ICANN67 | Virtual Community Forum – GNSO - EPDP Phase 2 Meeting (1 of 2)
Tuesday, March 10, 2020 – 09:00 to 11:00 CUN

TERRI AGNEW: And once again, thank you, everyone, for joining. It's Terri from Staff. We are right at scheduled start time. We are going to give folks just another minute or two to complete all the sign-in.

As a reminder, all members and alternates will be promoted to panelist status. Once selected to a panelist, please select "all panelists and attendees" for the chat option. This will allow the attendees to see the members and alternates chat. However, alternates will be on view only. Once again, all members and alternates will be promoted to panelist. Once promoted to panelist, please select "all panelists and attendees" selection for chat. Right now, we do have just short of 100 attendees on. Thank you.

Janis, welcome. It's Terri. We're now two minutes after. Did you want to quickly go ahead and test your audio before we begin?

JANIS KARKLINS: Hello, Terri.

TERRI AGNEW: Hi, Janis. Welcome.

JANIS KARKLINS: I heard you. Do you hear me?

TERRI AGNEW: I sure do. Thank you for testing your audio.

JANIS KARKLINS: Okay. So, we can go any time you want.

TERRI AGNEW: Okay. Great. We'll go ahead and begin the recording. Technical support, if you could please begin the recording. Thank you.

Good morning, good afternoon, and good evening, and welcome to ICANN 67 GNSO EPDP Phase 2 Call, taking place on the 10th of March, 2020. In the interest of time, there will be no roll call. If you're only on the telephone, could you please identify yourselves now? Hearing no one, we have no listed apologies. All members and alternates will be promoted to panelist for today's meeting. Members and alternates, when using chat, please select "all panelists and attendees" in order for everyone to see the chat. Attendees will not have access to chat themselves, but will have view only.

Alternates not replacing a member are required to rename their line by adding [three Vs] to the beginning of their name and at the end, in parentheses, their affiliation dash alternate, which means you are automatically pushed to the end of the queue. To remain in zoom, hover over your name and click "rename." Alternates are not allowed

to engage in chat apart from private chat or use any other Zoom Room functionality, such as raising hands, agreeing, or disagreeing.

As a reminder, the Alternate Assignment Form must be formalized by the way of the Google Assignment link. The link is available in all meeting invites toward the bottom.

Statements of interest must be kept up-to-date. If anyone has any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance, please email the GNSO Secretariat. All documentation and information can be found on the EPDP Wikispace.

Today's call is being recorded. Recordings will be posted on the public Wikispace shortly after the end of the call and also on the scheduler. Thank you. And with this, I'll turn it back over to our chair. Janis Karklins, please begin.

JANIS KARKLINS: Thank you very much, Terri. Hello, everyone. Welcome to the EPDP Second Phase 46 Team Call, which is taking place in the framework of the remote ICANN 67. So, we will examine today priority two items that are on the agenda that now has been displayed on the screen.

For those who are not team members and following this conversation today, I would like to simply remind that the initial report of EPDP on priority one item, SSAD, the system of standardized access and disclosure, has been posted for public comments. The public

comment period ends on 24th of March. And I would like to encourage all those who are interested to submit those reports to do so.

But today, we will look at priority two issues. And the question now to the team members, whether proposed agenda consisting of eight items is suitable for today's meeting. Amr, your hand is up. Please go ahead.

AMR ELSADR: Thanks, Janis. I have a question on agenda item six, automation use cases. We had a call about these use cases about two weeks ago, I think. I don't recall there being any follow-up or action items from the call, except for perhaps one use case that I think … I don't want to put Mark Svancarek on the spot but I think he said that there was one that he would revise.

But my question is that was meant to be a small team call so not everyone was on the call. Are we going to … We're getting some audio from an unmuted mic. Anyway, my question is are we going to follow up on that conversation as in continue it with everybody present? Are we going to review what was previously discussed? I don't recall any notes or action items being circulated. I'm just wondering what the game plan for this agenda item is. Thank you.

JANIS KARKLINS: Thank you, Amr. Indeed, we had a small group meeting, I think 10 days ago. We reviewed four and we started to review the fifth use case.

Unfortunately, we did not find additional time for the next small group call.

So, therefore I am proposing that we continue … That we devote 45 minutes' time as a team to review use cases, starting from five onwards, and see whether we can reach the end of the list. So, and then we will come back for the second and final reading of those use cases, which then will be fine-tuned as a result of this initial discussion. So, that's the game plan.

And also, maybe for the knowledge of everyone else outside the team who is following the call, our intention is to review priority two items as closely as possible. And if we will find a common ground, we would publish that common ground, in terms of initial report on priority two items, also around the end of March. Hopefully, after the review period, we will be able to compile both initial reports and commentaries in one final report, which is set to be released around the 11th of June as the plan suggests now.

So, I see Mark SV hand up. Please, Mark.

MARK SVANCAREK: Thanks. I have to also say, the same as Amr, that I was expecting the automation discussion to be a small group again. I would note that the assumptions section of the document, we probably spent half the meeting talking about the assumptions section. And so, there will be people in the group who have not absorbed those assumptions yet. The document was public but that doesn't mean everybody has spent

any significant time on it. So, that might be a stumbling block as we go through the second half of the use cases. So, let's just be aware of that. That is a risk that I think we're going to face. Thanks.

JANIS KARKLINS: Yeah. Okay. So, look. If that is the case, though, I recall that many of team members were on the small call anyway. But then my proposal is to revert and take items in order of four, five, seven, and eight. And then, remaining time on the call, we would suspend a meeting of the team and we would immediately start a meeting of the small team. And we would review, then, these use cases in a small team setting. I think that that may work. So, I see no hands up. I take that this is something we can [pull]. Good.

So, let us now move to item four, display of information of affiliated versus accredited proxy/privacy providers. We had already a first reading of the document. And now, our task today is to see whether we can agree on a preliminary recommendation that was suggested. My question to the staff … Yeah. I see that there have been some proposed changes and they came from which group?

MARIKA KONINGS: Janis?

JANIS KARKLINS: Yes please, Marika.

MARIKA KONINGS: I'll raise my hand at the moment, as I'm still a co-host. But yes. Just to know, we got some input from the Registries Stakeholder Group and in the minor edits section. And to facilitate everyone's review of those, I've applied those added to the actual text that was originally proposed.

So, that is what you currently see in the redline. Those are edits that were put forward. I believe Marc Anderson put them into the document, which, again, were labeled as minor edits. And at least for a staff perspective, most of them seem to focus on clarifying the language or simplifying the language for ease of readability.

JANIS KARKLINS: Okay. Thank you, Marika. Mark?

MARC ANDERSON: Thank you, Janis. Can you hear me okay?

JANIS KARKLINS: Yes.

MARC ANDERSON: Great. Thank you. I raised my hand just to agree with what Marika said. The edits that I added to the document are not intended to change the substance at all. Just like Marika said, the intent is to add clarity to the language, and particularly with an eye towards

implementation—hopefully make it clearer to implementation exactly what we intended with this language.

So, I know that this came in late last night but hopefully once everybody has a chance to review it, they'll agree that this is language that doesn't change the substance but rather makes it easier to understand, at implementation time, what we're intending with this recommendation.

JANIS KARKLINS: Okay. Thank you, Marc. So, now recommendation is on the screen. Let me read it. "In the case of the domain name registration where an accredited privacy/proxy service is used, e.g. where data associated with a natural person is masked, registrar and registry, where applicable, must include the full RDDS data of the accredited privacy/proxy service in response to an RDDS query. The full privacy proxy RDDS data may also include pseudonymized email." So, that is proposed language for initial report on this topic.

And then, there is an implementation note of two points. "Because accredited privacy/proxy registrations are expected to be a superset of affiliated privacy/proxy registrations, as described in the EPDP Phase 1 recommendation, this recommendation once in effect replaces or otherwise supersedes EPDP Phase 1 recommendation 14.

"The intent of this recommendation is to provide clear instructions to registrars, and registries where applicable, that where a domain name registration is done by an accredited privacy/proxy provider, the data

must not also be redacted. The working group is intending that domain registration data should not be both redacted and a privacy/proxy." So, that's the proposed language.

Brian, your hand is up. You are in agreement, correct?

BRIAN KING: Janis, thanks. We are in agreement, in principle. If you can leave us just some time to confirm this language, I know there's just a brief pause in the IPC because we've been trying very diligently to try to get Org to implement the privacy/proxy, the PPSAI. And I just want to make sure that if they continue to drag their feet on that, that doesn't somehow undo what we have here. I don't think so. But we agree. Let us just spend a little more time before we agree finally, okay? Thanks.

JANIS KARKLINS: Okay. So, we can … If you need some five minutes, then it's one thing. We could simply let this time pass for your internal consultations. If you need more, then maybe we can go to the next item and then come back to this one. Margie, what would be your preference?

MARGIE MILAM: Oh, hi. I just wanted to ask a question, too, that we consider making a recommendation that the implementation of the PPSAI resume immediately. There's been some discussions with ICANN staff about waiting until we finish our work. But it looks like, with this, we would

be finished with our work. And so, we just wanted to ensure that there's no hurdles in implementing the new policy.

JANIS KARKLINS: Yeah. Thank you, Margie. So, Brian, what would be your preference? To suspend consideration of item or you need some five minutes to consider?

BRIAN KING: Thanks, Janis. I don't want to hold this up because we do agree in principle. And I agree with Margie there, too, that we should be clear that we're done here. And PPSAI should go ahead and not wait for us any further. If we can have the five minutes at least, let us consult and get back to you. Thanks.

JANIS KARKLINS: So, you have now five minutes. And for the moment, we will be reviewing other—individually, not collectively—other topics. So, five-minute suspension of the meeting. Amr, your hand is up.

AMR ELSADR: Thanks, Janis. If I could ask a question or say something before the five-minute break … I just wanted to … Regarding the implementation review team, the PPSAI Implementation Review Team, my understanding is that IRTs take their instructions, or specific staff managing the IRTs, they take their instructions from the ICANN Board, not from GNSO working groups or, in this case, an EPDP team. And I'm

not sure that we have, ourselves, as a team, reached conclusions on this until we fully reach definitive answers on some of the questions on this preliminary recommendation.

For one thing, I note the use of pseudonymized email in the recommendation. And we had a briefing from the legal team during our call last week. So, some changes may need to be made that provide further instruction to the IRT.

So, I'm not exactly clear how we, as an EPDP team, at this point, can provide instructions to the IRT which they would feel comfortable following. I would assume that we need to finalize our report, have the GNSO Council adopt it, then eventually the ICANN Board adopt it before the IRT can act on whatever it is we come up with. If my understanding is incorrect, I'd be happy to be corrected. Thank you.

JANIS KARKLINS: Now, look. This is just … We're working towards initial report on priority two items. So, nothing prevents us from revisiting that if some new elements come up, either at the later stage, or especially if we are not suggesting to change substance but to add some additional elements from one side. And from other side, there is always a final report where all bugs need to be caught and text cleaned up. So, we will have plenty opportunity to add additional elements to the proposed text as we progress. Alan Woods, your hand is up.

ALAN WOODS: Thank you, Janis. I was going to say exactly what Amr said but he more eloquently said it than I could ever do. And I think it's important that we … We have sympathy, absolutely, for the stalling of the PPSAI and people waiting for that but we really must draw a line in the sand and make sure that we are not those people who are recommending something that is very much outside of our scope.

So, I think it's worth saying that the Registries are saying that it's not in our wheelhouse to actually recommend that another PDP proceed or IRT proceeds. Thank you.

JANIS KARKLINS: Yeah. Thank you. Margie?

MARGIE MILAM: Yeah. Hi. I think if we clarify that this group is doing no further work beyond this recommendation, I think that would be helpful because what's causing the delay is this expectation that the EPDP is going to tackle this issue further. And from what I see in our recommendation, once we make this change in the proposed language, there is no further work. And so, if we can get agreement on that, I think that's what we need to go back to staff and say, "It's time to restart the IRT."

JANIS KARKLINS: Okay. Thank you. Alan G?

ALAN GREENBERG: Thank you very much. We may not have the legal authority to restart the IRT. But I agree with what Margie has said. We need to send a message saying, "We're not going to be doing anything else which will get in your way." It's not our call whether it restarts or not, but given that there is pressure to get the work done and we see no impediment from us of not doing it, I think we need to send that message and not worry about whether we have the proper authority or the GNSO Council has the proper authority to actually restart it.

Let's not worry about the formal restart order. Let's just make sure it's well understood that we're not and we should not be considered an impediment. Thank you.

JANIS KARKLINS: Thank you, Alan. Brian?

BRIAN KING: Thanks, Janis. I agree with Alan that that's the way to do it. Just say, "Hey, we're done here. So, we know that we can't make you carry on but if you're waiting for us, we're done. Up to you."

JANIS KARKLINS: Indirectly, we're saying that, no, with the first [round] of implementation?

BRIAN KING: I think so, Janis. I think we would like to just send an email, perhaps, just to do something affirmative to signal that our work on privacy/proxy is complete.

JANIS KARKLINS: I think we have ICANN Org liaisons on the team. They can send the email or call implementation team and convey the message.

BRIAN KING: Okay. Thanks, Janis. I think that's great. So, let me formally request, then, that Dan and/or [Eliza] or someone from Org signals that internally. We've had time to caucus offline and the IPC's happy with this language. We thank staff and Marc Anderson for efforts to get us here. Thanks.

JANIS KARKLINS: Thank you, Brian. Mark SV?

MARK SVANCAREK: Thanks. There have been two interventions and I think something in the chat regarding our remits. So, there is a process question that has been asked by multiple people. Who can clarify that question? Is there some procedural reason why we can't make this recommendation? I am not the expert of this but I didn't think that there was. So, if staff could also just clarify that, that would he helpful, I think. Thanks.

JANIS KARKLINS: Thank you. Look, I don't know why we're not recommending. We are too recommending. We are saying that preliminary recommendation is the one that is on the top of the screen and then implementation note, what is in red. This is our recommendation for initial report. So, if that will be approved by community or modified by community, it will find a way in the final report. That's it. This is our task. So, we're not involved in the operational activities of ICANN. So, we do our policy work at this is how I see we should do. And ICANN Org liaisons are on the team the they will convey whatever needs to be conveyed.

So, my question now is after this exchange and having some 15 minutes passed, can we all live with the text as it's not displayed on the screen for the initial report? I see no objections so this will find the way in the initial report. And then we will see how community will react to this proposal. Thank you.

Next one, data retention. So, same here. If I may ask Marika to kickstart and remind where we are.

MARIKA KONINGS: Thanks, Janis. Same applies here as for the previous issue we reviewed. We got some minor edits from the Registries Stakeholder Group that we've applied in the language, that in the redline version you can see the changes that are being proposed. And again, from a staff perspective, these seem to be intended to clarify and simplify the language for inclusion in the addendum to the initial report.

So, I think if you scroll a little bit further down, you see the specific changes that were made. I think one is a correction that Alan made to the date and then there is some proposed language changes.

JANIS KARKLINS: So, thank you, Marika. Berry, can we get this on one screen—all preliminary recommendation? Maybe we can enlarge it a little bit. So, here we are, the one that we reviewed last during the first reading. And now, additional editorial changes have been suggested, specifically replacing the last sentence with a different one. "For the avoidance of doubt, this retention period does not restrict the ability of registries and registrars to retain data elements for longer periods."

And additional implementation note … "For the avoidance of doubt, registrars are required to maintain data for 15 months following the life of registration and may delete the data following the 15-month period." Marc Anderson?

MARC ANDERSON: Thanks, Janis. I can speak to these real quick. I'll say the implementation note was based on our experience in the EPDP Phase 1 IRT. In that IRT, there was a little bit of confusion initially whether the minimum data retention period was meant to be 15 months or 18 months. As the language in the recommendation notes, it's 15 months plus three months to implement the deletion. So, there was discussion over whether that meant the data could be deleted at 15 months plus one day or whether it was 18 months plus one day.

And so, based on that experience, that implementation note is just meant to provide clarity to the implementation team that it's meant to be after 15 months the data may be deleted but there is a three-month deletion window. So, hopefully that makes things easier for the implementation team.

As far as the other sentence—I guess this is the last sentence of the preliminary recommendation—I do want to note that the first draft says that "for the avoidance of doubt, retention periods not restricted …" It says "for shorter periods" at the end, which actually … I suspect that that was a typo or an error in drafting because taken literally, that would undo the intent of having a minimum of 15-month period if registrars were able to retain the data for shorter periods than 15 months.

So, I think the intent there … I think that was a typo and it was meant to be "longer periods." And so, that was clarified in the proposed edit. And then, just the language was simplified, removing extraneous language. So, hopefully that helps explain the edits.

JANIS KARKLINS: Okay. Thank you, Marc, for this explanation. Alan Woods, your hand is up. You're next.

ALAN WOODS: Thank you, Janis. I just want to preface this by saying this is not me giving out about the language at all and I'm not proposing a change. I just want to point out the last sentence there on page five, where it

starts “of the transfer policy.” Sorry. It’s not that. “For clarity, this does not prevent requestors, including ICANN Compliance, requesting disclosure of these retained data elements for purposes other than the TDRP.”

So, again, I just think that we need to be clear here that what we’re suggesting there is a rather cumbersome way of a retention period for ICANN Compliance. We’re not saying that that won’t work and that, of course, can’t ask for the disclosure on a case-by-case basis. It’s just cumbersome for them to have to go that way.

ICANN Compliance are part of the data ecosystem here. They are a controller in this instance. And it would be easier in my mind—and I don’t know if other people agree with me—it would be great that ICANN Compliance … They clearly have something in mind where they think that they can review this data. And they have said it to us already that they may request this data at some point during the retention period. It would be cleaner for them to just put that in and tell us what that is, as opposed to us saying, “You may ask for disclosure,” because then it would be a right of theirs, as a controller, to retain because they were just saying, “We need to retain for that reason.”

So, I’m not suggesting a change in this. I’m just saying that ICANN, as a controller, can add to this in the future when making this a purposeful retention. And it would be just a cleaner, easier process for us to follow because that’s the whole point of stating what the retention is necessary for. So, as I said, I just wanted to put that on the record and

make sure that we understand that. I'm not making an objection to it but it should be noted on the record.

JANIS KARKLINS: Okay. Thank you, Alan. That's noted. Any reaction to Alan's comments? I see none. So then, I take that the proposed preliminary recommendation, with edits suggested by Marc Anderson, may find the way to the initial report on priority two items. And they will be reviewed, of course, as a result of comments by the community. Good.

Let us move, then, to agenda item, as we discussed, not six but seven. And we would spend some 30-35 minutes continuing discussing purpose two of Phase 1. So, we had already a rather lively and lengthy conversation. We agreed that the team of volunteers would continue a conversation online. And if I may ask now staff to tell us where we are. But I see Hadia's hand is up. Hadia, is this on this agenda item or something else?

HADIA ELMINIAWI: It is on this agenda item.

JANIS KARKLINS: Okay. So then, let me ask Marika first and then you will be following her. Marika, please.

MARIKA KONINGS: Yeah. Thanks, Janis. So, for those of you that are maybe observing this conversation, if you look at the text in the agenda, there is a little bit of background to this conversation, as purpose two is a topic that actually came up in Phase 1 of the EPDP Team's conversations. And as Janis said, the group has already discussed this at one of its previous meetings.

So, as a result of that conversation and the input that was received, Brian sent a revised proposal to the list on the 4th of March, which can be found here in the agenda. I know that he actually, just prior to this meeting, sent other version to the list, I'm guessing or hoping that in response to further conversations that took place on the mailing list in response to that.

And maybe to try and summarize, it seems that the conversation in the group centers around the question, is this purpose necessary for the functions that ICANN Org performs, as well as the SSAD, or is it already captured through the other purposes that were developed and adopted in Phase 1? And I think, then, another question is if it is indeed deemed necessary or helpful, how much detail needs to be provided in the purpose description to make it compliant with the GDPR requirements?

And again, I think various perspectives have been expressed on that on the mailing list. And I'm sure those that hopefully have had chance … I see the language is now in the document as well, as proposed by Brian, so people can weigh in on whether that meets their expectations and the comments that have been expressed to date.

JANIS KARKLINS: Okay. Thank you. Marika, now we see on the screen in red the proposed text which was edited by Brian as a result of this online conversation that took place. I know that I said that Hadia will be next but maybe, Brian, you can explain your thinking behind this proposal.

BRIAN KING: Sure, Janis. I couldn't tell if you were calling on me or Hadia. Sorry.

JANIS KARKLINS: No, no. Please. If you could explain just on this edited version—so, what was your thinking?

BRIAN KING: Sure, Janis. I'd be happy to. Thanks. I conferred with a few members of the EPDP Team outside of the IPC and the CSG and got some input here, both on the email list and on the phone. We noted that the concept of security, stability, and resiliency might be leading us astray here and could be problematic for us. So, I suggested that we remove that and just limit the purpose to the copy and paste language here from the ICANN Bylaws, "the maintenance of and access to accurate, up-to-date information concerning registered names and name servers."

And then, for some additional specificity, I wanted to say which policies we're talking about here, in order to give more specificity to registrants and to the DPAs to show them that we've done our

homework here. So, the Registration Data Policy is, I think, the formal name of the policy that came out of Phase 1 of the EPDP. And I added placeholder language here, in case this policy that we're creating for the SSAD in Phase 2 ends up being called something different. If not, just being called Registration Data Policy.

I think it's important to note here that this is ICANN in its role as controller to enforce these policies. That gives us some additional clarity where I think we have an opportunity to be really formal about what the role is here.

And I would finally note that we do feel that it's necessary to have such a purpose with some specificity about this. And I've heard from one or two other colleagues … I don't completely understand this argument that we don't need to explicitly define the purpose of collection of data to enable the SSAD. But the IPC thinks that we really do and we think that we risk building this SSAD on a shaky legal foundation if we don't note that one of the purposes for the collection of the data is enabling this SSAD down the road.

And so, if the best argument against having this at all is that we don't need it, let's put it in just in case. We've done that throughout the report and I think that approach is appropriate here, as well. So, happy to yield the floor for any questions or constructive suggestions. Thanks.

JANIS KARKLINS: Thank you, Brian. So, Hadia, your hand has disappeared. Are you offline or …?

HADIA ELMINIAWI: I thought maybe let the others stakeholder groups say their opinion about Brian's suggestion. And I just wanted to note two main principles.

First, we need to be very clear and transparent in the report that we put forward to the public. And for that, this is one important reason for which we need this purpose. Yes, the disclosure of the data is a right given to third parties with legitimate interest and a lawful basis. It's a right given under GDPR. But we should not rely on the assumption that the reader of the report knows about that. The reader of the report should be able to read the report and from it deduce the purposes and the processing activities that could be associated with the purposes.

And another thing also, we should not forget the recommendation of the European Commission of the 5th of—in May 2019, where [inaudible] of the first part of the recommendation and not [inaudible] the second part. And the first part mainly speaks to the security, stability, and resiliency of the DNS as a core mission for ICANN. So, I agree to Brian's proposal. I did agree, also, with his previous proposal. But let's hear from the other stakeholder groups.

JANIS KARKLINS: Okay. Thank you, Hadia. So, I have a number of hands up. Amr, Marc Anderson, Milton, and the list continues. Amr, please go ahead.

AMR ELSADR: Thanks, Janis. Just as a quick initial reaction to the text in red there that Brian's proposed, I'm not sure why you singled out accuracy as the issue here. There are a lot of policies in the Registration Data Policy, or a lot of requirements in the Registration Data Policy, for Contracted Parties to carry out.

But in general, I'm not necessarily opposed to this the way I read it now. I don't see that it changes any requirements. It's just starting that the requirements that are in the registration data policy need to be enforced. But then again, enforcement of policies, or making sure that Contracted Parties comply with policies, is an ICANN Compliance issue. And I would have imagined that this is captured in the purpose we developed in Phase 1 concerning ICANN Compliance. So, I'm just curious what Brian might think that this purpose here adds to that.

And I'm also curious why access to accurate … We have "maintenance of an access to accurate …" Why is that being singled out here? In reading it again, I'm not sure who he's referring to, in terms of "maintenance of and access to accurate …" I'm guessing he's referring to ICANN because he's enabling ICANN here. But again, how is this different or what does this add in terms of the ICANN Compliance purpose we developed in Phase 1? Thank you.

JANIS KARKLINS: Okay. Thank you. Maybe I will collect a few comments and then see whether Brian can respond to them. Marc Anderson followed by Milton and then Georgios.

MARC ANDERSON: Amr had some great questions. I must confess, I'm very interested in hearing the answers to those. I understand that Brian is trying to address a gap here. Based on this latest language, I'm not exactly sure I understand what Brian's concern is and what he's trying to address with this language. As I read this language, I must confess I haven't had a whole lot of time to digest it.

But as I read this language, he's referencing Annex G1 and G2 from the ICANN Bylaws and quoting language from that, "maintenance of and access to accurate and up-to-date information concerning registered names and name servers." That's a quote from the language in the Bylaws around what ICANN can enact policy on. G1 is about Registrars and G2 is about Registries, I believe. And it's the same language in both annexes.

So, by my read, what Brian has proposed is policy language on what the ICANN Bylaws say ICANN can create policy on, which seems very weird to me. I'm not really sure that this is accomplishing what Brian's trying to accomplish. And if it is, I guess I'm not sure I understand what Brian's trying to accomplish with this.

So, I guess my [act] is maybe for Brian to take a look at this and maybe explain to me what I'm missing or help me understand what the

problem is he's trying to solve for because I fear, looking at this language, I'm not getting it.

JANIS KARKLINS: Okay. Thank you. Marc, I recall from the previous conversations that there is a concern that there might be some gap in purposes. And this is what IPC or BC's trying to address with this. I also recall that they asked to constitute or to make a table whereby, on one side, list every purpose that ICANN has to collect information and then see whether there is really any gap that needs to be filled in this phase of the policy development. I'm not sure whether this table has been developed or not.

But let me now go to Milton and then I will ask Brian to address the questions that have been raised so far. Milton, please go ahead.

MILTON MUELLER: Hello. Can everybody hear me okay?

JANIS KARKLINS: Yes. We hear you.

MILTON MUELLER: So, I do not support this language. I think, unlike Marc, I don't want to say that I don't know. I don't want to be polite and say that I don't know what Brian is trying to do with this because I think I do know. I think this is, indeed, the reincarnation of the purpose two debate that

we had in Phase 1, in which some people are looking for a blanket statement that ICANN is collecting this data for the purpose of disclosing it. And we have been told several times, both by people inside this committee and by the data protection authorities, that that is not a legitimate purpose—that that is not something that works within the framework of the GDPR.

And we are also seeing, bundled into this, revivification of purpose two, the issue of accuracy. And perhaps Brian is correct that that word is in there simply because of copying from the Bylaws.

But I think this is just a road we don't want to go down. Nobody has shown what gap exists. There is no argument as to what this additional statement of purpose does that cannot be done under existing purposes. We still don't have that.

And so, I would ask Brian to tell us if this is here, what can we do, or what can requestors of data do, or what can disclosers, Registrars, Contracted Parties, data subjects …? What happens to them that doesn't happen if it's not there. And I'm afraid that answer is … Brian contends that without this we are on a so-called "shaky legal foundation."

And again, we have dealt with this argument at length in our last meeting, which I guess he thinks that somebody's going to challenge the existence of an SSAD when every stakeholder group in this EPDP is fully committed to that. And nobody, including the Data Protection Authorities, has ever told us that we can't have a system of access and disclosure, an SSAD. Nobody has ever said that.

So, I just don't understand what this "shaky legal foundation" is. I don't understand what can't be done that needs to be done and legitimately should be done without this. And I'm afraid of what could be done with it. So, I'm opposed to this language. Thank you.

JANIS KARKLINS: Okay. Thank you, Milton. Brian, after hearing all these questions, do you have any answers or any comments?

BRIAN KING: Sure, Janis. Thanks. If I can jump the queue … I see some hands and eager to hear some …

JANIS KARKLINS: We will go to the queue. But just a reaction on the questions that have been raised so far.

BRIAN KING: Sure, Janis. Thanks. Happy to address that. In reviewing the purposes from the first phase—I addressed some of these questions in the chat as well—we have purposes for ICANN's own limited processing, including for Compliance, which allows ICANN to process the data. But what we don't have is … It seems odd, but we don't have a purpose for the data collection to result in any disclosure to a third party through the SSAD.

I'm trying to address Milton's confusion here or concern. But it seems to be a no-brainer that in a policy about ICANN as the controller and access to the data that we wouldn't have established that as a purpose for the collection of the data. And it does not mean that the data can be processed by anyone or unlimited processing but just acknowledgment, plain and simple, that the potential disclosure for somebody else's purposes is one of the purposes for which the data's collected.

I think it's pretty simple. We don't have that spelled out and the European Commission has asked us to do that. And we're trying to tie this to the Bylaws with the Bylaws' language. It has nothing to do with the fact that accuracy is included in that language. It's a pure copy and paste there.

To the point about building this on shaky legal grounds, we'll be in a much better place with a data subject who challenges the SSAD or the disclosure to a third party if we have language that notes that one of the purposes for which the data was collected is to enable that third party processing through the SSAD, should it ever be required.

If there's no purpose stated that would allow that to happen or that would enable that to happen … I don't know how to be clearer about the risk there. It leaves a real vulnerability in the policy if it's not stated that one of the potential outcomes is that the data could be processed or that that's one of the purposes for which it was collected. Like I said, it doesn't enable processing in all cases or in any particular case,

even. But let me leave it there. I will take more thoughts and questions from the queue.

JANIS KARKLINS: Okay. Thank you, Brian. Look, I think that here the conversation is whether stated purposes of data collection are sufficient or there is a gap. This transpired in our previous conversation and I recall the beginning of it saying that in Phase 1, about 1,000 hours have been devoted to the discussion of this topic. And so, I suggested that let's put everything in writing and see whether there is a gap or not.

Table was created. Staff put the reference URL in the chatroom. So, only one comment had been received. And I think that until we will identify whether there is a gap or not, it will be difficult to agree on any editorial suggestions, from one side.

From other side, I also think that if there is one or two groups of the team who wants to put something specific on the table, we should just not contradict existing policy, and if that is really strong opinion, whether other groups could let it be and could let that particular formulation be part of the initial report.

So, unless there is a contradiction … Then, of course, it's a different story. But if one group thinks that this should be and maybe other groups who do not have particular feelings should let simply go. With this, I am turning back to the queue. And I have Georgios, Margie, and Volker and the queue continues. Georgios, please.

GEORGIOS TSELENTIS: Thank you, Janis. Georgios Tselentis for the GAC. I would like, if possible, to get just or a minute my other hat as European Commission because one was coming from my institution regarding this purpose. I would like to state … It is in our letter but I would like to state the [inaudible].

JANIS KARKLINS: Georgios, I am afraid that your sound is not really good.

GEORGIOS TSELENTIS: Can you hear me now?

JANIS KARKLINS: No. You are cutting in and out. Try again, please.

GEORGIOS TSELENTIS: Yes. I was saying that the reason for not giving our support to this purpose was solely on the conflation between ICANN purpose and the purpose of third parties. Having said that now, in the proposal that I see now from Brian, I would like to make just an observation because it starts by talking about the role of ICANN as data controller. And to our discussions so far, we can see that ICANN is not the sole data controller.

So, if somebody reads the purpose as written, we cannot see there that this is a controllership issue here, as I read the purpose. ICANN, as it is in this, has to enforce the policies. They are not the only one that

enforce the policies regarding the registration data. So, maybe with some further tune-up, this purpose could advance further. Thanks.

JANIS KARKLINS: Thank you, Georgios. It would be good if you could also help to tune up the language because of your very unique perspective from the European Commission side. Margie, you are next, followed by Volker and Marc Anderson, in that order.

MARGIE MILAM: Thank you. I was going to say the same thing that Georgios said, in the sense that the comments that raised the conflation issue didn't say that the purpose was—at least the first part of the purpose—was a problem. It's merely that the two elements of the purpose shouldn't be joined together. So, by separating them, we alleviate that concern.

But I also wanted to share some observations that I've already shared on the list about areas that are not covered under the current purposes. And so, if as you build out the table, I would ask you include them, one of them being operationalizing and implementing new policies and contract provisions. And here, we're talking about RDAP transfers, Trademark Clearinghouse. I think that the language the Brian proposed doesn't pick up all of those elements.

Secondly, conducting research using the contacts, that's not covered by the language proposed and would be covered under the original purpose two. The third is coordinating cyberattacks, such as Conficker

and other things like that. Those involve using contacts and that's not covered by any of the purposes.

Publishing the accuracy of system reports … Those access the contacts. And conducting testing of a new registrar and registry is to ensure that the WHOIS systems work in the manner required by the contracts. So, there's a lot of OT&E testing that goes on, that involves contacts. And even things like implementing and testing escrow deposits with third-party escrow providers for the WHOIS data. All of that is something that is not currently included in the purposes. And I would propose we go back to the original purpose two, which had consensus in the report, and keep the original preface to the language. Thank you.

JANIS KARKLINS: Thank you, Margie. Volker?

VOLKER GREIMANN: Yeah. Thank you. Just putting aside my Corona here.

JANIS KARKLINS: I hope not virus, but a beer.

VOLKER GREIMANN: Yes. Of course. I had a call with Brian last week. And the thing that we realized and ended up on, and what Brian is trying to address with this language, although I think it can still use some work, is that we figured

out that ultimately, the purpose here is not any of the other contractual issues that ICANN is dealing with but rather those that specifically rely on having access to SSAD or provisioning SSAD. So, basically what is ICANN's purpose I having this SSAD available and what is ICANN looking for, from its own interests in maintaining SSAD? That would be a purpose as a controller. That would be its purpose, maybe even as a user.

But all these things like escrow and UDRP that are additional, and that ICANN doesn't have a functional role in or didn't need the WHOIS and wouldn't need the SSAD for because they have different access to that data, would not flow into that.

And I think we would be supportive of a language that clearly delineates the interests of ICANN as opposed to the interests of third parties in having SSAD. And I feel that maybe the best language that we can propose here is to have some form of placeholder language that allows ICANN Org to implement its own view of what they are as a controller, what their own purpose is in having SSAD—instead of us dictating that to them, ICANN Org providing that to us. How do they see their role? What is their purpose? Why do they need SSAD?

I think if ICANN Org could answer that question for us, which I think they are better equipped than we are, then we could move a large step forward on this. Thank you.

JANIS KARKLINS: Okay. So, before I'm giving the floor to Marc Anderson, let me see or let me warn some of ICANN Org liaisons on the call. Would you be able to answer that question that Volker just raised or suggested? Please think about it. Marc Anderson?

MARC ANDERSON: Thanks, Janis. Volker made a lot of really interesting points there. And it sounds like he's had some conversations with Brian about what is missing here and what language is needed to accomplish that. And I think I'd be interested in hearing some additional work along those lines. I don't think that the latest language that Brian proposed accomplishes what Volker was suggesting. So, maybe more discussion is needed there.

I did raise my hand initially, though, in reaction to something Chris Disspain put in chat. He noted that this is a topic that the Board is planning to discuss and hopefully provide information on. He said, "Just to let you know, the Board will be discussing this today and over the next couple days and we hope to give you input on the Board's attitude re this soon."

So, I wanted to flag that for everybody. I think it would be extremely helpful to get input from the Board on this one. I think we all noticed that the Board did not approve that specific purpose when they were discussing the Phase 1 recommendations. And so, I think it would be extremely helpful if we'd get further input and guidance from the Board—on this to help inform our work. So, just highlighting that for everybody and just maybe give it a plus one, Chris. We'd love to hear

more from the Board on this one, or at least I would, and would appreciate that input.

JANIS KARKLINS: Okay. Thank you, Marc, for being sharp of the Board Liaison and reading their chats. So, I have two more hands and then I will not take any further hands. In light what Marc just said, the Board will be looking itself in the topic and they'll provide some for the conversation. So, I have Amr and Milton, in that order.

AMR ELSADR: Thanks, Janis. Apologies for taking a minute to get off mute. To be honest [inaudible].

JANIS KARKLINS: We lost you. Amr, we lost you.

AMR ELSADR: It seems to me that we're, again, we're just … Oh, sorry. Can you …

JANIS KARKLINS: Sometimes we hear you. Sometimes, no. Now I don't hear you.

AMR ELSADR: I don't know if it's any better now.

JANIS KARKLINS: Now it's better.

AMR ELSADR: No?

JANIS KARKLINS: Yeah. Now we hear you. Go ahead. You're normal. Just talk.

AMR ELSADR: Hello? Okay. Well, Janis, your audio's breaking—

JANIS KARKLINS: Now it's okay. It's okay.

AMR ELSADR: All right. Great. Thanks. So, it seems to me that we're revisiting some of the discussions we had on this purpose in Phase 1. And at the time, one of the issues that was raised was that we need a placeholder recommendation in Phase 1 in order to ensure that we will address third-party issues as part of Phase 2, which we have been doing. So, to me, that cancels out the need for purpose two in the first place.

But then again, Margie now raised a bunch of other purposes, or potential purposes, over email. And Margie, thanks for putting those in the chat. It seems to me that all of these are very specific issues that need to be dealt with individually.

We can't have a one all-encompassing purpose, or a purpose to rule them all, that addresses all of these issues. If there are new policies that are developed concerning gTLD registration data, then these new policies have to address the lawfulness of processing the data in the same manner that we've done. We can't just set a purpose now the covers everything in the future.

Some of the other purposes that I think are not necessarily applicable … I don't know that ICANN actually coordinates responses to cyberattacks or not. I don't think so. ARS is an ongoing discussion, in terms of whether accuracy is within or not within scope of this EPDP. Personally, I think it isn't. And also, the Trademark Clearinghouse process registration data [inaudible].

JANIS KARKLINS: Amr, again you are fading out.

AMR ELSADR: [inaudible] the Contracted Parties. But again, just putting all those in a list and potentially adding to it in the future I don't think is something we can do now. These need to be addressed. And if, for example … If there is any processing of gTLD registration data required by the TMCH, then that needs to be taken care of on the RPMs PDP but I don't imagine that there are any. So, I am inclined to recommend that we drop this purpose altogether because we seem to be failing to identify a specific purpose that this addresses. Thank you.

JANIS KARKLINS: Okay. Thank you. I think we're talking a little bit past each other. So, there is a group that wants the very specific mentioning of that. There is a group that does not want it. And then, there is groups in the middle who can live with the language, if that does not contradict existing policies. And we need to reconcile both groups on both sides of the spectrum.

So, I said that I would not entertain further discussion after Milton. In the meantime, Mark SV has raised his hand. We still have other things to discuss today. Milton, please go ahead. Milton?

TERRI AGNEW: Milton, if you could please check mute on your side.

JANIS KARKLINS: While Milton is unmuting, Mark SV, please go ahead.

MARK SVANCAREK: Thanks. I think Amr said some interesting things. My main takeaway from it is that in order to avoid the idea of omnibus purposes, it makes more sense to just have more purposes. So, you could add several purposes which are more narrow and more well-defined and I think that would solve that problem in particular. Also, we should probably consider the purpose of ICANN as ICANN as we know it today and also ICANN as the gateway operator. So, those might be helpful ways to think about this. Thank you.

JANIS KARKLINS: Thank you. Milton?

TERRI AGNEW: Milton, if you could just check mute on your side.

JANIS KARKLINS: So, it seems Milton has a problem. Look, I think we need to continue this conversation—take it offline. If I may ask Brian to continue, and then maybe Volker, and also Milton or Amr from NCSG group, to see whether we can find any converging language in that small group conversation. And, of course, as we learned, the Board will be looking into the issue. And Chris, I hope that you will be able to provide some input, maybe by end of this week. So, that would be very helpful. Thank you for confirming, Chris.

So, with this, I would draw conclusion to this conversation today. We will come back next week and continue. In the meantime, as I said, please continue online conversation and searching for a compromise solution.

So, now we have agenda item eight, and that is to confirm that our next meeting is on Thursday, 12 March. And we will start not as usually at 2:00 PM UTC but we will start at 4:45 UTC. And the topics that are currently scheduled for the meeting will be second reading of feasibility of unique contacts to have a uniform anonymized email, and the city field redaction, as well as accuracy and WHOIS, as well as financial considerations.

So, on the latter ones, please look at the document that has been drafted in response to questions received from ICANN Org. I understand that no inputs so far have been received. And that is essential that we send these replies as soon as we can.

So, with this, as I suggested, I would draw conclusion to the team's call today. And we would switch to the small group mode.

BERRY COBB: Janis?

JANIS KARKLINS: Yes?

BERRY COBB: You wanted to get back to the affiliated privacy/proxy—the sidebar—real quick, before we closed out the main session.

JANIS KARKLINS: So, what was the issue there? I think we concluded that conversation. My conclusion was, after conversation, that the text, as drafted on the screen, would find exit in the initial report on priority two issues.

BERRY COBB: That's right. My bad. Thanks.

JANIS KARKLINS: So, with this, I close the team meeting and open the meeting of a small group on proposed use cases that support automated disclosure decision from day one. The document is now on the screen. We had reviewed the first four cases. And staff and the penholders took good notes on all concerns that have been expressed. So, we still need to go through all remaining cases. And so, then we will see where we are and what kind of common ground we can find. I see Alan's hand up. Alan?

ALAN GREENBERG: Thank you very much. I'm not part of the small group and I don't plan to be active in the discussion. But I would like to say something to start. It's something that came up another day in one of our other discussions. We have been told repeatedly by the European Data Protection Board and the representatives from it that they cannot comment on generalities. But if we give them specific things, then they will try to give us some guidance as to whether they are legitimate under GDPR or not.

As we go through these use cases, and these specific examples of what we may or may not try to automate, if we are extremely conservative and only put in our report things that we are absolutely sure are safe and legitimate, we are walking away from the offer from the Data Protection Board to help us. I believe that in our draft report, we need to be somewhat more aggressive, and identify ones that we are not absolutely sure are good, and look for guidance from the European Union and the Data Protection Board and data protection officers.

If we don't do that, then we will take an exceedingly safe position in our draft report but we won't learn anything again. And I think we have to avail ourselves of the input that has been offered multiple times and not be so conservative that we are walking away from it. I would suggest that, as we go forward looking at these cases, that we keep that in mind.

We may end up getting feedback that says, "No. You're wrong. These are indeed not safe and they're not legitimate." And we will learn something from that and the final report can take that into account, or evolutions as we go forward. We don't have to implement all of these but if we don't test them, we're losing the opportunity. Thank you.

JANIS KARKLINS: Thank you, Alan. I think, maybe also for the purpose of audience following this conversation today, the initial report of SSAD contains two examples of cases where automation could be done from day one and the placeholder suggesting that work on other cases continues. And this is the part of that process. We're continuing examining real use cases that may find entry in the final report.

So, when it comes to the questions to European Data Protection Board, Alan, from the meeting that I attended, I have personal doubts that they would venture to provide any input in the timeframe that is set for us. They may provide input at one point, at the later stage, when the report is out. But I would not count on any interim, clear-cut advice from them until June. So, I regret to say that but this is my

impression from the conversation I attended. Alan, your hand is up. You're in line or let's hold on? Thank you.

So, we're now on case five, clear cut trademark claims and maybe I can ask Mark SV to kickstart the conversation.

MARK SVANCAREK: I'm here.

JANIS KARKLINS: Go ahead.

MARK SVANCAREK: All right. Welcome, everyone, to the ever-growing small group discussion on use cases that could support automated disclosure decisions. We've made it up to number five, clear cut trademark cases. This is going to be a tricky one, so I'm expecting a fulsome discussion.

And it does help if you remember some of the assumptions from earlier in the discussion. One of them in particular is if you're planning to take legal action, that should be part of your request. And if you are planning on not taking legal action, that should be part of your request.

So, in A, the trademark owner of—and then we have a placeholder here, some sort of a trademark string—submits the request for RDS data, which supports their trademark infringement and justifies the need and necessity to get access to the registrant RDS data in order to

determine what they're going to do next. So, are they going to file a claim? Are they going to just try to contact the person and ask them to cease and desist? These should be called out clearly in the request. It makes the decision making easier.

And there are some clarifications here. When we say that it's a trademark, it has to be in the Trademark Clearinghouse and it has to be a live trademark, not something that's in process, or something that has been rejected, or something that has expired.

The second point is that the trademark owner has proved its agency to request the data, either as the owner or the trademark or the entity acting on behalf on the owner. This is another thing that we'll have to determine—how to express that in the request format.

There are some limits on this. How can you say that something is clear cut? And so, the first suggestion is that the trademark string must be of sufficient length and complexity that collisions are unlikely. And so, I put the example of Microsoft there. And we had already begun the discussion of what happens if you have something that is long and complex and yet still has unclear trademark ownership?

The second one, 5CII, the trademark name … Nonpublic registration data requested has to be identical with the trademark or the trademark is a prefix, infix, or suffix of the trademark name. III, automation would not work for figurative marks or where the domain name is allegedly confusing, similar to the trademark. There is a lot of concern that this case would be pushed forward for things that are

allegedly confusingly similar. And so, that's a good discussion. And here, we're putting forward that that's not the intent of this.

And then, finally, I think this is very important for all these cases, not just for this one. The gateway can apply a published algorithm to ensure that recommendations are generated consistently. I think it should be an overall assumption, that all algorithms are published. I don't remember if we had that as an assumption earlier. Let me look. No. So, we should always assume that the algorithms used for any automation are published publicly because that's the best way to ensure that there's no systemic problem in the algorithm itself.

JANIS KARKLINS: Okay. Thank you, Mark. I have a few hands up for comments. Brian, Volker, Amr, in that order.

BRIAN KING: Thanks, Janis. If I can elaborate a bit on the value here, we know that the GDPR permits data to be processed for the establishment of legal claims. I think we've done a good job here of spelling out some ways that we can make sure that we know that the requestor has some legal protections—they have some IP that could give rise to a legal claim, should the IP be infringed and we have at least some evidence that the IP is being infringed by limiting the requests to an exact match of the string.

I think we've gone a bit above and beyond what the law might require by introducing these length and complexity requirements that Mark

mentioned. So, you can have a trademark … There's a computer company called CA. I think we're willing to limit, for expediency here, this type of processing to trademarks that are a bit longer to avoid any kind of false positives. And then, let me leave it at that. I see a queue here of folks that might have some other thoughts.

I would just finally add, before I yield, that it's not in ICANN's remit or in the Contracted Parties' remit to be the arbiter of a trademark infringement case. I think we don't want the SSAD to be running little mini trademark trials every time somebody wants to process data. The law doesn't require that and I think we'd be foolish to ask registrars, many of whom don't employ a full-time attorney, or a full-time data protection officer, or a full-time trademark expert, or might not even have many folks that speak English or any given language, really, to do this, based on trademark rights anywhere in the world.

So, I think we have a pretty legally-sound case here for disclosure in all cases that meet this criteria. So, love to hear what everybody else thinks. Thanks.

JANIS KARKLINS: Okay. Thank you, Brian. Volker?

VOLKER GREIMANN: Yes. Thank you, Janis. And also, thank you, Brian. I don't disagree with you that trademark claims, especially the clearer ones of that, have a good case of requesting disclosure. I just have very great doubts that

these disclosures can be automated, simply for the fact that trademarks are not universal rights. They have their limits.

If we take the example of Microsoft that Mark SV so graciously put there, even Microsoft might not be protected for every category that's out there. And if I, as a creator of gummy bears, wants to create very small and very fluffy gummy bears for people to eat, and you haven't protected the food category, I might very well register microsoft.food or .gummybear and have that as used. And any disclosure that would be automated would be infringing on my rights as the registrant.

So, there's many elements in there that simply, in my view, cannot be automated because they require some form of meaningful human review. And therefore, I would say that yes, this is a use case for disclosure. However, this is probably not a very good use case for automated disclosure, simply for the fact that there are so many elements that need to be reviewed by a human being at this time. Once we have artificial intelligence, that might go away, but that's what the evolution of this process is for. Thank you.

JANIS KARKLINS: Okay. Thank you, Volker. Amr followed by James. Yeah. I completely agree with what Volker just said. He pretty much covered what I wanted to say. The existence of a trademark in the TMCH does not mean that any sort of flagging of a registration that, as a result of the existence of that trademark in the Trademark Clearinghouse … It doesn't mean that there's an automatic claim to the trademark holder on the string that was registered. That's just a flag.

So, the Trademark Clearinghouse basically involves the trademark notifications and the sunrise registrations. For the purpose of this discussion, sunrise doesn't really apply. But for trademark notifications, just because a notice has been posted to a registrant upon registering a specific string, that doesn't automatically mean that this registrant is infringing on a trademark holder's rights. It's just a warning that this might be the case. And this is where the meaningful human review that Volker mentioned comes up. It's part of that process.

So, what's being proposed here is basically a change to that process that requires no human review and enables the trademark holder to seek disclosure of the registration data involved with that string in an automated fashion. I don't think that is correct and I don't think that dropping the balancing test in evaluation of the disclosure request for this type of case is applicable. Thank you.

JANIS KARKLINS: Okay. Thank you, Amr. James followed by Margie.

JAMES BLADEL: Thanks, Janis. Mostly, I think Amr and Volker captured a lot of my concerns around the idea that we can automate clear cut trademark claims. I have a couple specific concerns. I'm not sure if they were mentioned. The first one is the proposal that this be a prefix, a suffix, or an infix of a string in a domain name. There are numerous examples where that just fails.

There's one reason why the Trademark Clearinghouse doesn't use this approach. And I think we used the example, for example, that the Microsoft product surfacebook.com contains an infix of the string facebook.com. So, it's really easy to see collisions there.

Also, I'm concerned that there's no way to automate a test for fair use. If I say, "I like Microsoft," or, "Vote no on Exxon pipeline," or something like that, that this algorithm does not allow for the possibility that those registrations are legitimate criticisms or whatever of a brand and therefore would fail a balancing test to disclose the registrant's personal information.

So, this is complicated and I think that's one of the reasons why I don't think it's suitable for automation. I do agree that trademark infringement is one of the potential avenues that would require disclosure of registration data. I don't think anyone disputes that. I think the concern is that automation is open to abuse and error.

And I think Brian King and I agree on that part, which is that ICANN and Contracted Parties are not well-situated to understand all of the complexities and nuances of trademark law, and the context, and industries, and markets where that's applicable. But that's exactly what we're trying to do by developing an algorithm and automating that is we're trying to say that, "Yes. We are qualified to make those determinations and we're going to bake it into some code."

So, ideally, there's a bit of a contradiction there. If we agree that it's too complicated for us to take on here, then we should also

acknowledge that we're not going to write a couple hundred lines of code and solve these issues.

And finally, I would just also note that we do have an automated channel for clear cut cases of infringement, which would be that we could automate, and I think Contracted Parties have agreed that we could automate, disclosures to UDRP and URS panelists as a function of that policy. And that would be, I think, one area where I would be more comfortable with automating disclosures. Thanks.

JANIS KARKLINS: Okay. Thank you, James. Margie?

MARGIE MILAM: Hi. I think we're talking past each other because one of the things that I think the Contracted Parties are forgetting is that they don't need to be the arbiter of the trademark dispute and that the request for information is oftentimes used by the trademark holder to establish whether it should bring a claim.

So, in the example that Volker gave, a different category from the trademark rights, that's exactly what the trademark holder is trying to figure out when they make their request. They take a look at it. Then, they realize, "Oh! It's that entity that has a trademark right in the domain name. I'm not going to proceed."

And so, we don't want to get in the middle of that. In fact, that is something that we should encourage happening. Otherwise, the only

option is a UDRP or a lawsuit and neither of those are good avenues to resolve things that can be done quickly. If you think about phishing, for example—phishing domain names that involve trademarks—you've got to resolve a phishing dispute within hours, not months that take when you go through a UDRP or URS.

So, I really think that we have to look at this from a higher level and that we have to acknowledge that when you're making the requests, you're subject to all of the representations and all of the risk of losing your accreditation if you submit a request that's erroneous. And that's why automation makes sense in a case like this because we're relying on the trademark holders to assert that they're doing it in good faith and to risk whatever penalties or loss of accreditation if they submit erroneous requests.

So, I just want to make sure that we don't lose sight of the fact that that is not the role of the Contracted Parties, to decide whether or not somebody has a legitimate right and someone else doesn't. That's not the purpose of this. The purpose of this is to allow the trademark holders, once they've asserted their rights and made all the representations that they need to make, so that they can do that analysis.

JANIS KARKLINS: Okay. Thank you, Margie. Mark SV followed by Volker.

MARK SVANCAREK: Thanks. I think a lot of what I wanted to say has already been said so I'll just make it quick. There was a mention that there's a reason that we have trademark attorneys. I think Margie made the point clearly that if an accredited user is making a credible claim that they want to determine if a trademark infringement has occurred with a jurisdiction or subject to whichever rules, you wouldn't want to put the onus of that on the registrar themselves because they would be less qualified to determine that or not.

And then, I think we're going to have to have the discussion about 6(1)(f) being automatable or not. That's not specific to use case five but I think it's an issue we're going to have to talk about. Thanks.

JANIS KARKLINS: Thank you. Volker?

VOLKER GREIMANN: Yes. Thank you. Sorry it took so long. I have my doubts that 6(1)(f) is automatable at this time, simply because it requires balancing of arguments—those that are made by the disclosing party and the facts that are known about the disclosee, so to speak. So, ultimately, I think this is something that lies with the controller or the entity holding the data and that is problematic in automating that at this stage.

There might be something, down the road, that we can say circumstances have changed. But at this time, I think we simply have to stay on the position that yes, you do have a right to disclosure if you can make a case that there is a likelihood of a violation. But please

note that this determination will have to confirmed by a human mind that has to look the facts and your arguments first before we shuffle it through. So, the automated process that will indefinitely, at some point, in some cases, violate the privacy rights of the data subjects that are affected by this as well. Thank you.

JANIS KARKLINS: Okay. Thank you, Volker. Amr?

AMR ELSADR: Thanks, Janis. Two quick points. Use case 5A states that the trademark holder has to justify its need or necessity to have the registration disclosed to it. This is exactly what needs to be balanced against the rights of the data subject or the name holder.

So, 5A only mentions half of what is involved in a balancing test. The other half is what we're arguing needs to be subject to human review. And from what I can tell, all the arguments on the need for this use case, they're all arguments on the potential necessity of having the registration data disclosed by no one is actually addressing why this needs to be automated. So, if someone could shed some light on that, that might be helpful.

The other quick point is … And this is not specific to this use case. But if we're going to recommend complete automation of any sort of scenario, we also have to consider that this has to be disclosed to the registered name holders. And we also have to bake in the data subjects' right to object to being subject to fully-automated

processing of its data, which is highlighted, I think, in Article 22 of GDPR.

So, this is something we need to consider and we need to consider how these cases would be handled. So, if a registrant clearly states that, "No. I object. I do not want to be subject to fully-automated [inaudible] in cases of any sort of processing activity." Thank you.

JANIS KARKLINS: Okay. Thank you. Brian, this is your old hand, right?

BRIAN KING: No, Janis. I've been waiting patiently.

JANIS KARKLINS: Sorry. I thought that this was …

BRIAN KING: It's a new hand.

JANIS KARKLINS: Okay. Please go ahead.

BRIAN KING: Thanks. Let me try to help folks understand where we're coming from here. In the cases of the Microsofts and the gummy bears and those things, what we're saying is that the GDPR permits processing for the establishment of a claim. And what we're saying here is that even if

the data subject is not infringing, that's okay. There's not going to be liability for the disclosure of the data in these circumstances.

By doing this homework—by requiring these representations, and validating that you have a trademark, and an assertion that you're investigating infringement—that all adds up to the data for the third party is going to be processed for the purposes of establishing a claim. And in those cases, even if the data subject is not infringing—which again, we would reiterate the Contracted Parties and ICANN are both wholly inadequately prepared to asses or establish—that in those cases it's okay.

That's why automation is necessary and attractive here, because if those questions go the Contracted Parties, we see on this call how much concern and question there is about whether something's infringing. And it could be evidence between the difference in standards between a trademark infringement case and even the UDRP, which are completely different tests in the trademark world.

So, because it's so unreliable when the test gets to the Contracted Parties … Again, without intending any disrespect to my colleagues on this call, most Contracted Parties have not seemed to be able or willing to respect a trademark claim and come to the right outcome, with respect to a WHOIS data request. If this can be done at the centralized level for at least some limited cases, this will be really helpful for the IP community. Thanks.

JANIS KARKLINS: Okay. Thank you, Brian. Alan Woods?

ALAN WOODS: Thank you. I wasn't actually going to weigh in on this. But just the very last line Brian said there, I think it actually brings up a very important question which was raised in the small team. I think it was … Just to give some sort of a background to those who weren't in the small team, myself and Mark SV did sit down when we were at the face-to-face, prior to one of the meetings—the last day of the meetings. We discussed and we actually came to an understanding which, unfortunately, I think, has somewhat gone to the wayside, just as the way the document has progressed.

That was asking that single question of who do you expect …? Is this a mandatory automation or is this at the behest of the controller? Because if it is at the behest of the controller—that is, the person who is making that disclosure decision—and these are suggested routes which a controller can go, "I'm happy to take that risk as me as a controller," then I think we will get a lot more. I said this in the team. We'll get a lot more consensus very quickly here.

The issue we have here is that these are things that we all have a lot of misgivings about because I understand how useful this is for the BC, and IPC, and those who are trying to protect trademarks and other issues. But this is not something that we can stand over saying, "In all situations, automation is going to be legal here." If it is me as a controller and I do my own DPIA, my data protection impact assessment, and I think, "The risk here is actually relatively low. It's a

good process to put in. It will save time for me. It will save time for them," then as a controller, at the disclosure stage, I will give this an automated heads up, or a nod, or whatever.

[inaudible] we have to do this at a centralized central level. At this particular moment in time, I don't think we're going to get very far. Maybe, down the line, once we have a lot more data to support and a lot more case law, maybe. That's absolutely not a door that is being closed. That is a door that is still absolutely wedged open. But at this particular moment in time, I think you need to look at what you're asking the Contracted Parties and ICANN to take on from a liability and a burden point of view.

I don't think we can automate it to the extent, at this moment—again, I say at this moment—that we can say that we can accept the risk here because it is still risky. But again, if you're saying it is an option, at the behest of certain controllers who [inaudible] take that, we should do that. And I think we will move forward a lot faster. It will be less contentious of a discussion and I think we can really move forward on this one. But if we're just going to [inaudible] to these [inaudible] and say, "No. It's all or nothing," I think we're going to have a difficult conversation and path ahead of us.

So, I would ask people to think about what the ask is here. Is it a "may" or is a "must?" And if it is a "may," I think we can we can move fast.

JANIS KARKLINS: Okay. Thank you, Alan, for concluding this conversation. I think there is clearly no consensus in putting this particular use case to be automated from day one. But as you suggest, there may be some possibility of automation in the future.

So, we still have another four cases to go and 15 minutes on the call. So, therefore, I would like to suggest, Mark SV, that we continue with case number six.

MARK SVANCAREK: Actually, I do think there is a comment that needs to be made. Alan made it but I just wanted to clarify. In version 2.01, everyone should look at assumption five, which is "the gateway may have enough information to make an informed suggestion to a CP regarding the CP's process or processing. CPs with enough confidence in the gateway may choose to automate, based on the gateway's recommendation."

So, the assumption of the document as written now in version 2.01 is that most of the time, these are "mays." So, always look at this as a "may." See if you can find an opportunity for a "must." I personally think that use case three can be a "must." I don't see any objection to that. But with the rest of these, probably your default review of it is as a "may" and see if there is a way to get to a "must." So, hopefully that clarifies things.

JANIS KARKLINS: Okay. Thank you. So, I think that if every use case is "may," then we're done. The question is—

MARK SVANCAREK: Well, I'm not sure that we're done. I really think that use case three really ought to be automated.

JANIS KARKLINS: That's what I'm saying. If you accept that everything is "may," then we're done. We'll put everything in "may" and no further discussion required. The discussion is required and agreement needed if it is "must." So, let's go to six.

MARK SVANCAREK: Okay. Yeah. And I see a lot of comments in the chat regarding "may" language. And I share those concerns that as soon as we get to IRT, all the "may" language is just tripped up.

All right. Use case number six, request for data from ICANN Compliance. This one has a placeholder. So, in A, it says, "In order to investigate something, ICANN requests RDS data for the domain name under investigation." These somethings could include auditing, validity of the name holder, compliance with other laws, such as accuracy under Article 5 of GDPR, should we ever get legal guidance on that. That would justify it.

B, "ICANN must agree to be a controller for the purpose of this processing." So, this is not a case where the gateway operator is the

controller. This is ICANN itself being a controller, regardless of whether it's the gateway operator.

And 6C, "ICANN must warrant that the data will not be used in a way that has legal or similarly significant effects on the data subject." So, this is another one where you have to say up front, "I am planning to bring legal action," or, "I am planning to not bring legal action."

Yeah, James. One of the things we discussed in the previous meeting is that if you elect to take legal action after having received it, under the previous assertion, you have to ask for it again and this time say, "Okay. Now I'm taking legal action." You have to be really clear about that, up front. You can't change your mind. If you do change your mind, it's a different data request—so, just for clarity.

JANIS KARKLINS: Okay. Thank you, Mark. Any comments? So, no comments at this stage.

MARK SVANCAREK: Well, there was a comment from Amr. I think that there is a potential edit that could be added to the document. You always have to warrant whether or not you're intending to take legal—to use it in a way that has legal or similarly significant effects because that's an issue related to automation. So, just assume, in all of these cases—I apologize that it's not listed explicitly in all cases—you have to say up front, "I'm planning to use this in a way that has legal or similarly significant effects," or, "I am planning to not do that."

That may not be definitive necessarily but certainly you have to say it. And if you decide later that you want to change the way you're processing the data, you must discard the data and request it again.

JANIS KARKLINS: Thank you. Amr, your hand is up.

AMR ELSADR: Thanks, Janis. Sorry. This tracks back to use case five. If we did edit that use case to include what is in 6C here, I'm not sure how that would work because my understanding is that part of use case five is that trademark holder wants to make the determination of whether legal action or something a little more lightweight will be required. So, the disclosure might very well result in legal action. So, just wanted to flag that. Thank you.

MARK SVANCAREK: Yeah. So, back to that. If, having examined the data, you determine that legal action is appropriate, you have to discard the data and ask for it again, under the assertion that that is your intention. It's a little bit onerous for the requestor, in some cases. For a large corporation like Microsoft, it's not really a problem. For smaller trademark owners, it may very well be a problem. But I think it's an appropriate safeguard that has to be state up front.

If you assert a purpose for processing and then you use it for a different one, you can't do that. And in this case, if my intended

processing is not intended for legal or significantly-similar effect and you determine while you're processing it that that is, in fact, what's going to happen, now you would be violating the assertions that you put forward when you requested the data in first place, which we've already decided is not going to be allowable. So, you would have to ask for the data again. The final version of this document should make that clear throughout.

JANIS KARKLINS: Okay. Thank you.

MARK SVANCAREK: Yeah. Amr, it's a different … Amr is actually making the argument about the butterfly effect, which is a thing indirectly leads to another thing. And I think the law will support that idea that if the subsequent request is different than the initial request that it's going to be automatable. We don't have a lot of guidance on this of course, but this is my expectation. So, butterfly effect is one of the terms that I use. It's very scientific and of art, I'm sure. But that's where I'm coming from there. So, thanks, Amr.

JANIS KARKLINS: Okay, look. Let us take number seven. This conversation is inconclusive, at least for me. But I have an idea. That is to ask groups to think, on all these nine cases that we're examining, in terms of three categories. One, must be automated from day one. Second is may be automated, moving to must at one point. And may be automated at

the discretion of each Contracted Party. And then we will see where we end up. But first we need to go through the remaining three cases and we have seven minutes. Certainly, we will not finish today. But we will take number seven today. Please, Mark.

MARK SVANCAREK: Number seven, identifying the infrastructure involved in botnets, malware, phishing, and consumer fraud. So, number A is "the requestor is accredited as cybersecurity professional and has agreed to comply with specific cybersecurity codes of conduct, if applicable."

Not everyone can simply assert that they are such a professional. I think Anti-Phishing Working Group is planning to create such an accreditation. I think that registry of last resort is planning to create such an accreditation. So, these accreditations or codes of conduct will probably exist before we even finish IRT. So, just FYI. But again, clarity. You can't just assert that you such a professional. There has to be some large organization providing that accreditation.

7B, "The requestor represents that it has investigated and confirmed that the domain name is being used as part of a criminal infrastructure." So, this is one more thing that has to be included in the request payload. "Direct evidence can be included in the request, based on the request contents building block."

7C, "The requestor asserts that the data will not be used in a way that has legal or similarly significant effects on the data subject." This is an interesting one because it's often asserted that finding criminal

infrastructure is automatically going to result in a legal action. And actually, there was a great quote that I heard at IGF this year—I got it from Milton—which was, "The firefighters need to put out the fires. They don't need to identify the arsonists or send them to jail."

And that's really the intent here, is to locate the infrastructure and make sure that the entities who are going to take it down do it but not try to necessarily even attribute the actors, like, "Actor A has done x, and y, and z. It doesn't necessarily mean that we have to definitely identify Actor A or make sure they go to jail. We just need to identify all the bits of the infrastructure itself.

Finally, 7D. So, here, you can see the explicit language was, in fact, used. "Data to be used in a way that has legal or similarly significant effects on the data subject will require a separate request."

JANIS KARKLINS: Okay, Mark. Thank you for introduction. Any comments from the members of the group? Can this case be automated from day one? Volker?

VOLKER GREIMANN: I think the same applies here. "May" is good. "Must" is bad. It can be automated but it shouldn't be required to do so.

JANIS KARKLINS: Okay. Anyone else? No hands up. Alan Woods?

ALAN WOODS: Thank you. Again, I just put it into the chat there but I know that it's hard to monitor everything. I just wanted say, especially there, with regards to "the requestor asserts that the data will not be used in a way that has legal or similarly significant effects on the data subject," that is part of the decision of the controller.

A requestor asserts that—very well may make that assertion. They may genuinely believe that assertion. But that does not mean that that is determinative of whether or not there is a legal effect on that data subject. So, again, it's up to the data controller to weigh whether or not that assertion is good or bad.

So, that is not automatable. It is certainly something to … That, to me, is akin to checking a box, "Will this have a legal effect?" "No! Of course it won't." We have to be careful. I understand that most of the people making these requests are not going to be those people. But again, we're talking about on a case-by-case basis making that decision as opposed to a set accepting, on very single occasion, that that box has been checked correctly. So, again, looking at it from the registrant point of view, not necessarily from the requestor's point of view. Thank you.

JANIS KARKLINS: Okay. Thank you. I see here as well that consensus may be not immediate. We have remaining two minutes on the call and I have one further hand up and that is Hadia. Hadia, please.

HADIA ELMINIAWI: So, for this case, what if we are only asking about the contact information, so that you can contact whoever is responsible and maybe tell them about what's happening on their platform or how their domain name is being used. What if we are only asking for contact information in order to mitigate a risk. Would that be possible to automate?

And then, also, given the fact, for example, that .eu, they publish the contact information for that particular region—for the reason to be able to contact the domain name holder in case there is something related to the security of the domain name. Thank you.

JANIS KARKLINS: Okay, Hadia. Thank you for your question. Maybe Mark can think about it and we will come back to this small group meeting, most probably Thursday at the end of the team meeting. But as I suggested, staff will put this in doc format and then create a table. And I would like to ask all groups to look and see how they see all these use cases—whether they should be "must," whether they should be "may" going to "must," or they should remain "may" all the time.

So, with this, unfortunately, we have run out of time. Thank you very much for participation in the meeting. And we will continue this conversation at a later stage. So, thank you very much. This meeting is adjourned. Have a good rest of the day.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. We'll stop all recordings. Please remember to disconnect all remaining lines and have a—

[END OF TRANSCRIPTION]