

27 January 2019

RE: Status of ICANN's exchanges with the Belgian Data Protection Authority

Mr. Graeme Bunton
Chair, Registrar Stakeholder Group

Dear Graeme,

We appreciate our partnership in resolving specific GDPR compliance questions. Pursuant to our letter of 6 December 2018¹, we would like to keep you and the community informed of the latest developments on the topic of international transfers (see question 3 of our letter of 6 December 2018) and the related correspondence with the Belgian Data Protection Authority.

What is the status of the exchanges with the Belgian Data Protection Authority?

Following our letter of 6 December 2018², the Belgian Data Protection Authority sent a letter to ICANN on 15 January 2019³, which states: *"it should be noted that article 44 and following of the GDPR do not stipulate that appropriate safeguards shall no longer be necessary in case where the GDPR is directly applicable to the recipient of the data. Article 46(1) GDPR instead refers to the obligation of the controller or processor to provide appropriate safeguards in case of (any) transfer to a third country or international organization in the absence of an "adequacy decision" pursuant to article 45(3). The only derogations to this general principle are enumerated in article 49 GDPR."*

This letter also explicitly states that *"The analysis contained in this letter has been made on the information currently available to the Secretariat of the Belgian Data Protection Authority[,]"* and that *"It does not preempt a later formal decision by the Belgian Data Protection Authority"*.

ICANN has submitted a response letter⁴ on 25 January 2019 to the Belgian Data Protection Authority providing additional information to the authority.

¹ <https://www.icann.org/en/system/files/correspondence/namazi-to-bunton-06dec18-en.pdf>

² <https://www.icann.org/en/system/files/correspondence/marby-to-debeuckelaere-dixon-06dec18-en.pdf>

³ <https://www.icann.org/en/system/files/correspondence/debeuckelaere-to-marby-15jan19-en.pdf>

⁴ <https://www.icann.org/en/system/files/correspondence/marby-to-debeuckelaere-25jan19-en.pdf>

What are ICANN's current considerations?

ICANN has taken note of the provisional and informal view taken by the Belgian supervisory authority that the GDPR does not stipulate that appropriate safeguards are not necessary in the case where the GDPR is directly applicable to the recipient of the data.

Further, ICANN notes that there seem to be differing views amongst the EU supervisory authorities on the issue of direct applicability of GDPR as regards transfer safeguards⁵ and that this issue may be addressed in the final version of the "*Guidelines 3/2018 on the territorial scope of the GDPR (Article 3) of the European Data Protection Board (EDPB)*".⁶

In particular, ICANN is aware of the ongoing discussions of the various EU supervisory authorities in the expert subgroup on the "*Interplay between Art. 3 GDPR and Chapter V of the GDPR*" of the EDPB. ICANN understands that the expert subgroup is still working on this topic as reflected by the agenda⁷ of the EDPB meeting, which took place on 23 January 2019.

What are the next steps?

ICANN understands that it may take some time before the final EDPB guidelines on the scope of GDPR are adopted and published. In the meantime, ICANN will continue to facilitate the dialogue around the issue of direct applicability of GDPR as regards to transfer safeguards, and look forward to further discussions with the RrSG on this matter about next steps.

Based on its further assessments, ICANN may then also consider requesting further clarifications from the Belgian Data Protection Authority.

Sincerely,



Cyrus K. Namazi
Vice-President
Global Domains Division

⁵ See, for example., <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/international-transfers/>.

⁶ The draft version for public consultation has been published at: https://edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-32018-territorial-scope-gdpr-article-3-version_en

⁷ https://edpb.europa.eu/sites/edpb/files/files/file1/20190122plen_agenda_public_version_en.pdf