSAD-related recommendations should not be adopted without reevaluating the recommendations in light of this new regulatory guidance.

2. Substantive Issues

a. Phase 2 Recommendations Do Not Provide for Meaningful Access for IP Enforcement and Consumer Protection Purposes

Simply put, the SSAD model developed by the EPDP Phase 2 simply does not provide appropriate access to domain registration data. While the SSAD recommendations helpfully provide a centralized location and standardized method for requesting this data, the recommendations fail to guarantee any meaningful access for even the clearest and most compelling needs.

Today, non-compulsory requests for access to domain registration data are ignored “approximately 75%” of the time.² While INTA appreciates that the SSAD recommendations would require a response to all requests, available data shows that of the minority of requests which do receive a response, the vast majority of those are denied.³ In fact, a study performed by MarkMonitor’s brand protection business (now part of OpSec) obtained requested data

¹ European Commission, Directive on measures for a high common level of cybersecurity across the Union, repealing EU Directive 2016/1148 (Dec. 16, 2020), available at <https://ec.europa.eu/info/law/better-regulation/>.

² European Parliament, Parliamentary Questions: Subject: Lack of access to WHOIS internet domain registration data (11 Feb. 2020), available at https://www.europarl.europa.eu/doceo/document/E-9-2020-000826_EN.html

³ <https://www.appdetex.com/appdetex-whois-requestor-system-awrs-3/>

merely 14% of the time.⁴ These requests, which followed the format prescribed by the Registrar Stakeholder Group,⁵ were manually reviewed and submitted by professional brand protection analysts after confirming that over 1,000 domains/websites were infringing a famous brand's trademark rights.

This lack of disclosure is troubling, especially given that intellectual property, like privacy, is a fundamental right under the EU Charter of Fundamental Rights,⁶ and that data subjects rights under the GDPR do not override data processing for “the establishment, exercise or defence of legal claims.”⁷

This demonstrated lack of willingness to provide access to domain registration data voluntarily gives little comfort that SSAD requests would not similarly be denied. In fact, INTA is further concerned that ICANN has indicated that it would not override a contracted party's decision to withhold this data. This would effectively grant contracted parties the unilateral ability to deny any and all requests on the grounds that they subjectively felt that the data subject's rights outweighed the legitimate interests of the data requester, no matter how grounded in law or fact, objectively important, or compelling those legitimate interests are.

b. Phase 2 Recommendations Do Not Adequately Ensure True, Legitimate, Non-Fictitious Data

The ICANN Bylaws state that as part of ICANN's Mission to coordinate the stable operation of the Internet's unique identifier systems, it is meant to coordinate the development and implementation of policies relating to the maintenance of and access to accurate and up-to-date information concerning registered names.⁸ The EPDP Phase 1 Final Report did not make any recommendations to modify existing requirements of contracted parties to ensure the accuracy of domain name registration data, and indicated its expectation that the topic of accuracy would be considered further.⁹

Accordingly, it was INTA's expectation that the issue of data accuracy would be taken up by EPDP Phase 2, even if designated as a “priority 2 topic” following preparation of recommendations for a proposed SSAD. Ultimately, however, the EPDP Phase 2 team did not address the ongoing community concerns relating to data accuracy.¹⁰ INTA understands that the GNSO Council is considering the possibility of launching a new workstream to continue work

⁴ <https://clarivate.com/markmonitor/blog/gdpr-whois-and-impacts-to-brand-protection-nine-months-later/>

⁵ <https://rrsg.org/wp-content/uploads/2020/10/CPH-Minimum-Required-Information-for-a-Whois-Data-Requests.docx.pdf>

⁶ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012P/TXT&from=EN>

⁷ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=en>

⁸ ICANN, Bylaws, Section 1.1(a), Annex G-1 - G-2 (Nov. 28, 2019), available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁹ ICANN, EPDP Phase 1 Final Report, at 7 and n.6 (Feb 20, 2019), available at <https://gns0.icann.org/sites/default/files/file/field-file-attach/epdp-gtld-registration-data-specs-final-20feb19-en.pdf>.

¹⁰ ICANN, EPDP Phase 2 Final Report, at 6 (July 31, 2020), available at <https://gns0.icann.org/sites/default/files/file/field-file-attach/epdp-phase-2-temp-spec-gtld-registration-data-2-31jul20-en.pdf> (“As a result of external dependencies and time constraints, this Final Report does not address all priority 2 items.... Per the instructions from the GNSO Council, the EPDP Team will not consider this topic further; instead, the GNSO Council is expected to form a scoping team to further explore the issues in relation to accuracy and ARS to help inform a decision on appropriate next steps to address potential issues identified.”).

on data accuracy, in the form of a possible EPDP Phase 2B, but such an initiative has not yet started.

Meanwhile, the overarching purpose of the EPDP was to develop ICANN consensus policy on registration data, including to enable ICANN and contracted parties to comply with data protection laws, primarily the GDPR. The GDPR includes specific data accuracy provisions, namely article 5, which, in pertinent part, states that “Personal data shall be ... accurate, and, where necessary, kept up to date; 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 (‘accuracy’)....”

Many in the ICANN community have argued that this accuracy requirement constitutes an absolute right of the data subject. But the wording of the GDPR itself discusses ensuring accuracy of data with regard to the purposes for which they are processed. If such a purpose includes, for instance, access to this data for legitimate purposes of third parties such as law enforcement, cybersecurity, and intellectual property enforcement or other establishment or defense of legal claims, then the accuracy of the data must be ensured for these purposes, even if the data subject asserts that false or otherwise inaccurate data is “accurate”.

Previous comments from the GAC representatives from the European Commission to the ICANN Board have also confirmed this interpretation, in particular that accuracy is understood as relevant to the data subject and third parties with legitimate interests in the data, and it is not enough that the data subject claims it data is accurate; data cannot be false or fictitious, otherwise it is not personal data to the data subject.¹¹ The NIS2 further supports this interpretation of the GDPR data accuracy principle and generally provides substantial additional legal guidance on the matters of domain name registration data accuracy and access to third parties.¹² Thus, given the additional legal guidance now available regarding data accuracy, and the repeated failure of the EPDP team to address data accuracy issues, it is imperative that the Board insist that the community turn to this issue as a matter of priority.

c. Phase 2 Recommendations Do Not Require Publication of Non-Personal Data, Including Legal Person Data, Consistent with GDPR

It is clear that the GDPR only applies to personal data, and that non-personal data is not covered by the regulation. Nonetheless, the EPDP Phase 1 Final Report recommends that contracted parties should have the option to voluntarily differentiate between data of natural versus legal persons (but not an obligation to do so), and that this issue would be further

¹¹ See ICANN, Transcript: ICANN68 Virtual Policy Forum - GAC Meeting with the ICANN Board (June 24, 2020), available at https://cdn.filestackcontent.com/content=t:attachment,f:%22I68KUL_Wed24Jun2020-GAC%20Meeting%20with%20the%20ICANN%20Board-en.pdf%22/tqsexB8RSaKHHwde1Aez (“Georgios Tselentis [European Commission]: I would like to raise a point on accuracy. We have been vocal as members of the GAC and the EPDP and I have to disagree that it is crystal clear that the accuracy principle refers to the data subject only, actually the [indiscernible] July says we think [reading] consider the interest of persons other than the data subject and the data controller but then they invoke that there is an issue of lack of guidance, and in this sense I think this is a subject that we mean to take into account. We also highlighted that this might cause problems with regards to compliance toward the GDPR and we still believe -- I believe the rest of my colleagues agree to that, that this is an issue that the GAC considers still important to consider, thanks.”).

¹² See European Commission, Revised Directive on Network and Information Security (NIS2), Recitals 59-62; Article 23 (Dec. 16, 2020), available at <https://ec.europa.eu/info/law/better-regulation/>.

considered as part of Phase 2.¹³ INTA is not aware of any contracted party that currently voluntarily endeavors to differentiate between such data sets. As a result, all registration data is treated the same, and all data elements are redacted in the public RDS without regard to whether the data constitutes personal data or non-personal data, such as data of legal persons that does not include personal data, with the limited exception of data elements that have categorically been determined not to constitute personal data (registrant state/province and country, along with organization name if any is provided).

However, the Phase 2 Final Report fails to provide additional recommendations regarding this distinction with respect to publication of non-personal data. Rather, the Phase 2 Final Report mandates that through the proposed SSAD, contracted parties must review a request for registration data and if, following the evaluation of the underlying data, the contracted party reasonably determines that disclosing the requested data elements would not result in the disclosure of personal data, the contracted party must disclose the data, unless the disclosure is prohibited under applicable law.

The Final Report goes on to say that, for clarity, if the disclosure would not result in the disclosure of personal data, the contracted party does not have to further evaluate the request. However, such non-personal data should be made public in the first instance, as it is not protected under GDPR or other data protection law, and it should not still be walled off and available for access only through the SSAD. In short, all non-personal data should be made publicly available in RDS in the first instance, without the need to request access to non-personal data via the SSAD.

INTA understands that the recently formed EPDP Phase 2A is undertaking further consideration of the natural versus legal person distinction with respect to data processing. However, the Board should affirm that it is a matter of priority for the community to develop and implement modifications to the existing gTLD Registration Data Policy that obligate contracted parties to vet registration data up front and publish all non-personal data in RDS, rather than forcing third parties to seek such data through the SSAD.

Thank you for your consideration of INTA's comments. If you have any further questions or comments regarding this submission, please feel free to contact Lori Schulman, Senior Director, Internet Policy at lschulman@inta.org or +1(202)704-0408.

Sincerely,



Etienne Sanz De Acedo
Chief Executive Officer

¹³ ICANN, EPDP Phase 1 Final Report, at 17-18.

About INTA

INTA is a global not-for-profit association with more than 6,500 member organizations from over 185 countries. One of INTA's goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. During the last two decades, INTA has also been the leading voice of trademark owners within the Internet community, serving as a founding member of the Intellectual Property Constituency of the Internet Corporation for Assigned Names and Numbers (ICANN). INTA's Internet Committee is a group of over 175 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations, and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.