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**Subject: ICANN's public consultation on 2013 RAA Data Retention Specification
Data Elements and Legitimate Purposes for Collection and Retention¹**

Dear Mr Jeffrey,

As the European Data Protection Supervisor, I am writing to you in response to the public consultation on 2013 RAA Data Retention Specification Data Elements and Legitimate Purposes for Collection and Retention² (referred to in this letter as 'the Draft Specification').

In this respect, I also want to refer to the letters sent to you by the Article 29 Data Protection Working Party on 26 September 2012, 6 June 2013 and 8 January 2014 in connection with the Data Retention Specification³ in ICANN's 2013 Registrar Accreditation Agreement (2013 RAA). As a member of the Working Party, I have fully supported those letters.

Whilst we duly acknowledge ICANN's efforts regarding data protection and privacy and its openness to continued dialogue, regrettably, neither the 2013 RAA approved by the ICANN Board on 27 June 2013 nor the Draft Specification addresses sufficiently our concerns which were raised in this correspondence between the Working Party and ICANN on the retention periods and data collection.

The Draft Specification defines in more detail the data to be collected, the purposes for which they may be used and the retention periods for which the data are to be kept under the 2013 RAA. This is welcome in that it would offer more transparency. Nevertheless, the 2013 RAA

¹ See consultation notice at <http://www.icann.org/en/news/announcements/announcement-3-21mar14-en.htm>

² <http://www.icann.org/en/resources/registrars/raa/draft-data-retention-spec-elements-21mar14-en.pdf>

³ See Section 6 of the 2013 RAA at <http://www.icann.org/en/resources/registrars/raa/approved-with-specs-27jun13-en.htm#data-retention>

and the Draft Specification continue to fall short of compliance with European data protection law.

The Draft Specification should only require collection of personal data, which is genuinely necessary for the performance of the contract between the Registrar and the Registrant (e.g. billing) or for other compatible purposes such as fighting fraud related to domain name registration. This data should be retained for no longer than is necessary for these purposes. It would not be acceptable for the data to be retained for longer periods or for other, incompatible purposes, such as law enforcement purposes or to enforce copyright.

Processing contrary to these recommendations would be contrary to three key principles of European data protection law set forth in Directive 95/46/EC. It would violate the principle of purpose limitation under Article 6(1)(b) of Directive 95/46/EC, which prohibits the processing of personal data for incompatible purposes⁴, the requirement under Article 7 of the Directive to have an appropriate legal ground for the processing of data, such as contract, consent or the legitimate interest of the controller⁵, and the requirement of proportionality, including the requirement not to retain data 'longer than is necessary for the purposes for which the data were collected or for which they are further processed' (Article 6(1)(e)). These provisions are specifications of the fundamental rights to privacy and the protection of personal data laid down in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union.

Retention of personal data originally collected for commercial purposes, and subsequently retained for law enforcement purposes, has been the subject of a recent landmark ruling by the European Court of Justice, which held Directive 2006/24/EC to be invalid, as an unjustified interference with those rights.⁶ The Court recognised that the retention of personal data might be considered appropriate for the purposes of the detection, investigation and prosecution of serious crime, but judged that the Directive 'exceeded the limits imposed by compliance with the principle of proportionality'.⁷ It is reasonable to expect requirements for retaining personal data to be subject to increasing scrutiny and legal challenges in the EU.

Further, as you are aware, the current European data protection legislation is under reform. The European Parliament voted on 12 March 2014 overwhelmingly in favour of a new General Data Protection Regulation which is designed to replace Directive 95/46/EC and be directly applicable in each of the twenty-eight EU Member States. There is therefore now a more compelling need than ever before for ICANN to apply the waiver of the retention period under the 2013 RAA Data Retention Specification uniformly to all EU Member States as requested in the 'harmonised statement' of the Working Party issued by letter of 6 June 2013.

We would also encourage ICANN, being at the heart of the future of Internet evolution, and in view of its mandate to serve the public interest on a global scale, to take a lead in ensuring that privacy and data protection are embedded by default, when new tools and instruments or new internet policies are designed, for the benefit of all - not just European - Internet users.

On these grounds, we reiterate our recommendations to reduce the data collection and retention requirements in the 2013 RAA 'by default' to what is genuinely necessary for the performance

⁴ See the Working Party Opinion 3/2013 on purpose limitation, adopted on 03.04.2013 (WP203).

⁵ See the Working Party Opinion 6/2014 on legitimate interest, adopted on 09.04.2014 (WP217).

⁶ ECJ judgment of 8 April 2014, Joined cases C-293/12 and C-594/12 Digital Rights Ireland and Seitlinger and Others.

⁷ See para 69 of the judgment.

of the contract between the Registrar and the Registrant (e.g. billing), and to limit processing of this data to compatible purposes, such as proportionate measures to fight fraud related to domain name registration. It is possible that the Working Party may wish to provide more details at a later stage.

Yours sincerely,

(signed)

Peter HUSTINX

Cc: Isabelle FALQUE-PIERROTIN, Chair, Article 29 Data Protection Working Party