ICANN69 | Virtual Annual General - GAC Discussions on Registry Data Services and Data Protection
Tuesday, October 20, 2020 - 14:30 to 16:00 CEST

JULIA CHARVOLEN: Good morning, good afternoon and good evening. Welcome to ICANN69 – GAC Discussions of RDS/WHOIS Data Protection, scheduled on Tuesday, 20th of October, from 12:30-14:00 UTC. Recognizing that these are public sessions and other members of the ICANN community may be in attendance, the GAC leadership and support staff encourage all of you who are GAC representatives and delegates to type your name and affiliation in the participation chat pod to keep accurate attendance records as well as for comments and questions to be read aloud.

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It is now my pleasure to hand the floor to the GAC chair, Manal Ismail. Manal, over to you.

MANAL ISMAIL, GAC CHAIR: Thank you very much.   Julia, before we start, is this session scheduled for 60 or 90 minutes?

JULIA CHARVOLEN: My apologies. Manal, thank you very much, it's 90 minutes.

MANAL ISMAIL, GAC CHAIR: Thank you, just to plan accordingly. Thank you very much Julia, and welcome back everyone. We will now start discussions for 90 minutes regarding latest efforts to bring WHOIS into compliance with applicable data protection law following publication of the EPDP Phase 2 final report. The report along with minority statement is expected to be considered by the board but also discussions on a number of policy areas are expected to start or reconvene including data accuracy and distinguishing between the publication of legal versus natural registration data. But without further ado, allow me to hand over the floor to members of the EPDP small group, Laureen, Chris, and Georgios.

LAUREEN KAPIN: Thank you, Manal, I will kick us off with a brief roadmap. So we will be talking and updating about the status of the EPDP recommendations in Phase 2 and also Phase 1 and the implementation there. We will be giving you a little bit of an update on what recommendations were adopted by the GNSO for the SSAD, and this acronym stands for standardized system for accuracy access and disclosure. And we will talk about the

GAC and other stakeholders' concerns, and then we will move on to next steps. Overall timeline, board deliberations, Phase 2 A, I thought it would be Phase 3 but I think this is a little bit of a marketing technique to just call it 2a, but this next phase whatever it is called will be focused on the natural versus the legal issues, i.e., how to treat data from a legal entity not protected under the GDPR in contrast from natural entities which are protected and then the issue of unique anonymized contacts. And then accuracy of gTLD registration data. Chris, I think you have the next slide for background.

CHRIS LEWIS-EVANS: I do, indeed. And I will quickly go over what seems like the dim and distant past. So Phase 1 started in August of 2018 which is a long time ago. However, it's only burned in my memory. So the Phase 1 completed and most of the policy recommendations were adopted on the board in May 2019. One of the recommendations within that was the implementation phase should be finished by February 2020 or the end of February 2020. As you can see there, Phase 1 implementation is still ongoing. We will cover this timeline toward the end. At the moment no fixed date for the completion of the IRT. It would raise actually last of the last but one call around working towards a fixed date; however, nothing really has been agreed upon that. So I think

that may be a slight early warning sign towards Phase 2, IRT, and I know obviously we have the new operational design phase to talk about as well and how that interacts and I know that was a subject of discussion with the board earlier today.

So Phase 2 is now complete. The financial report was published July this year. I think we missed out slightly on a couple of face-to-face meetings because of COVID circumstances; however, we were able to get that finalized. All of the AC's involved submitted a minority statement, and ours [indiscernible] one of those submitted was the end of August. The GNSO obviously took all the [indiscernible] to have minority statements to have a look and actually adopted all of the policy recommendations and passed them onto the ICANN board for consideration towards the end of September and then obviously we are now in the phase that was discussed earlier today. So I will pass it over to Georgios to cover the actual consensus recommendations.

GEORGIOS TSELENTIS: Hello, everybody, Georgios Tselentis from the European Commission. Part of this group of the EPDP, we have been several times updating you on the issues that we have been discussing in this group, it may have seen that like if we had only disagreements but this is not the case. We have several recommendations that have passed the second phase with

consensus. And here you can see the table with the recommendations and how those recommendations that are highlighted with green are those that are with full consensus or at least consensus.

So during our discussions, I will go through this slide by trying to explain what basically was in agreement with all the stakeholder. So the first was about the recommendation for the accreditation where we basically agreed to have an establishment of an accreditation authority and also agreed to stop an IRT policy for accreditation where the SSAD will accept requests for access and disclosure for [indiscernible] organizations or individuals and from any intended user of the system. So also the policy defines a single accreditation authority which we believe it would be good to be managed by ICANN org responsible for the verification of this requestor. By doing so it should also develop a privacy policy. We also agreed that there are third parties that are allowed to perform this, and we have also established in the policy rules like revoking the accreditation, reporting violations and other things.

So all in all, in this recommendation I think there was a good consensus. I think we have covered the ground which was needed for accrediting the requesters. The same, if you remember, also happens with the second recommendation and

here we made a proposal from the GAC regarding the accreditation of the governmental entities. Here the purpose that if applicable, if we want the [indistinct] governmental entity accreditation -- then it will facilitate the discussions of the ones responsible for the [indistinct] of the contracted parties or gateway and easier to grab access to non-published registration data. So on this recommendation we had agreed that the same more or less principles and rules that govern the [indiscernible] and also the accreditation for example by country or by [indiscernible] government body could be implemented by whatever this country decides to be [indiscernible] authorized or could be also by an international governmental organization.

Also we agreed in the policy that this should be available to various eligible government entities that require access to non-public registration data such as civil and criminal laws authorities such as the data protection authorities, judicial authorities, consumer right organizations, et cetera, et cetera. So again, in this one, the second recommendation I think it was, the work which was done was very good in full consensus. There was also the recommendation number 3 that is regarding the criteria and content of requests, and this governs the standardized submission of requested data elements. And in this one we came in agreement about what a necessary request must include in terms of information necessary for the

disclosure. And here we agreed that things like the domain name should be in there, the identification and information about the requestor, information about legal rights of the requestor, specifically this request, legitimate interest or other lawful basis, et cetera et cetera.

So we also agreed that in terms of the criteria and [indiscernible] request the central gateway must inform that all this information is provided. Recommendation number 4 which covers the acknowledgment or receipt [indiscernible] timely response from central gateway manager after all the field correctly filled out. Recommendation number 7 is about request requestors that must submit data request [indiscernible] for specific purposes, as I mentioned before for requests that refer to critical law enforcement, civil claims, civil protection, abuse prevention, network security and also covers other cases such as to validate the right of the registrant to claim ownership over a domain name registration.

Now in this one, one has to highlight the assertion that we have a valid and specific purpose, it doesn't mean that it doesn't have automatically that the disclosure will take place, depend on the evaluation of the merits of the specific request. The recommendation number 11 which is about SSAD terms and conditions, there we have set up minimum expectations for

what should be appropriate agreements and policies such as for the use of the SSAD, and therefore we also agreed about including what are the clauses that refer to the issues which we said are very important, but we didn't think too much in that about the cross border transfers, ensuring commitment by the parties that all the necessary clauses about data protection will be followed.

The other thing that we talked and agreed on are the terms and conditions that may be updated as appropriate by ICANN org to address applicable laws and practices. Also we included in this one the disclosure that -- appropriate disclosure agreements for SSAD requests, acceptable use policies should be laid out.

Recommendation number 13 which is a recommendation dealing with a query policy, we agreed that the central gateway manager should monitor and take appropriate action against any misuse of the system. And by misuse we mean high volume or malformed requests, credentials that are not correct, et cetera et cetera. And in this one we agreed contacted parties shouldn't reject any disclosure on the base of abusive behavior which has not been determined as such by the central gateway manager. Instead there are provisions to to report back to do so. Also in this one for the query policy, we agreed that we are allowing queries that use [indiscernible] that they performed

multiple domains with a single request, some issues that were raised by several other also stakeholders. Also requests that are not subject to automated processing should be routed to the contracted party which is responsible for the disclosure decision. And the central gateway manager must only support requests for current data and not historical ones.

Last but not least, the SSAD must be able to save the history of all the different disclosure requests in order to keep the traceability between the exchanging of the questioners and the disclosers. That is it. If I can highlight what were the recommendations that we had agreements. And now I will pass the floor I think again back to Chris for the things we didn't agree. Chris?

CHRIS LEWIS-EVANS: Thank you, Georgios. And to the next slide, we will look at the recommendations that had some amount of divergence or strong opposition. So starting off with recommendation 8, 9, and 10, these really are the recommendations that deal with how the disclosure happens within the SSAD system. [indiscernible] perspective, it is highly linked to recommendation 18 and the way that the SSAD will actually evolve. There was lots of discussion within the EPDP and certainly differing views at times. However, recommendations

under 8 and 9 were where the team had fallen to with what they believed was legally permissible at the time and [indiscernible] asked for legal guidance and some arrived quite late onto the stage, so that's where the EPDP team settled. And I think some of the problems are around the recommendation 18 around the evolution of the model and how it would update things like the automation of disclosure requests. So very intrinsically linked between those but obviously across the community did cause some concern that it wouldn't necessarily meet the needs.

The other really main one I would like to flag is recommendation 14 which is around the financial sustainability. There was a lot of concern, both around the viability of the system with regard to some of the data that we were provided from ICANN around the costs of the system but then from a governmental area we were concerned how some of these charges would be met and how the actual system would work is just a little bit difficult for us to all get to agreement on throughout the EPDP. So those are sort of the three main areas I would like to highlight on this as problems, and I think we have certainly discussed some of these before and they will certainly come up again in whatever is the next phase of the EPDP, whether IRT or inter operational phases. And then if I can hand it over to Laureen for details about the minority statement.

LAUREEN KAPIN: Thanks, Chris, and as folks have pointed out in the chat, certainly there was a lot agreed upon and in fact the original slide didn't highlight every place where there was consensus, it highlighted those just dealing with the SSAD primarily. But there were other points of consensus as well. But nevertheless, the GAC did have some concerns, and those were highlighted in its minority statement. And indeed, as folks have pointed out, this is what the multi-stakeholder model is, it allows all different stakeholder groups a voice and an opportunity to hammer out place where they can agree and if there is disagreement, vehicles to express that disagreement. So the GAC minority statement was the vehicle for the GAC to express I say concerns, particular throws those with a public policy impact.

So the GAC minority statement and when you go GAC to the slides in your leisure time, it contains a link to the full statement which you can read for yourself, but there were several high level topics, and I will just go over this at a high level because I know folks can read it for themselves. But big picture, this system at its present -- and I realize as Thomas points out in the chat, its potential may yet be unfolding, but at this point it is in I say bud stage and right now what it looks like is something interests fragmented rather than a centralized disclosure system. The GAC flagged concerns that these disclosures decisions may not be enforceable because the recommendations don't really

contain a standard of review. I will point out that the ICANN CEO has also pointed out the need for more guidance on this issue as to how contracted parties discuss the decision to disclose, that is not exactly clear in the [indiscernible] itself, [indiscernible] ICANN to start second-guessing that decision second and pay part from [indiscernible] role of what it can look like which is whether the procedures followed correctly but getting to the substance, there will be a more challenging enterprise because there is lack of Clarity in the law. So the GAC pointed out currently recommendations don't contain these standards to [indiscernible] closure decisions in a way that will be meaningful for ICANN compliance.

We also pointed out it didn't sufficiently address consumer protection and trust concerns, more specifically with the prioritization and service level agreements of timing to respond to those requests at a big picture level there is a real question about whether the consumer protection issues which of course would include your DNS abuse issues that are not life-threatening, whether sufficiently prioritized to act swiftly enough to actually make a difference there.

And as we heard in our prior DNS abuse panel, many times these are attacks to the domain name system that are quick and have a big impact but don't last very long. So if you don't act quickly,

the bad actor may be gone and using yet another domain to perpetuate its attack. So this issue a rather important. Also that there aren't reliable mechanisms for this system to evolve, and there was a lot of very good constructive work on this issue, but at the end of the day, the recommendation did not provide the level of clarity that the GAC would have desired in promoting a move towards a more centralized rather than fragmented disclosure system.

And finally, this issue of financial sustainability and whether the users of this system are going to be able to afford to use it. And I just want to emphasize that this doesn't just include public agencies who usually are not -- their cup usually doesn't runneth over with lots of resources and funds but also includes cyber security professionals who are often on the front lines of detecting malware and abuse and from time to time not infrequently work with law enforcement to detect these issues and then refer it to law enforcement.

We also highlighted issues the GAC has advocated on repeatedly in certain instances that were not addressed in the Phase 2 recommendation. Data accuracy, which was the subject of many discussions and our EU colleagues, particularly Georgios, discussed repeatedly not only the importance of data accuracy by why this is enshrined in the GDPR the data must be accurate -

- for which the purposes it is collected. The natural versus legal issues were not addressed in this phase of the legal recommendations but optimistic they will be addressed sooner rather than later, within the next Phase 2a of the EPDP. And along with the issues regarding natural versus legal and how that data should be treated, we will also be addressing the use of anonymized email. Other issues that were noted in the GAC minority statement were certain issues that require further clarification, particularly regarding the status and role of data controllers and processes.

So there I will pass the baton -- and I am doing a crib sheet here on my phone (no audio) speaking about other stakeholder groups concerns, and as it was highlighted, there were many stakeholder groups that filed minority statements so we will hear a little bit about those share stakeholders concerns from Chris.

CHRIS LEWIS-EVANS: Thanks, Laureen. Chris Lewis-Evans again, for the record. So as Laureen just highlighted there, I think every other group within the minority statements final report so a lot of concerns during the process were raised and outcomes and points that people wanted to highlight. So I will just concentrate on some -- aspects we had and a couple that were sort of highlights from

that. So the ALAC and the SSAC highlighted similar concerns to us around the -- sorry [indiscernible] around how the financial sustainability would work and how the users of the system could actually participate in the system. So this really comes back obviously to that big diversion recommendation 18 on financial sustainability. So there is certainly more work that needs to be done there, and it will be interesting to see if it does go ahead when the operational implementation would actually draw out some more details and provide more clarity around how this actually works and how the system can be made to work for all the uses of the system.

During the voting within the GNSO Council, the i PC and bc voted against the adoption of a number of the recommendations, and these were mainly involved in the disclosure side of those, but that was still passed and the GNSO super majority ruling. The other thing we wanted to flag here is the ALAC expressed concerns around the GNSO forwarding non-consensus policy recommendations to the board which is against some of the GNSO operational rules. So they are looking to push that forward, and that is obviously an interest for us around how that works, considering some of those non-consensus recommendations were ones that we included in our minority statement.

LAUREEN KAPIN: And I will just jump in for one moment to add onto which Chris said, it's not necessarily that the GNSO passing on these recommendations was against their procedures, it's that the GNSO procedures allow for the GNSO to deliberate on whether or not to adopt these recommendations and pass them onto the board when they lack consensus or whether to remand the recommendations for further analysis and work.

So I think the big picture issue here is how the board -- we know how the GNSO weighed this by their actions, they passed them all on, but the board will have this in its factor in its deliberations as it decides what recommendations to approve, certainly a consideration I anticipate will be the level of consensus and the discussions of concerns raised by various stakeholder groups.

CHRIS LEWIS-EVANS: Thank you for that clarification, Laureen. So I will pass it over to Georgios to go over the timeline.

GEORGIOS TSELENTIS: Thank you, Chris. Georgios Tselentis with the European Commission, for the record. You can see here in this picture here the timeline as it is now summarizing what happened so far and what is expected to happen in the future, the near future and the more far future. You can see here some issues that were

mentioned also by Chris regarding the Phase 1 policy implementation were we had initially set earlier dates of transposing the policy recommendations to the contracts from Phase 1 which is still moving on. We have issues like the operational design phase which was discussed also briefly during the directions also with the board that is to precede the implementation phase of Phase 2. You can see also the discussion about the [indistinct] issues we highlighted also in our minority report, the data accuracy and the legal verse natural, that is considered by the GNSO Council not in the critical path so they were deferred -- but they accepted that those were important issues that had to be dealt with and are still on the table. And you can see also the discussion about the cost/benefit analysis of the model due to the implications of the financials sustainability of the model.

All this, we knew that it was -- it is complex. We knew that it is difficult to solve as a problem, and there is a lot of activities that are planned as we are going on. We highlight our worries about what we have said in previous GAC advices for the timely and effective solution of a standardized model, access and disclosure model and how this will be impacted in this timeline by the addition or the non-solution of those issues. So I will pass it now back I think to Laureen for the next and I think final slide, Laureen, back to you.

LAUREEN KAPIN: So we will talk about next steps. First there will be a consultation between the ICANN board and the GNSO Council. And the GNSO Council flagged the issue of financial sustainability and raised the issue of potential cost/benefit analysis in its actions here. So we are looking forward to seeing how that issue is going to be handled. I think in the board meeting earlier today we heard that if there is going to be a cost/benefit analysis done, that that would takes place before the board issues its ruling, so to speak, on whether it is going to accept the Phase 2 recommendations. And I am going to flag that this could be an issue of importance to the GAC to get more information about how this analysis will be done, particularly how the benefits will be measured and whether stakeholder groups will contribute to the analysis or the design of the analysis. Lots of open questions, and I think there's probably a great interest in how this analysis is going to be conducted.

The ICANN board of course will receive the baton next in terms of considering the poll recommendations and possibly after a [indistinct] operational design, there has been a request for input from the GAC about that. It did seem from the discussion, however, from the board that there is -- how do I put it -- a strong possibility that they are going to apply this phase, the EPDP recommendations, if I heard correctly. So I'm sure we hope that the GAC's input on the operational design phase will be

considered in that regard. And then as it usually happens, the board will ask the GAC if it has public policy concerns with the recommendation. And that is another opportunity for the GAC to provide input.

In terms of implementation, like Phase 1 stakeholder groups are invited to participate in the implementation discussions. I can tell you as someone who has been participating in the Phase 1 deliberations that these implementation discussions are very important and often what seemed very clear to the policy deliberates and the PDP preferance isn't so clear to the implementers. So this work is important. We would welcome the participation of GAC representatives in that phase of the work when it is initiated.

And then as we have already discussed there will be a next phase, Phase 2 A, that is going to be shorter, which is a light lift, I think, to address the issues of how the treatment of data from legal entities should occur and unique anonymized contacts and again the GAC will be invited to those proceedings and on the issue of data accuracy, that is not going to be a part of these phased EPDP deliberations, rather that will be a separate, the GAC and advisory committee signaled they would like to participate in that effort, and I anticipate that the GAC will also

be actively participating in those policy efforts on this important issue of data accuracy.

And I think with that, I think we're done with our slides, if I'm not mistaken. Yes. Which means that it's time for questions. And Manal, I don't know if you want to act as the facilitator for that?

MANAL ISMAIL, GAC CHAIR: Happy to, Laureen. So let me just check for any hands up. I can see have question from Vincent from France in the chat, if one of the recommendations that did not receive consensus can it be later voided as it was transmitted to the board in a way that may be in contradiction to the GNSO operating principles? I think Laureen you touched on this, but...

LAUREEN KAPIN: Sure, and I did try to touch on that. I don't think -- as I read this, and I am not an expert on the nuances and subtleties of GNSO Council procedures. With that caveat, as I read the procedures, it struck me at least that the GNSO does have some discretion here, and I will put it in my lawyer terms, it would go to the weight, not the admissibility, i.e., it would go to how the board is weighing whether to accept the recommendation or not, not whether they can even look at it. That at least is the way I read it but my view certainly is not [indiscernible]

MANAL ISMAIL, GAC CHAIR: Thank you, Laureen, and definitely we're not talking here for the GNSO but also my understanding that there was no validation to whatever rules of the GNSO. The only thing is that there was no full consensus in how would the board deal with the situation. But I don't think there is any violation to GNSO procedures. And Vincent is thanking you, Laureen, in the chat. Apologies if we missed in the questions in the chat. I am trying to scroll up. And meanwhile, if anyone would like to seek the floor, please raise your hand. Obviously the slides were crystal clear [chuckling] -- or this is non-controversial issue. I see Ryan from US?.

UNITED STATES: Can you see me and hear me?

MANAL ISMAIL, GAC CHAIR: Yes.

UNITED STATES: Perfect. Thank you, Chair. Thanks to Laureen, Georgios and Chris for the fantastic presentation, really good to be back at a GAC meeting and sort of see people digitally. Just a few words speaking from the US government perspective, I think the team laid out well sort of the GAC concerns the Phase 2 recommendations which the US continues to support. I will note

we look forward to remaining involvement in the Phase 2 efforts and the future work to apply issues like the treatment of legal person data and data accuracy. After the session I think we will be proposing some communique text that takes note of previous GAC advice that emphasizes -- that has emphasized the need for the SSAD to be an effective tool for the various user communities [indiscernible] and emphasizing the need for accuracy. So you will see that sort of on the list or I think in the session we have after this but wanted to highlight that for everybody. And that's all. Thanks.

MANAL ISMAIL, GAC CHAIR: Thank you very much, Ryan, and thank you for flagging that you will be providing communique language so we will be waiting for this. And I now see another hand from Russia please? I don't want to pronounce the name wrong, so Russia please, and you may introduce yourself.

RUSSIA: [indiscernible] Russian Federation. Colleagues, just I want to talk a little bit on the issues. Yesterday France made a statement about [indiscernible] the Internet system and importance the ICANN role as a keeper of global non-fragmented common information space. I would like to echo this statement and

stress that the whole EPDP story and whole story about WHOIS is the result of national regulations initiatives, not only European because practically all states have their own regulation for privacy and personal data and regulations for Internet.

On the other hand, [indiscernible] you mentioned already the importance of considering the regulations of each jurisdiction? Why I start to talk about this? Currently the WHOIS service is unbalanced, depending on regulation requirements of individual states and even [indiscernible] depending on interpretation of these requirements by local players. I think states should make more proactive in this area in this direction.

I see clear need for international harmonization of our regulation, our national regulations, and I propose to prepare some draft recommendation for national registry and registrar and registry, where they need to provide data for WHOIS service and during public safety group session it was a very good example, maybe you have seen it, it was on a slide that in Denmark there is the main name [indiscernible] which requires [indiscernible] data publication of registration data.

I think this is an example of how states can support ICANN and help with issues not only like an expert in the EPDP group, not only as a consultant but as an active actor of this story.

Thank you.

MANAL ISMAIL, GAC CHAIR: Thank you very much, Russia. And indeed, national regulations are all equally important, and thank you for also flagging the importance of harmonization of the national regulations and reminding us also of the statement we heard from France on the plenary yesterday. Any other comments? Or questions? I see no requests for the floor. I am trying to check the chat. And I see no one flagging a comment or question. So it looks like we will be wrapping up half an hour earlier. Okay. So I still see for requests for the floor so maybe a need for a longer break.

So I would like to thank you again very much, Laureen, Georgios, and Chris for the excellent presentation, very informative. I really appreciate the effort you put in the slides, the diagram of the overall timeline, the table highlighting agreements and disagreements, very informative. I hope everyone also benefited from your excellent slide deck, and special thanks to all members of the GAC small group for their significant and tireless efforts throughout this process. This concludes the GAC discussion on registry data services and data protection.

So it is now time for a break. I think it will be like an hour. Please enjoy, and please be back in the GAC Zoom room at 16:30

Hamburg time and 14:30 UTC so we can kick start discussions on the communique. Thank you, everyone. This meeting is now adjourned. Thanks.

[END OF TRANSCRIPT]