EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR COMMUNICATIONS NETWORKS, CONTENT AND TECHNOLOGY
The Director-General
DIRECTORATE-GENERAL FOR MIGRATION AND HOME AFFAIRS
The Director-General
DIRECTORATE-GENERAL JUSTICE AND CONSUMERS
The Acting Director-General

Brussels,
CNECT.E.3.001/MS

Dear Mr Marby,

Following our previous exchanges on the reform of ICANN policies regarding the registration data for generic Top Level Domains (gTLDs), we would like to welcome the conclusion of the phase 2 of the Expedited Policy Development Process (EPDP), in which the European Commission has taken an active part as representative of the Governmental Advisory Committee (GAC).

The Commission supports the GAC Minority Statement on the Final Report of Phase 2 of the EPDP. We notably regard with concern the fact that the proposed System for Standardized Access/Disclosure (SSAD) may impede a "stable, predictable, and workable access mechanism for non-public WHOIS information". As we have highlighted in previous correspondence and the recent GAC minority report, the EPDP should address a number of essential issues including data accuracy, the distinction between legal and natural persons, and the possibility to use anonymised emails. The model would also benefit from further clarifying the status and role of each of the data controllers and processors involved in the processing of gTLD registration data.

It is interesting that you put back some of these questions to the GAC and to the Commission. We think these questions are primarily a matter of ICANN policy and should be addressed within the EPDP according to the established procedures. Moreover, questions concerning the application of the General Data Protection Regulation (GDPR) should be primarily addressed to your legal advisors and, where necessary with a view to ensuring legal certainty, the competent EU data protection authorities (DPAs).

In this regard, we consider that the details of the processing activity involved in the SSAD and in particular the disclosure of registration data have to be determined in the policy. The role of data controller requires implementing the necessary technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with the requirements of the data protection legal framework. When a group of controllers decide jointly on the purposes and means of the processing (joint controllers), they have to determine their respective responsibilities in a transparent way, normally by means of an arrangement between them as well as by making available information on such agreements to the data subject. To this end, we believe that controllership agreements are essential to clarifying further their respective roles and responsibilities, also in the context of a future centralized decision-making system.

Commission européenne/Europese Commissie, 1049 Bruxelles/Brussel, BELGIQUE/BELGIË - Tel. +32 22991111
Office:BU33 3/087   Tel. direct line 51023

Melina.STROUNGI@ec.europa.eu

On the issue of international transfers, we can confirm that the Commission, as indicated in its Communication of June 2020, is actively working on the development of standard contractual clauses both for international transfers and the controller/processor relationship. In that regard, the public consultation on the draft published on 12 November 2020 has been recently completed.

On the issue of data accuracy, the Commission has repeatedly underlined that the accuracy of domain name registration data is of prime importance for the purpose of maintaining a secure and resilient DNS – a purpose that is also stated in ICANN's bylaws. This is now also explicitly recognised in our recent proposal for a revised Directive on Security of Network and Information Systems (NIS2 Directive)[1]. The Commission proposal introduces new obligations for TLD registries and registrars providing services in the European Union, namely to: i) collect and maintain accurate and complete domain name registration data; ii) publish non-personal domain name registration data (i.e. concerning legal entities), iii) provide access to specific personal domain name registration data upon lawful and duly justified requests of legitimate access seekers, and iv) reply without undue delay to all requests for access. The proposal leaves open the possibility to use an interface, portal or other technical tool to provide an efficient system for requesting and accessing registration data.

We understand the complexity of the aforementioned issues and we acknowledge the efforts put by the ICANN community in developing a policy that allows at the same time, the protection of the personal data of the registrant, and the lawful access for legitimate access seekers. While it is not within our remit to effectuate a data protection assessment, we remain committed to facilitate the interactions on the matter with the European DPAs. As our colleagues have mentioned to your team, we are in touch with the relevant DPAs to see if they could provide additional guidance to the points you raise in your letter. We are also discussing with them the opportunity to formally consult the EDPB in accordance with Article 64(2) GDPR.

As a final note, we would like to state our concern with the length of the WHOIS policy development and implementation process. We have already noted the concerns raised by law enforcement authorities, cybersecurity organisations and intellectual property rights holders about the negative impact of the limitations of access to WHOIS data on their work. The finalisation of the EPDP, including the development of a complete SSAD, should be treated as a matter of priority. The implementation of the policy should also be given priority and done in full compliance with the agreed policy. The Commission remains committed to contribute to this joint effort.

Yours sincerely,

(e-Signed)   (e-Signed)   (e-Signed)
Roberto Viola   Monique Pariat   Salla Saastamoinen

---

[1] https://ec.europa.eu/digital-single-market/en/news/proposal-directive-measures-high-common-level-cybersecurity-across-union