
JOHANNESBURG – GAC PSWG Update to the GAC Plenary

Wednesday, June 28, 2017 – 08:00 to 08:30 JNB

ICANN59 | Johannesburg, South Africa

CHAIR SCHNEIDER: Good morning, everybody. This is the update of the PSWG, so please sit down and let them start. Thank you.

CATHRIN BAUER-BULST: Good morning, GAC. Thank you very much for being here bright and early after the fun evening yesterday.

This is Cathrin Bauer-Bulst for the public safety working group. We're going to provide you an update on two things, on the privacy proxy implementation team and on RDS in general, and then we also want to take a few minutes to discuss a possible GAC position on the RDS or the WHOIS conflicts of laws procedure where, as you may remember, we shared a draft about 10 days ago.

So let's start with the update on privacy proxy implementation, and for this, I'll give the floor to my colleague, Nick Shorey.

Nick, please.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

NICK SHOREY:

Thank you, Cathrin, and good morning, GAC. I hope you are all well. This is Nick Shorey for the record. A quick update on the privacy proxy services.

As you know, this is now at the implementation phase of the actual final policy following the final recommendations report that was produced, of which the GAC provided advice during the Helsinki meeting raising a couple of concerns regarding those recommendations.

As a result of that, a few GAC representatives, of which I am one, joined the IRT in order to seek to address these concerns in the implementation phase of the policy.

The members of the PSWG were asked to develop a disclosure framework that would help hopefully to reconcile these concerns, so a small team within the PSWG has been working on this since January. This was then endorsed by the PSWG, and, as you all know, by the GAC on the 2nd of June and then issued to the IRT.

The IRT have reviewed and discussed the document and a small number of edits have been proposed.

In the spirit of collaboration, this was shared with the PSWG last week, and yesterday members of the PSWG held a discussion with the IRT to talk about the edits and all of that.

The proposed edits pertain to the types of data listed within the framework, the categorization of high-priority requests, the publication of contact point information, and the time frame for review of requests.

I think it was a positive meeting. Certainly from a personal perspective, I think that some middle ground was found on data types and categorization of high-priority requests. Unfortunately, we ran out of time, as is often the case in ICANN sessions, so we are seeking to see if we can schedule a follow-up to cover the last topic. So we'll see if we can do that this week before we go home.

Certainly as one of the representatives for the GAC on the IRT, I've -- I sort of welcome feedback from PSWG folks that I can sort of take into the IRT as we continue to discuss this document.

We'll continue to sort of finalize this and the framework over the coming weeks which will then form part of the final policy document which will be issued for public comment hopefully in advance of ICANN 60. We anticipate around about September time.

So we'll continue to sort of work within the IRT, negotiate, and finalize this stuff and then there will be a public comment period where there will certainly be a substantive opportunity for the GAC to express its views either way on it as well.

So please do keep that in the back of your minds and on the horizon, because it will be a very important step for this.

That's all I have on this, Cathrin, unless there are any questions, I suppose.

CATHRIN BAUER-BULST: Thank you very much, Nick, also for your hard work on all of this.

Are there questions to Nick on the PPSAI?

Okay. If there isn't any, let's move on to the next agenda item, which is the RDS work that is going on, and I think the first item on the agenda was the feedback from yesterday's session on the impact of the GDPR on the WHOIS.

So there was a cross-community session yesterday which I think most of you attended where we tried -- where I was also one of the speakers who tried to present a little bit how the E.U. general data protection regulation actually works, and then Becky Burr from the ICANN board and Theresa Swinehart from ICANN org took the audience through some of the impact that they see on ICANN systems and the need for some pretty much immediate steps to take in order to ensure compliance by the time the regulation becomes applicable in May 2018, and that is actually a process that's -- I think is of some interest also to the GAC, and I understand Becky has reached out to the GAC to try and get the

GAC involved, so she is convening a small group of people from all across the community to try to not design new policy but, rather, to look at how the existing contracts can be interpreted and construed in such a way -- for example, through guidance given by ICANN or other means -- to allow the contracted parties to not violate the GDPR and at the same time, I suppose, to try and preserve as much of the WHOIS as possible, for the time being, while the RDS policy development process is still ongoing.

And if -- I guess Thomas, I don't know whether Becky has already spoken to you, but if the GAC were to be contacted, of course we're always ready to support the GAC in this work also in identifying the purposes for which public safety agencies, including law enforcement and others, might need to access the WHOIS data, which I understand is a big part of the exercise that Becky wants to go through.

So from the perspective of the GAC public safety working group, we would very much support this process and the involvement of the GAC and would recommend that we actively participate in this, because quite frankly, it seems the only way right now, in view of the current state of the RDS PDP, to ensure that there is a modicum of conformity with the E.U. general data protection regulation by the time it enters into application.

So maybe I'll just stop here and see whether anybody has any questions or views on this.

Yes, please.

SOUTH AFRICA:

Thank you very much. I just have a brief question. I know that probably maybe you've discussed this. Is there a plan to actually extend the issue of data protection, not looking only at the E.U. perspective, but also looking at global regulations or even regulations in other areas, because I see that your focus is E.U. Thank you.

CATHRIN BAUER-BULST:

Yes. Thank you for that question. This is Cathrin again.

To my understanding, there are processes ongoing also to take into account other laws, and just as an example, in the bylaws it now says for the RDS review team, that we also have to take into account the OECD privacy principles, so there's a number of other privacy frameworks around the world and some of those are distilled into those privacy principles, so there are other efforts ongoing.

As I understand it, this process that the ICANN board now wants to launch is very much focused on the GDPR because of the

immediate need to comply with that before May 2018, but to my understanding, the data protection laws that have been adopted around the world recently and the changing frameworks, a lot of them share a lot of the same principles as the GDPR, so to my understanding we would also be doing better on compliance with other legislation, once we start looking at complying with the GDPR.

Are there other questions or comments? Okay. Oh, yes, please.

INDONESIA:

Just a short question. One of the things that was mentioned since last ICANN is the possible problem that the WHOIS data maybe conflict with the local law regarding personal data protections. I just wonder if you already have -- ICANN already have some sort of cases regarding that problem, real cases on any country. Thank you.

CATHRIN BAUER-BULST:

Thank you. This is Cathrin again. To my understanding, the .AMSTERDAM registry has stopped providing WHOIS data altogether at the moment because of conflict with the Dutch law. And they are looking to obtain a waiver from ICANN. That is the one case that I know of where the WHOIS data is now completely unavailable, and I think there may be more to come.

Yes, please.

INDONESIA:

Just a continuation. Is there any cases where when you do WHOIS lookup, you can have the personal data, then to avoid WHOIS data to be able to be seen by other people and you have to pay particular more money for the operator not to show the data for the public? Is there any cases like that? Thank you.

CATHRIN BAUER-BULST:

Yes. This is Cathrin again for the record. And I'm sorry, I will probably have to ask you to identify yourselves for the record also.

There is such a service. There's a paid service, which some companies also offer for free but generally it's paid. It's called the privacy and proxy service. And this is as of now a sort of unregulated service. And Nick's work is aiming at implementing the first accreditation system for WHOIS services.

We had an interesting conversation yesterday on the sidelines with two researchers. And it turns out, there's about 570 WHOIS -- sorry, privacy and proxy organizations in service right now. And about a quarter of domain registrations use privacy-proxy services, if I'm not mistaken. So it's quite a significant business also for registries and registrars which provide these services.

INDONESIA: Just for the record, Cathrin, Ashwin from Indonesia.

CATHRIN BAUER-BULST: If there are no other questions or comments, let me briefly update you on the work of the RDS review team.

So as you know, Lili Sun and Thomas Walden and I are the GAC representatives to the RDS review team which looks at the state of the current WHOIS and whether it still meets its needs. And as you may remember, there was some discussion around the scope of the review, and that's one of the first points that this RDS review team actually has to tackle. We have not yet had a formal meeting, but we had our first informal meeting yesterday. And I think we're very close to coming to an understanding on the scope already. So as we were mandated by the GAC to ensure that this was not just a post-mortem review of the first WHOIS study and the implementation of its recommendations but rather to also take a look at the current state of the WHOIS as it is now shaped and at whether it still has the -- or whether it meets the criteria that is set out in the bylaws inter alia to serve the needs of law enforcement. And I think we're going to do exactly that. So we agreed with the people present. Not everybody from the team was present, but those who were present yesterday agreed that we should look, one, at

the recommendations of the old study, the old WHOIS reports and their implementation and, two, at the current state of the WHOIS because it might be around for a while to come and that the one thing we want to stay away from, of course, is to make policy recommendations on how the WHOIS should be shaped because that is the purview of the RDS policy development process, which is a separate process.

So that is the state of things right now. We're going to close this question over the mailing list hopefully in the coming days with the remaining members of the RDS review team who could not be there yesterday. And then we should be fine, and that should match exactly the scope that you told us to aim for. So I think that's good news for us.

Does anybody have any questions on this? I think then we can move on to just a quick update on the next-generation RDS PDP.

Greg, do you want to take it?

GREGORY MOUNIER:

Good morning, GAC members. I'm Greg Mounier from Europol. On behalf of the public safety working group and together with colleagues such as Tjabbe Bos from the European Commission, we are monitoring the development of the next generation RDS policy development process. For those of you who are not

familiar with this PDP, it's -- it has been launched by the GNSO in January 2015. And it's a very old process in the sense that ICANN already had in 2012 a final report on the future of the RDS and then that led to an expert working group which delivered a landmark report in 2014 on the future of the RDS. And then the policy development process was launched in January 2015.

This is attracting a lot of attention, so we are about 190 observers and members. On the call every week, you have much less people to be honest. A number of GAC members also officially are part of that process.

In terms of updates, over the last 18 months, we had a lot of discussions, protracted discussions, involving the various communities with obviously different interests in terms of data privacy and access to public information and laws. So the leadership team has decided to take a rather pragmatic approach. So for the last six months, we have been discussing mostly thin data which means, in fact, part of the WHOIS which does not include personal information on registrants; but you can find, for instance, the registry which would give you a domain.

So we have been through a number of user purposes. We have been through a number of ways to access information, and we

reached a number of informal and draft agreement and a number of processes.

But what is important for you to keep in mind is that, of course, the outcome of the general discussion which is actually starting now on the impact of the GDPR, on the WHOIS, and on ICANN in particular will have a massive impact on the outcome of the PDP.

So my personal impression is really that we are -- I don't want to say beating around the bush but just addressing a number of issues, waiting for the big questions which is the impact of the GDPR, of course.

In January, we were supposed to issue a first interim report. This was postponed. We don't really have a date.

After the ICANN meeting in Copenhagen and the engagement with the various data protection authorities, the leadership team of the PDP has sent a number of questions to various data protection authorities. We got some answers, and now we're processing the answers.

I know that the leadership team is also minded to request some official legal advice on the issues and the impact of the GDPR on the outcome of the PDP.

So, yeah, currently, although we are making progress, my feeling as a public safety working group member and advising on the GAC, I think that we are also very much in the expectations of the outcome of the discussion on GDPR.

I think that's it, ICANN. Thank you.

CATHRIN BAUER-BULST: Thank you very much, Greg. This is Cathrin again. Yes, I think this just highlights the concerns that also were shared yesterday in the session and that have prompted the thinking about other steps that need to be taken in the interim to ensure that we have compliance with the applicable laws. So I can just encourage everybody to think about that as a possible way forward.

The final point we want to discuss today is the GAC position on the public comment period on the procedure for handling WHOIS conflicts with local laws. So as you may remember, there's -- there's a process already in place for those contracted parties that feel that they're -- that the policy they have to follow at ICANN conflicts with their local privacy laws, including data protection laws.

And this procedure was found to be quite cumbersome because in the past, you pretty much needed to get a judgment or a

decision against you from your data protection authority in order to be able to claim a waiver.

And, therefore, attempts were made to adapt the process to make it more flexible. And a new rule was introduced that would allow -- that would allow the contracted parties to basically use advice from their local data protection authority as a basis for applying for a waiver. So it would present a hypothetical situation to the local data protection authority and then get advice from the data protection authority that this would probably not be in conformity with the law and then would submit that to ICANN to ask for a waiver.

Now we have -- the GAC has consulted at the request of the ICANN board various data protection authorities, and the Council of Europe had kindly taken the lead in coordinating input from a large number of data protection authorities. We also had input from Europol and the data protection authority, and I think there was separate input -- no, Interpol was also included in the other one. And we had input from the European Commissions' data protection unit also.

So were three different sets of expert inputs, and what we have proposed to the GAC is to forward this without taking a specific position on the experts' opinions, which are not identical, but all of them raise major concerns with this idea that DPAs, data

protection authorities, could give advance opinions in all of these cases that might hypothetically come up, and they also raised the concern that in any case, those opinions would not be legally binding. So the data protection authorities would need to stay free to also take a different view of the same case when they came back to it at a later point in time. So it wasn't seen as a good way forward.

And so what we have put in the GAC sort of chapeau for this -- for these three expert inputs was just to say, "This is the expert input that we are providing as the GAC, as requested by the board. We are not endorsing it. We're providing it as expert input. But we would just like to highlight the fact that all of the inputs states that this procedure or this adaptation of the procedure is actually not a good step forward because it does not -- it doesn't actually address the issue, and that perhaps this would also be another incentive to focus on the RDS PDP to focus efforts on actually reducing the conflicts with privacy laws."

So that's what we have proposed as the possible GAC chapeau, not really a position, but as the GAC letter to respond to the request from the board to provide input from experts.

And you see it now on the -- on the screen, I hope, and we have time until the 7th of July to submit the public comments, and I

guess to respond to the board, so one possible way forward would be to forward this to the board in response to the -- to the letter that was sent, but also to instruct the three different sets of stakeholders, so Europol, the European Commission and the DPAs coordinated by the Council of Europe, to submit this as part of the public comment period separately so that it's officially entered into the process.

Now, I know that there were some considerations to possibly also have a GAC position on this, so if any of you have views on this that you want to share, please do so now.

Yes. Ashley, please.

UNITED STATES:

Thank you.

I want to first thank you for this excellent draft, but to be quite honest, we just haven't had time in the U.S. to actually do the proper interagency consultation and I was just wondering if it was possible to somehow do, via email, an endorsement procedure after -- somewhat immediately after this meeting to just allow additional time for internal consultation in capital. Thank you.

CATHRIN BAUER-BULST: I mean, for us this would be perfectly fine. We still have until July 7th, in any case. This is Cathrin again for the record.

I think in view of what has been shared at ICANN these last days, and especially in view of this process that the board is thinking of launching, we might also want to consider adding a sentence on our position on this new separate process that is being launched. That's also something possibly to consider via email. So if that would be of interest to the GAC, we can propose some language and then share it and then there can be consultation on the list before the public consultation closes on the 7th of July.

Is that something that people would find useful or would we rather not take a position on the -- on the separate process that the board is thinking of launching?

Should we circulate some language and then we can exchange views on the list?

Okay. I see nods. Excellent. Thank you, Mark.

You know, we're here to work for you so just tell us what to do.

All right. So that concludes our update to you. Thank you very much for your attention, and have a wonderful rest of the day.

CHAIR SCHNEIDER: Thank you, Cathrin and colleagues from the PSWG. We will continue with the next session in a few seconds. Thank you.

[END OF TRANSCRIPTION]