MONTREAL – WHOIS and Data Protection Policy)
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MANAL ISMAIL, GAC CHAIR: Thanks, everyone for your patience. We were just getting the slides on the screen. Without further delay, shall I hand it over to you, Laureen.

LAUREEN KAPIN: Good morning. We are going to be chatting about the issues surrounding the expedited policy development process, you will hear EPDP, that's what it stands for working group dealing with what will be the replacement policy position on registration domain name data, formerly known as WHOIS. So we will be taking you through some background. We will be discussing some proposals to consider for GAC positions. And we will be giving you some updates. And I will be joined by my excellent colleagues, Georgios Tselentis and Chris Lewis-Evans, and they will each be discussing separate developments. And if not, you have questions, please wave a hand and we will be happy to answer them.

So in particular, we will be giving you an update on the status of policy development, we will talk about timelines, because this is supposed to be the expedited quick policy development process, and then we will get into more of the nitty-gritty about roles and responsibilities under this new model, ICANN's engagement with data protection authorities which is of course key because they provide valuable guidance on what is and is not acceptable under EU privacy law. We will be talking about accreditation of public authorities which is something that the GAC will be particularly involved in since you are the government representatives and will likely play a key role in accrediting your public authorities for their ability to gain access to the WHOIS system, and we will be talking in general about the public authorities' ability to access nonpublic data and then finally, next steps. Next slide, please.

So here as a preview are proposals for your consideration as to steps that the GAC can take on this important topic. And as you likely recall, the GAC has consistently in its advice and positions talked about the need for very swift progress. That is our expectation, and this was set forth in the Kobe communique and in our statement about Phase II, and we were very specific in our Kobe communique advice that we have an expectation for a quick timeline for Phase II, to both conclude the policy and then of course you can make whatever policy you want but the rub hits the road when the policy implemented and put into place and that's its own separate process and the expectation that would be done as quickly as possible. And in the Kobe communique we advised parallel work should be going onboard technical implementation, will this work technically. And then finally that there are other policy development processes that also come into play that perhaps should be restarted. And one specific example that we called out in our Kobe communique was the privacy proxy services accreditation issues which is already a policy that has been developed by implementation has been stalled. And just for background, the privacy proxy providers are those providers who provide a privacy service for those who do not want their information published in the WHOIS. And that is a related process that the GAC has advocated, that implementation should be restarted.

So those are some of the things that we reiterated in our Kobe statement about our expectations, and if it's worth saying, sometimes it's worth repeating, and that's something for us to consider. We also, for your consideration, think it would be prudent to discuss our expectations for a timely deployment. And when we say timely, we mean sooner rather than later, i.e., as soon as possible, of a unified access model. And as I'm sure you are aware, there have been interest recent developments proposed by the ICANN organization on that topic, particularly regarding ICANN's willingness to take on responsibilities and lability. There has been a whole very detailed proposal by ICANN submit ago possible model for its key role until taking the lead on providing a gateway for folks to access this nonpublic information with an intent on ICANN, assuming liability that perhaps might otherwise be assumed by contracted parties. So this is a very key development. One of the asks by ICANN is to the European data protection authority for some guidance on this proposal. Because as I have said, the European data for example authority is the key figure that will provide insight and guidance as to what is appropriate and whether ICANN's assumptions in this model actually are consistent with what is possible under EU privacy law. And again, our expectations about process and timing for how this unified access model could work. Again, right now we're in a situation where things are fairly uncertain and challenging in many ways for public authorities in particular to gain access to nonpublic information.

And then finally we will also be considering what could be an acceptable accreditation model for the GAC to decide thousand accredit public authorities. And I think you have had a preview of that concept paper. And to put that in sort of plain language, in order to gain access for nonpublic information, an entity has to go through some sort of formal process so that folks know that this is a legitimate entity, that they are who they say they are, and that they're actually complying with EU privacy law. And some steps of that go into the accreditation process, and that is something that my colleague Chris in particular has devoted a lot of work on and will be discussing that in more detail during this meeting and also during this presentation. Next slide.

So briefly, because there's a lot of history and I don't want people falling asleep by going through all the detailed history, I will give you the trailer, the highlights reel you know this. These are key investments. Way back in 2007, the GAC actually set forth principles regarding WHOIS and what I want to call out from those principles, many aspects on which are very relevant and so relevant we emphasized again in 2017 in the Abu Dhabi communique, is the necessary balance for the registration data to be protected appropriately and also to serve the public interests particularly to promote consumer trust and to serve the interests of law enforcement authorities who may need to investigate bad conduct surrounding the DNS, it's always been this balance, not just privacy, not just law enforcement, not just the public but a balance between all of these things and these issues are eventual in play now.

There were proposals set forth on a unified access model, not in play now but raised issues in terms of what the GAC commented on in terms of what would be most important. And then in light of EU privacy law, the current WHOIS system was as you say suspended -- well, implies it will arise again, it will not, it was eliminate, and there was a temporary specification put into place so there would be something until a more formal development process could be concluded and that's the place we're in now, there's been the temporary specification and then Phase I of the expedited policy development process has concluded, and now we are in this sort of a little bit of a twilight period where Phase II is ongoing. One of the impacts of the temporary specification that I wanted to underscore is that we have gone from a system where there was all information available to the public, law enforcement, anyone who wanted it of contact information for who is behind a domain name. That is no longer the case. A lot of that information now is considered to be protected under EU privacy law, and that has many, many benefits but it also has perhaps some unintended consequences and some of those consequences are that there is no one-stop shopping, for example, for a public authority or the public in general to get access to this information. In fact of the 2500 some odd contracted parties, they each could have their own specific interpretation of what it means to provide reasonable access to that information. And as you may imagine, that has created some considerable challenges for law enforcement authorities in particular to know who to go to get information and how to do so. In fact, I have heard from criminal law enforcement authorities that it's even challenging to get information for very high priority topics such as websites engaged in the illicit sale of opioids, which at least in the United States and I'm sure in other places, is a top priority. And even that sort of high level importance type of investigations stalled somewhat by registrars refusing to turnover their information. So there are challenges. But what we're here to discuss today is some ways to meet those challenges and also some of the ongoing work that's taking place. So I'm going to turn it over to my colleague to talk to us more about the specifics of the policy work that's going on.

GEORGIOS TSELENTIS: Thank you, Laureen. Next slide, please. So already Laureen said about the difficult phases that I would like in this slide to remind you. We have the first part, the temporary specifications, the policy that ICANN put in place before GDPR was enacted. It was a first attempt to be compliant to the law. So the first phase that started last year in August 2018 until February 2019, we put the foundations of the policy, we discussed them on the different communities, I remind, this is a GNSO development policy process, so all the representatives there laid down the foundations of the policy recommendation we wanted regarding WHOIS and compliance with GDPR. And we produced a report which was just a sufficient basis, and it was approved and initially by the GNSO council and then the board. Most of the policy recommendations we had in this report were accepted and they gave the ground for the implementation of those recommendations. So at the same time we have a policy development and implementation development. So we started then the policy -- sorry, the implementation development process had an initial completion date for February 2019 year 2020, but we are witnessing delays in this implementation review. Now we're in full swing of Phase II. Phase II is touching about something which was requested from the community for a long time now, it is about an SSAD, an access and disclosure model, it has to be first, we have to be first agree on the policy issues, and that's the work of the EPDP, and then to see with subsequent implementation phase to see how this model will be implemented.

This type of model -- I remind that in Phase I we were discussing about the purposes of processing private data, what sort of data limits we should process. In this phase now we look at it from the side of the access requester, and here we are talking about what sort of requests we are going to have, how the system will respond, what sort of disclosure if there is going to be automation and if there are going to be identification, accreditation, and we go to the nitty-gritty details of some a disclosure system. Also, to do so, we started developing specific in the beginning of the Phase II, started developing specific use cases to see what are the possible users of such a system would like to do with the WHOIS data. We started also to ask questions about the legal basis which are necessary for processing such data. Next slide, please.

Here you have a visual of the distinct phases that we talked about so far. So you have the temporary specifications, the Phase I and the Phase II of policy and the implementation. At the same time, you can see that there are parallel activities that are informing our policy development process and vice versa. So this is a quite complicated mechanism because when we do our policy discussion we want to know about what where discussing, whether it is implementable, whether it answers the expectations and the requests of the people who want to have access, but at the same time we want to be this in compliance with the law. So we have what we call we had some initiatives like a technical study group that was presenting and concluded the work already in the previous period, the technical study group put to the community a possible model taking into account several assumptions. Now -- and I say this because it is necessary for us to see how a disclosure model might work. This by no means that we want to guide the policy considerations that are happening during the EPDP but want to be informed about the possibility and possible ways this could be implemented. At the same time there is a request from the ones who are observing the law, the data protection authorities, and we will go further down on explaining what exactly happened there. Next slide, please.

So as I said, finally, we made come with the best system we could imagine here and try to satisfy all the possible wishes of the access requesters, but at the same time what we do here to see to be compliant with data protection law. So as I said, there was the technical study group that had very specific mandate to check the possible ways of shifting liability between the different actors and whether we would use centralized model for processing the data and also a [indiscernible] group was looking at regarding the accreditation, authentication and disclosure. This was delivered for consideration. We thought it was a very useful exercise and some of the assumptions are used for the production of different other model that you have seen going around also in previous ICANN meetings.

So ICANN tries to see the implication set a model will have with regards to the liability and the responsibility of such a system. We tried in several occasions that we had the possible to discuss with them to say that when you interact with a data protection authorities, you should not go and talk about shifting liability but we should clearly indicate who is responsible for what, where their responsibility lies because data protection authorities want to see that the rights of that subject are respected. So there were several assumptions and still within the GAC and small group we believe that the central model has some good features with regards to the disclosure of personal data. And we tried to decode exactly what we mean by centralized model. Doesn't necessarily mean we put all WHOIS data to a specific central entity. But it is important again to clarify where the decision of the disclosure is taking place and also to highlight all the processing activities that are taking place. I remind that the GDPR as a law has this legal approach that it examines all the processing activities and fortune, we have to define a clear legal base in order to process private data. So the ICANN org sent a letter to the European data protection board and also informally we know that there is going to be a technical group inside the board that is looking at this before bringing the discussion to the plenary so we are looking for any type of interaction we can have at this stage with data protection authorities. And we expect that it will be discussed sometime next meeting which is around December. And I will hand it over now to my colleague Chris.

CHRIS LEWIS-EVANS: Thank you very much Georgios. There is talk of a UAM [indiscernible] testing a model, the list getting longer and longer as the time frame keeps going. And it becomes very confusing even for us who are embedding in the system all the time. And the way that we like to concentrate on this is the different processing activity that occurs at every single stage of the request of the data so the collection of data, request of the data and how it is subsequently released, so when we talk about models and how any system may work dependent on the policy development process, we've always thought about the processing activities and what is carried out and where it's carried out, which entity is ultimately responsible for carrying out that activity I think still has to be decided and is really dependent on advice [indiscernible] coming back in the [indiscernible] as well as policy process within the EPDP. This slide shows a number of those processes and how they link together and this is quite important to understand, they can be assigned to one or more entities carrying out each of these functions and this is still to be decided, I think pretty much all of the middle part can be lumped together and certainly within the last letter to the DPA's, that was one of the options that ICANN org put [indiscernible] carries out those central activities.

Next slide, please. So this one is pretty much the same but what we really wanted to highlight there is there's still no firm decision on exactly where data is going to be stored while is it in transit and as part of the processing activity. So there is a thought that if a central gait way holds all the data then the responsibility for disclosing that data is taken away from the contracted parties and remains solely within that central gateway. However, obviously data risks with that and this is one of the questions that has gone to the DPA's, obviously no data has to be stored at the gateway, as indicated in the diagram, we can make a request that the gateway acts as a part of that request and stored and sent to the year on this successful request that is then obviously subject to the correct [indiscernible] safeguards and every other aspect. So when you hear about UAM SSAD, sometimes it's good to pull that back to what processing activities being carried out and be aware nothing decided and until a policy process completed, I don't think we will have a firm model. So this is unfortunately very fluid still which makes explaining it three times, if not more, complicated. Next slide, please. So I will pass it over to you for this one.

GEORGIOS TSELENTIS: So as I said, there is a request about having some response if possible from the DPA's, the issue here being that DPA will not respond if they don't have a clear understanding of the model, if they respond even if they have that, and here we have the possibility of some assumptions and some different scenarios and that was in the letter that was sent from ICANN to the European data protection board. The first of the questions try to address the notion that if we have a centralized system, then it would be much better in order to protect the interests of the data subject because we will have a central point which complaints and responsibility can be at attributed to. So that's the first and main [indiscernible] from ICANN org today board. The other one is going a little bit to the notion of where the responsibility for the disclosure lies. Is it more towards -- and this is a big discussion we have inside the EPDP, is it a question about the disclosure, about the central gateway releasing the data or is it about the contracted parties that have collected the data and they have conveyed the data to the central gateway so in order to analyze it further down needs to take into consideration the roles of the controllers, the roles of the processor, for which processing activity are we talking about and need to go to the nitty-gritty details of data transfers. So these are questions that are essential. We are turning around in our discussions EPDP, practically in every meeting we are going around those questions. It will be very helpful that in any model we decide, we have at the same time the same information about the actors of this model, so the contracted parties, ICANN or whoever wants to be in their position of the responsibility for disclosing those data, so to have a commitment on one hand. And on the other hand, we want to have an assessment on whether this commitment means responsibility regarding the liabilities.

CHRIS LEWIS-EVANS: Chris Lewis-Evans, for the record. In the GAC communique, we have always stipulated we wholeheartedly support the [indiscernible] entities represented within the EPDP, key to having the safe and secure Internet for all the people within our country. So a really key thing we have been pushing within this small group and continue to do so. There's also a need for nonaccredited parties to be able to make one off requests to a system and that's a key question within the EPDP at the moment, do they do a one-time [indiscernible] email to the system? But this is something really key to our work within the EPDP to get appropriate access to all party, this is still on our mind, still concentrated none and it's a really core function of any system that is generated.

And then the last point on the slide is I think echoed in everything that we have said around accreditation and access and disclosure is just because you are accredited doesn't mean you by default get access to any data. There has to be some safeguard, appropriate balancing decisions whether we should release data, or the disclosing body should release data or not, but that runs through everything we talk about when we talk about access and disclosure. Next slide, please.

So the difficult part for the EPDP is the accreditation of the public authorities. Realistically public authorities require a different mechanism to gain accreditation compared to private entities. Public bodies and public authorities have certain confidentiality requirements when going through this process. The range and nature of those public authorities are so wide that asking any one entity to collect the required data to accredit someone is very, very difficult. So we really need each country to be able to look after its own public authorities and protect itself in identifying the correct people. So what we're proposing in the document that we shared with you at the beginning of the meeting is a concept paper that allows for each country to have an identity provider that will allow for some form of accreditation of all of its public authorities, whether this is handled by your own governmental body or whether it's subject out to an intergovernmental body such as Interpol or one of the other bodies such as that. Depends on each country's decision on that. This allows each country to set its own requirements and to gain accreditation so your country and your bodies report being told you must provide xy and z but some third party mandated by ICANN, and we really do need to protect the ability for each country and its bodies to make the requests for WHOIS, because that data is important for a lot of the investigations and work carried out within each country. And you will see it time and time again, the final responsible for disclosing the data remains with the data controller. Just because a governmental agency has accreditation and authorization does not necessitate the release of data, so that's key on everything we're working through. Next slide, please.

GEORGIOS TSELENTIS: Okay. And this very quickly. I think this is homework we had to do since the last meeting and even before that we were requested to have an indicative list of public authorities that require access with the WHOIS data. So this type of public authorities can be also tasked for performing requests related to criminal and civil law enforcement but also with other categories like consumer protection. So what would be very useful -- so this is a list about who from the public perspective has interest in WHOIS private data, who is useful to have at the same time under which legal basis this is performed. The European commission so far has contacted and coordinating with European member states to identify exactly the law enforcement authorities to start with the need to access to nonpublic WHOIS data. And assembling, trying to see as broad as possible the spectrum of which constitutions are requesting this type of information. I think we are more or less -- next slide, please. I think it's concluding. I don't know, Manal -- next steps.

MANAL ISMAIL, GAC CHAIR: Thank you, Georgios, Laureen and Chris as well. So on the next steps, this is just compilation of the sessions running on this same topic during ICANN 66 so we're having our preparation for our meeting with the ICANN board. This is today at 1:30. And we're meeting again today with the registry stakeholder group at 3:15. Again, this is going to be on the agenda of this meeting. There is a cross community session on EPDP Phase II tomorrow at 10:30, and as I mentioned before, this is one of the topics that the GAC proposed for a cross community session. I hope you will be there. And also GAC on WHOIS and data protection session, again, on Tuesday at 8:30 in the morning. And this is for a GAC discussion after we had this brief today and this thorough update today and after hearing the cross community discussions and discussions throughout the week, this will be like a wrap-up discussion before our meeting with the board on Tuesday at the same day at quarter past three, so indeed an ongoing discussion throughout week. And then after the meeting here in Montreal, GAC members would be requested to provide input on accreditation principles for public authorities and also to considering indicating lists for public authorities and other parties requiring nonpublic registration data and finally public comments on EPDP initial report expected by the end of 2019. So one last for GAC colleagues to consider joining the GAC small group on gTLD and following the EPDP deliberations. I think we have reached the end of the session. So any requests for the floor before we conclude?

INDIA: Rahul Gosain for the government of India. Equaling the sentiments that Laureen said, worth being said, it's worth being repeated, mindful of the fact that the GAC or ICANN board cannot guarantee or control the end results as the EPDP is a community led process. However, we would like to make it a point to repeat the following suggestions which should be considered which need to be advised at all forums, both to the GAC, within the GAC, as well as to the ICANN board if need be. Necessary steps be taken to ensure that the scope of Phase II activities well defined with a view of achieving expeditious conclusion and implementation; 2, necessary steps be taken to ensure that the GNSO EPDP Phase II on temporary suspension case for [indiscernible] data institutes concrete milestones, progress reports and follows an expeditious timeline and consideration be given to starting implementation processes for relevant existing processes, such as proxy, and accreditation, [indiscernible] similar issues.

MANAL ISMAIL, GAC CHAIR: Thank you very much, India. And before we conclude, I have been told that the International Organization of Francophonie are requesting the floor to announce the meeting. Not sure if they are in the room. Sorry, please, go ahead.

[non-English word or phrase]

SPEAKER: Thank you, Madame Chair. I would like to announce that the representative of the member countries of the international representation of Francophonie are kindly invited to attend a session that will take place between 12:15 and 1:15 at [indiscernible] Montreal, the meeting held on the 8th floor, and you are all kindly invited.

MANAL ISMAIL, GAC CHAIR: Please be back in the room at 1:30 thank you.

[END OF TRANSCRIPT]