
ABU DHABI – Joint Meeting ICANN Board & Non-Commercial Stakeholders Group
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MARKUS KUMMER: Okay. Let's get started, then. And may I ask people in the room who would like to attend the meeting to take a seat, and those who don't want to attend the meeting, maybe leave the room and continue their conversations somewhere else. But they don't listen (laughing).

It's Markus Kummer speaking, and let's start with introducing ourselves.

Avri, could you start. Say who you are.

AVRI DORIA: Avri Doria, incoming member of the Board.

GORAN MARBY: Goran Marby, ICANN org.

MAARTEN BOTTERMAN: Maarten Botterman, ICANN Board.

TATIANA TROPINA: Tatiana Tropina, NCSG, GNSO Council.

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- RON DA SILVA: Ron da Silva, ICANN Board.
- MILTON MUELLER: Milton Mueller, NCUC.
- FARZANEH BADI: Farzaneh Badi, chair of NCUC.
- TAPANI TARVAINEN: Tapani Tarvainen, chair of NCSG.
- MARKUS KUMMER: Markus Kummer, outgoing board member.
- STEVE CROCKER: Steve Crocker, also going away.
- JOAN KERR: Joan Kerr, NPOC chair.
- MATTHEW SHEARS: Matthew Shears, incoming board member.
- RAFIK DAMMAK: Rafik Dammak, NCSG and GNSO councillor.

KHALED KOUBAA: Khaled Koubaa, board member.

LOUSEWIES VAN DER LAAN: Lousewies Van der Laan, board member.

BECKY BURR: Becky Burr, board member.

CHERINE CHALABY: Cherine Chalaby board member.

LEON SANCHEZ: Leon Sanchez, incoming board member.

RINALIA ABDUL RAHIM: Rinalia Abdul Rahim, leaving, Board.

MARKUS KUMMER: Thank you, and let's get started with the substantive suggestion. As usual, we have exchanged questions, and I would suggest that we give the NCSG priority, and let's listen to your questions first. Tapani, who is going to ask the questions?

Can we show the questions on the screen, please?

TAPANI TARVAINEN: Okay. Thank you, Markus.

We don't seem to have the person I had in mind for the first question around so I'll ask it. The question is simply how is the Board monitoring the performance of the Office of the Ombudsman to ensure that harassment complaints filed are being appropriately handled?

MARKUS KUMMER: Thank you for that. And Becky is going to answer the question.

BECKY BURR: Thank you.

We receive regular reports from the ombudsman, and those are made public.

We've looked at them in the Board Governance Committee and we think there could be greater detail and granularity, so we have asked the ombudsman to provide -- to start providing more granularity without compromising the confidentiality and privacy of the complainants.

That said, we are aware that things may change with respect to where reports go and the like following the conclusion of Work Stream 2. So we're monitoring that very closely.

We have not heard from the community that there are any problems with the manner in which the harassment complaints are being managed, but obviously if there are concerns about that, we would want to hear about it.

MARKUS KUMMER: Thank you, Becky.

Does that satisfy your curiosity?

TAPANI TARVAINEN: A quick question first. Does any of our other people want to comment?

No. Okay. The obvious concern is, indeed, this conflict between the confidentiality of the ombudsman's actions and the ability to monitor them. So I was hoping a bit more in depth comment on that, but I'm not sure if it's actually possible that.

MARKUS KUMMER: Well, I think as Becky said, if we get more statistics what kind of complaints they are, and that is a bit lacking in the report. It's very high level in that sense. But what we'd like to see is maybe saying of what kind of nature were the complaints, how many of that, and that is not there. So we hope to be able to get that.

BECKY BURR: Yeah, just to follow up on that, I think the bottom line is in order to follow -- to monitor this more closely, we need more granular information. The reports that we get are pretty high level, and we've concluded that we need more granular detail about what kind of complaints they are, how they're being resolved generally, to the extent we can get that granularity without compromising confidentiality.

So I think what we're saying is at the moment, we have concluded that we do not have sufficient granularity to monitor specific areas of complaints, and we've taken steps to get additional information that would enable us to monitor it more closely. So I don't think we're disagreeing.

TAPANI TARVAINEN: Thank you. It looks like George wants to say something.

GEORGE SADOWSKY: Thank you, Tapani. The ombudsman is in the process of establishing a survey, the form of which will be sent to every person who contacts the ombudsman. It's a voluntary thing. The survey hasn't been formulated quite yet, but we should be able to pick up information with regard to the satisfaction of people who present themselves and their cases to the ombudsman.

Clearly the -- there will be an aggregation of results, and there will be anonymization of the comments, but it's another source from which we can look at the success of the ombudsman program in general and maybe look at patterns that might help in terms of answering your question.

Thank you.

TAPANI TARVAINEN: Thank you, George.

Farzaneh, please.

FARZANEH BADI: So who is coming up with the survey? Ombudsman is coming up with the survey for its own office or how is the survey being carried out?

MARKUS KUMMER: That's what I understand, yes. Just to see whether people who contacted him are satisfied with the service they got.

FARZANEH BADI: It should be an independent survey. Ombudsman cannot evaluate himself. Also ombuds. It should not be an ombudsman, it should be an ombuds office, and we have been

saying this all along. And also as to the independence, we believe that ombudsman should not be going around in social events, and it hampers its independence. So, think (indiscernible) that's raised these problems.

BECKY BURR: Can I just -- I assume that all of these issues have been raised as part of the Work Stream 2 work on the ombudsman, and we're very much looking forward to reviewing the final reports and getting the community input on that.

FARZANEH BADI: That is true, but not the survey part, so we don't think ombudsman should come up with its own evaluation survey. Just a comment.

MARKUS KUMMER: Okay. We have taken notice.

TAPANI TARVAINEN: I see that there are people --

MARKUS KUMMER: Asha.

TAPANI TARVAINEN: Asha, and Avri, did you want to speak?

Okay. Asha, please.

ASHA HEMRAJANI: Yeah, I just want to echo what Becky just said. You're a part of the ombudsman working group that I am in and so is Avri, and as you know, we're still -- the work is still ongoing. There's still a formulation and discussion around how we -- what the recommendations on the changes that may or may not be required for the ombudsman, Office of the Ombudsman. So for now we're going to use the word ombudsman but later on I think we've pretty much agreed in the team it should be Office of the Ombudsman.

And as far as the survey is concerned, I will let George -- I think he wants to add to that, but what I will do as well is remind the Board that we have done a pretty good -- the consulting company that we had asked, we had commissioned -- or the working group had commissioned to work on this, they've also done a pretty extensive survey, and I will remind everyone that we had that survey results and, you know, share with them what the community has said about the ombudsman.

Your other comments, all fair and all have been taken into account or, rather, have been discussed in the working group. So I'm in acknowledgment of those.

Thank you.

TAPANI TRAVAINEN: Thank you.

MARKUS KUMMER: George wants to add.

GEORGE SADOWSKY: Yes. Thank you. The ombudsman is just one source of information for what should go in the survey. At the moment, the survey will be compiled anonymously and submitted to the Compensation Committee, which is the body in the Board that has responsibility for evaluating the ombudsman's performance. Does that help?

TAPANI TARVAINEN: Okay. Ming Milton.

MILTON MUELLER: Just for your information, and I hope we don't get distracted by this, previous ombudsman also submitted a survey which he

swore up and down would be an anonymous, and when I gave this person fairly low marks, he used an IP address tracking firm to trace it back to my Syracuse University office and then contacted Syracuse dean's office and (indiscernible) to try to get me fired.

So we have a little bit of concern about the idea of the ombudsman administering the own survey that might affect the results of his job.

GEORGE SADOWSKY: Milt to be, the ombudsman does not administer the survey. It's an independent organization.

MARKUS KUMMER: Can we close the discussion on the ombuds office?

TAPANI TARVAINEN: I think we can -- Let's move on to the next question, which I'll hand over to Milton.

MILTON MUELLER: Okay. So basically this is about relationship between ICANN and content regulation. Actually, I'd like to modify it a bit. I have two examples here, and just to keep you all on your toes, let me just strike the first one because we've had some conversations

with the new consumer safeguards director and sort of clarified what he was asking about. But we might want to substitute in there the -- the discussions about domain abuse in which sometimes we're talking more about technical forms of abuse that are directly related to domain names and at other times we're talking about illegal content that has very little to do with the domain name.

So the general question is, yes, we know that ICANN tells us and we believe many of you are sincere when you say that you don't want ICANN to be involved in content regulation, but at the same time we see various pressures and various ambiguities that lead it into content regulation, and PICs being a particularly interesting example.

So how can we keep ICANN clearly and permanently out of the business of regulating Internet content? Is the Board clearly committed to this?

MARKUS KUMMER: The answer is yes, but Becky can take it more in detail.

BECKY BURR: So I want to take this back one step and then get into the specifics.

The -- We've just completed -- I guess it isn't "just," but we have completed and are now sort of learning to live and make the new bylaws part of our DNA.

As part of this process and as part of our goal setting, the Board spent a lot of time talking about how we go about doing that. And the Board has resolved, and I think you will see it in the resolutions that have been recently passed, and it's going to get more clear, to be very clear in everything we do to articulate why we think what we're doing is consistent with our mission. We want to put that out there to start a conversation, a dialogue with the community to make sure we're all being -- that we all have mission as -- at the top of mind. I think you will shortly see a discussion paper with the community asking the community to consider that it do the same thing with respect to policy that it sends up or advice that it provides, to clearly articulate why it thinks this is within the mission.

Now, what's the purpose of that? The purpose of that is to make sure that we collectively have a very clear understanding of what ICANN's mission is, and we are consciously thinking about whether we are acting within ICANN's mission at all times.

That may seem like a small thing but I think actually we haven't really had this -- we haven't had a dialogue about it.

That, really, to me, is a critical piece of making sure that everything we do goes back to ICANN's mission, which, obviously, clearly excludes content control. And I think the Board is deeply committed to staying within the mission and to avoiding anything that involves content control.

The PICs -- as you know, the question of the PICs in the new gTLD registry agreements was the subject of significant discussion over the course of the accountability mechanism -- the accountability CCWG.

The community agreed in the process, although not everybody loved this, that the PICs that are in existing -- the existing registry, new gTLD registry agreements would be grandfathered.

Does that create some challenges in terms of this? Because there are PICs that were voluntarily offered by registry operators that veer into content control? Yes. That is going to create challenges. Those are challenges that we're going to have to confront and discuss openly.

But the agreement of the community with respect to the existing PICs is that they are grandfathered.

Having said that, you know, in any subsequent round, PICs would have to be consistent with ICANN's mission. I don't think that any of us would dispute the fact that some of the PICs that

were voluntarily offered create some tensions and some challenges for the organization in this regard. However, we really hope that you'll join with us in making sure that there's a clear conversation about this at every possible moment and developing a shared consensus across the community about what that means.

MARKUS KUMMER: Thank you. Other follow-up questions?

MILTON MUELLER: Well, I think that's as satisfactory an answer as I could expect Becky to give. And I do think that there are going to be some of these borderline questions.

But the thing that I like that I'm hearing is, going forward, a PIC that strays into these areas would not be considered something that ICANN would have to enforce through its compliance. Can we get a clear statement on it? New PICs?

BECKY BURR: Well, I think it's pretty clear that, if we had new PICs, those PICs would have to be -- that, to me, was the understanding of the community that new PICs going forward have to be -- have to fall within ICANN's mission.

MILTON MUELLER: Okay. And then the registry itself might offer PICs -- or even they wouldn't be PICs, just policies that would allow them to regulate content within their own top-level domain. But ICANN wouldn't be responsible for enforcing those commitments, right?

BECKY BURR: No. So, for example, a number of registries are working with organizations on different ways of resolving disputes about copyright-related issues. Those are not within ICANN's remit. ICANN is not involved in those. Those are private arrangements, private dispute resolution arrangements.

MILTON MUELLER: Thank you.

MARKUS KUMMER: So it seems we're on the same page here, which is good.

TAPANI TARVAINEN: Thank you. Anybody else want to raise anything on this? If Milton is satisfied, I guess everybody else will be.

MARKUS KUMMER:

That's peace and harmony. That's good. Yes. Can we then switch to the questions we have addressed to you? Can we show those on the screen? Questions from the ICANN board. What are the key issues, topics you're currently working on?

And then the second one: What the concerns of your group regarding GDP are.

Who is going to answer, Tapani? >>TAPANI TARVAINEN: Do I have any volunteers on this? Okay. I'll take a shot and note that these kind of emerged because one of the key issues we are working on is the GDPR, notably in the RDS working group where we have been reasonably active. I'm looking at you, Stephanie, by the way. But you don't have to say anything. Just giving you credit that the RDS is one of the key things we have on our agenda at the moment.

I'll jump straight on to the second question. I'll get back to the first one later.

Because GDPR will hit -- privacy is one of our key missions, and GDPR is about that. And anything related there and how it will impact ICANN, not only in RDS, but there are other issues where it may have -- so key concern is that RDS. Stephanie, would you like to open this up? No? Okay.

Anybody else? Tatiana?

TATIANA TROPINA:

Yes, absolutely. So, in addition to GDPR, I mean, I'm talking about the topics we are working on. Well, policy and accountability. I will start with accountability. We all know that the Work Stream 2 is eventually going to end sometime soon. But still it was in our priorities, and it is still in our priorities to bring forward some of the issues we have with regard to ombudsman, with regard to diversity. Human rights is finished, but it was our priority this year. And, of course, jurisdiction where we have also some issues. And we helped to draft the report.

We also are working on -- in terms of policy issues, we do pay a lot of attention to the content regulation issue and DNS abuse issue.

I would also like to thank Becky for making it clear where ICANN board stands.

But we do have a concern that these discussions about the ambiguity of the definition of DNS abuse and not narrowing down in scope to the technical issues only might go too far, you know, when we finally clarify that the scope is narrow.

So we're trying to intervene here and there and state clear that ICANN should avoid content regulation.

So these are updates I think that should be highlighted. Thank you.

MARKUS KUMMER: Thank you for that. Are there comments or questions from --

TAPANI TARVAINEN: Okay. Farzaneh?

FARZANEH BADI: So, as you can see, we're also at -- and in our stakeholder group we're also trying to get people to understand that we are working on policy development at ICANN with regards to generic domain names. And we are not saving the world. We have been recently receiving a couple of comments by people thinking that we do more than domain name policy. And they also do not get involved with policy making as much as we want to. So we want to strengthen that and enhance that and give a good understanding of what ICANN mandate and mission is and what we stand for.

We also have worked on the jurisdiction subgroup, and we support the recommendations. And we really look forward to these recommendations to be implemented.

MARKUS KUMMER: Thank you for that. Milton, please.

MILTON MUELLER: Just in terms of the list of key issues that we're working on, you'd have to add human rights as it applies to ICANN policy making and geo names and then increasing focus on registrant rights within the registrar and registry -- mainly, the registrar contracts -- we're focusing on that -- perhaps achieving greater protections for end users in the RAA.

MARKUS KUMMER: Thank you for that. I wonder whether any board member would have questions to NCSG or comments? It seems we seem to be satisfied with your --

TAPANI TARVAINEN: I want to still give a chance to committee chair, Rafik, if you have anything to add, any topics we missed.

RAFIK DAMMAK: Okay. Thanks. Rafik Dammak speaking.

I think as a stakeholder group we focus on all GNSO PDP discussion.

And I think we have a strong interest on the working track 5 regarding geo names. We are trying to put our position on the matter and to get more of our members participating -- to participate there.

Also wanted to highlight that we also have members participating in the rights protection mechanism. So we have so many important PDPs going on in addition to what is still needed to be done like in the ICANN accountability.

So there is some pressure to cover that if, for example, we see, currently, the public comments we have, like, around 5. And this has put the pressure on us how to respond and to consult our members in due time. Because some of them are not initiated by policy but by staff, for example, like the operating standards or the trust fund.

Just maybe because we talked before about CCWG. We participated actively in the diversity subgroup. And now the initial report is under public comment. And we hope that all parts of the community give us input on that matter.

So that I think what I have in mind for now, there are so many things going on.

And I guess one of the topics we need to discuss at some level on how we can manage all the effort that's been going between

PDP and -- maybe for accountability that will end soon. But still that raise a lot of problem in how we can manage that, including that we consult our members and the position and be able to respond to the requests for input. So --

MARKUS KUMMER: Thank you, Rafik.

Joan?

JOAN KERR: It's Joan Kerr, for the record.

NPOC is going to get involved with this discussion. Because one of the things that not-for-profit organizations have to realize is how much the information can be used against them. For example, in Canada there was a real issue where the government wanted to find out who was advocating against issues that the government was doing. And they really went after anyone that disagreed with them. And one of the ways that they found information was through the WHOIS info.

So it's a huge issue for not for profits. So we're going to get involved with this. So just wanted to say that.

MARKUS KUMMER: Thank you. Rafik, please.

RAFIK DAMMAK: Thank you. Sorry. Rafik Dammak consulting. A few days ago we sent a letter to Akram and Theresa Swinehart about GDPR.

And so we didn't get any response yet. I know that it was acknowledged, and now it's documented in the correspondence. But just want to know if there is any response or when we'll get that.

MARKUS KUMMER: Is Akram in the room? Is Goran able to answer that?

GORAN MARBY: Thank you very much for your letter. I think I actually asked you to send it. So I was very happy to have it. No, we haven't replied yet. We received it just before we came to the meeting. But we did acknowledge that we got it.

And it's important right now that we get in the discussion about the compliance with GDPR. It's important we get different sides of it.

Because one of the things with the law itself is that it's based on what I call user stories. If you save or use data for anything, you have to share sort of both sides of the story. And I thought it was

important to have that side of the discussion documented for us as well. So thank you very much. We will, of course, reply.

MARKUS KUMMER: Thank you, both. Okay.

Next question.

TAPANI TARVAINEN: That's all. We can only ask two questions. Quite funny that when we had more questions, we ran out of time.

Does anybody from our side wish to raise something else?
Milton?

MILTON MUELLER: I'm sorry. Are we still on key issues or topics? Or are we on GDPR?

TAPANI TARVAINEN: At this point, whichever you like. We were on GDPR last.

If you have some sort of comment, please raise it.

MILTON MUELLER: I would ask Stephanie to tell us what some of our concerns regarding GDPR are and how best to mitigate. I think she's our point person on that and maybe also Rafik.

STEPHANIE PERRIN: Thanks very much. Stephanie Perrin for the record.

Briefly, my principal concern that is a really easy one is when would the board like to make it clear how they feel they should be categorized under the GDPR? As a data controller? As a data co-controller? I don't think -- I think those are your two choices.

And then after that, I'm already -- my mind is wrapping around what I consider to be one of the harder problems. As many of you know, the RDS working group has been somewhat fractious. And a lot of the opposition to moving forward has been coming from the private sector security industry.

Now, the private sector security industry, it comes in all shapes and sizes. But we're basically talking about anti-spam private sector groups who work for large corporations to fight domain abuse and phishing and malware and you name it. It's quite a spectrum.

Those actors at the moment have been getting data from WHOIS, and they make a somewhat legitimate claim that the

Internet will break if they don't continue to do the work they're doing.

The question is: How do you actually accredit these groups, individuals, players globally so that they can receive the data? And what does that look like? Because it doesn't look like a warrant or a subpoena or a court order or anything that you might normally get under an MLAT. So I think that is a very hard problem that ICANN has not grappled with over the years. And the best solution I can come up with is that these groups get together at ICANN and create a quality management standard and become accredited according to their practices. That's what I'm thinking about at the moment. I don't know whether my colleagues are ready for me to start talking about this in public. But that's what you get when you ask, I guess.

MARKUS KUMMER:

Thank you for sharing your thoughts. The board is also thinking a lot, but we don't have answers.

But, Becky, would you like to give a first answer?

BECKY BURR:

Well, I actually think that the question of how you ensure that there is access to WHOIS data by those who have a legitimate reason for processing it with as little friction as possible will

probably require some form of an accreditation system. And I do think it's a hard task.

I don't think it's something that we'll be able to come up with overnight, and I certainly do think that it's something that the community is going to need to turn to, to make sure that we get the sort of collective creativity of how we solve what is probably a potentially very difficult problem with as much facility as possible.

MARKUS KUMMER: Thank you, Becky.

Steve?

STEVE CROCKER: I'm actually thrilled to hear this back and forth. And I think your picture that you paint, Stephanie, is exactly right.

Here's my reaction to the credentialing problem. No question that there's going to have to be some machinery with processes and so forth. We have enormous experience throughout society of these kinds of things coming into existence. And let me offer that there's sort of two general paths. One is to work out all the rules in advance and try to get that right. And the other is to get started and build the rules in.

Both of them have their downsides. If you try to build all the rules right and then go forward, first of all, it takes enormous amount of energy and enormous amount of time and you don't get it right completely. And mistakes get made in the sense that it may be too tight or there may be errors in the process or whatever.

And on the other side, if you just start in a kind of ad hoc fashion, well, then you get other kinds of mistakes. So there will be mistakes. And the question is: What's the most efficacious way to proceed? Do we want to proceed in a pragmatic fashion with an understanding that we have to be continuously watching for what harms are getting done and how to build more and more procedure in? Or do we want to start from a first "do no harm" as the absolute requirement? In which case, we actually are doing quite a bit of harm by having no system and having more delays.

My experience is on the latter in terms of -- and my preferences come from experience that suggest that you make a lot more progress by getting in, doing things, making a few mistakes, and then building the procedures necessary. But I think that is one of the things that is going to have to inform these discussions as to what is the criteria for moving forward. And as I say, if our criterion for moving forward is we're going to get it absolutely right before we do anything, then we have done it absolutely

wrong. And, on the other hand, I'm empathetic that people are worried that if we just plunge in, that we'll have a certain amount of chaos. Have to decide what the comfort level is between those.

STEPHANIE PERRIN:

If I could respond to that. Thanks very much. Stephanie Perrin for the record again.

To me, under the "do no harm" category, I do think that the costs should not be downloaded onto the registrars and the registries. I think that the players who are getting the data should bear the cost. I'm also concerned about anticompetitive forces that would come in here because the big guys can afford to get an ISO accreditation, the little guys can't. So that gives a role for ICANN.

But I'm also very much concerned that if ICANN is the broker, it has to keep content out. And once you start running principles and accreditation processes for private sector actors to get data, you run into the problem that there will be content questions arriving at the door.

So this is a great retirement project for you, Steve.

I think you could really help here.

STEVE CROCKER: Let me just raise one additional dimension to this, which is, is it necessary for ICANN to be in the middle of this as opposed to other forms of organization in the communities that care? I mean, yes, ICANN is sort of inextricably involved at some level. But there's questions of degree.

I remember now when you started speaking before, you talked about people coming to ICANN and doing this. But I could easily imagine the relevant parties getting together in other forums outside of ICANN, which many do. I mean, there's a lot of other players in this world besides ICANN.

STEPHANIE PERRIN: If I may respond to that. Stephanie Perrin.

My worry about that -- and the reason I think that ICANN -- and obviously this is -- we're still in the brainstorming stages of this. ICANN has a role to play to ensure that guys like civil society get in the door and get to have a say in the matter.

The private sector police work is currently being done by the private sector. We don't have a place at the table. We would like a place at the table. ICANN has the role to ensure competitiveness in all of these things. There might be some

cross-subsidization that has to take place to make sure small actors can meet this.

As you said earlier, we may have a code of practice before we have anything more formal. So this is not going to be an overnight sensation.

I sit on some ISO shadow groups, and I'm aware of how long these things take. But I do think that ultimately should be -- we need to sort of offload this into existing structures and not reinvent the wheel and do it all ICANN style. So it's that balance between ICANN brokering and making sure that we have a multistakeholder approach to this problem and fitting it into our GDPR compliance.

But I think getting back to GDPR compliance, if we were actually starting to work on this, it would very much help in discussions with data protection commissioners because this is a problem. Thanks.

MARKUS KUMMER:

Thank you. I think we seem to have broad agreement that it will not happen overnight.

[Laughter]

And it's early days, and we are still in the brainstorming phase and also just trying to understand what it all means.

I wonder whether Goran could explain a bit where ICANN org is in this.

GORAN MARBY:

Thank you. Thank you. We've discussed this before. It is -- the distinction you're making is important that we're talking about two separate things. One of them is actually compliance with the law, and the other one is the policy work. And we need to be very -- we need to make sure that we can keep those two things separated. They're easy to sort of come in together. And then the community has the absolute right and the obligation to work on the policies for any future WHOIS.

So what we're talking about here is a compliance issue. And it's a compliance issue, which is two dimensional. One of the compliance issues is with the law itself, which the DPAs has the final say. They don't have the first say because then it will eventually end up in European court. And the other thing is the contracted parties' relationship to us and the compliance with our contracts.

So what we've done so far is that we, first of all, went out and asked for user cases because the way the law is built up, you

have to sort of explain the reasoning why you have the data and what you're doing with it. I'm very thankful for so many in the community coming into that.

And the second thing we did then was to take that data and then go to the external law firm Hamilton to write an initial report.

We now asked for anyone to come up with legal questions because, again, this is compliance, to come up with legal questions that we will go back to the Hamilton law firm with that question. We're going to do that transparently so you can see the questions. We will, again, provide the answers back to you.

At the same time, we actually sent all those user cases to all DPAs for information. We didn't expect them to come up with any answers because it's hard for them legally to give a formal answer to any question. It's very hard in the European setting for DPAs to say something as an advice.

We also received -- and I'm a little bit uncertain if we actually formally received from the DPA in Netherlands. I think we have a paper they've written in a certain compliance case.

All of this is building more and more clarity to answer certain questions such as is ICANN a data controller or some sort of data controller.

Because this is a compliance issue, this very much belongs to the ICANN org. But we decided also to open up the next phase. So if we are a data controller, we have to be compliant as well. And that means that I will share with you a couple of different models how we think that we can be compliant, where we then ask the community through the compliance process to have views on those.

And one of them could be the one you're talking about. I'm channeling -- I'm not a lawyer but they told me I have to say things "if" all the time. That will give the community the third opportunity to be a part of this.

I also spoke to all the SO and AC leadership, and I sort of explained part of the structure. And I sometimes asked for information as well because I think it's important.

After that, I will make a decision about the compliance because that will be my responsibility because I have to be compliant to the GDPR as itself but I also have -- and when we say that we will be compliant with the law, our estimation of that, that will also be the benchmark how we do it with the contracted parties. We can't have two different. We can't have -- if we are a data controller, we can't have two differences.

After that, it could be so that because of the legal structure in Europe -- the DPAs in Europe are independent. Therefore, there

could be DPAs -- even if the law says that this is the standard, there are DPAs who in the beginning can have a different interpretation of the law.

If contracted parties, for instance, have a strong legal case, they can come in to us through the existing policy and ask for what you can control easily enough a waiver. Our contract never supersedes local law. And we have to do this fairly soon.

So already in the next week or something, we're going to send the next round of questions to Hamilton. And you will see the questions, and you will see the replies on that. So that's the real big step.

We were initially thinking of doing it a little bit earlier, but many -- many on different sides of this equation have come up and said they need some time to ask questions -- to format the questions.

We also are receiving from different parts of the community legal analysis just right now.

And I know I can't pronounce that right. Cherine always tells me my English is bad, and that's okay. I think it's a diversity thing.

So that's the structure of this. Two, there is unknown on this as well and how the community should handle the policy question going forward because if we know all the assumptions are that

we have to do this, this means that we cannot follow the policy from the community, which I happen to think is not a good idea. And, therefore, it sort of becomes important for the community to talk about this from a policy standpoint because the E.U. represents together with the other countries more than 28 countries -- I think it's 32 countries in which this is happening, which is a big part of the world. And I think that's a very important discussion to have.

So, these are the way we are trying to do this. We are doing it a little bit different from how we done things. But because I felt it was important, if ICANN is a big tent, community has many different opinions to put -- they should be able even in this compliance process to have something to say.

I'm very -- I'm very happy that you brought up one of those things that becomes apparent, the sort of uses of the data and the privacy of the data because in many times, we want to have privacy but also want, for instance, to mitigate DNS abuse. And they came from the same information.

Some of you were well aware of the project we're having internally called DAAR. It used to be called DART. I think it's DAAR now. We don't have any data that no one else has. We don't have a database of information no one else has. So in that project, that I know many people are interested in, we are

affected by -- we are affected by the lack of -- if we get less information, we will have -- we could have problems with that as well. And that's a point you're pointing at. And that's a very good point. It becomes a user story, how to use the data. So the more we can have of those user stories, it helps us.

I can't say that today I'm 100% sure which solution we will come together about. But I'm actually after this week more and more confident. And it shows again that the ICANN tent really can come together when it comes to issues --

TAPANI TARVAINEN:

Goran, may I interrupt? You have a few other issues, and somebody has to leave. I will hand it to -- Farzaneh has to leave pretty soon.

FARZANEH BADI:

I'm sorry. We have to go to the middle script to talk about jurisdiction, so it's very important to be there.

Just that when we talk about legitimate use, what we keep forgetting is how do we define "legitimate."

Of course, in our discussion, we talk about law enforcement. But there is bad law enforcement in some countries as well. And this is getting ignored in a lot of the discussion in WHOIS. People get

prosecuted and civil rights activists get prosecuted in various countries through law enforcement. And the use of WHOIS in these cases could be established.

And the other thing that I wanted to say, I'm the incoming chair of NCSG. And -- and so at NCSG, we have 600 members and about 180 organizations. They are from civil rights and civil society advocacy groups. And we are hoping that we will get these organizations and individuals more active in policy development. And I promise that we will make them work for us.

MILTON MUELLER: Before Goran goes, if I could be recognized.

TAPANI TARVAINEN: Okay, Milton.

MILTON MUELLER: There was a discussion about the use cases of this data. And I think this is one of the backwards things that was going on in some of the RDS working groups, is that people were talking about all the different constituencies that had an interest in the data, all the ways it could be used.

But this fundamentally overlooks the key aspect of data protection law which is: What is the actual purpose of WHOIS? And to make this distinction clear, you know, you could say, well, law enforcement uses WHOIS data. But if the purpose of WHOIS data is to facilitate law enforcement -- and I actually asked some person from the I.P. constituency about this -- then when you register a domain, it would be highly useful for law enforcement if you had to put in your Social Security number, a biometric, a photograph, and other kinds of personally identifiable information that would -- but it's not the purpose of WHOIS to facilitate law enforcement. That's an ancillary use of the data. So we have to have a clear and mission-consistent definition of the purpose of the data and not base our issues on use cases.

TAPANI TARVAINEN: Thank you.

STEVE CROCKER: Excuse me. Last I looked, which was about four decades ago or so, the purpose of WHOIS was to allow contact with the administrators of the time sharing systems that were connected to the ARPANET. Maybe that's no longer relevant. It's going to be hard to connect the dots between -- I mean, the point that I'm making is that I don't think anybody has filled in and said, in

today's world the purpose of WHOIS is XXX or whatever and so there is a big gap there.

MILTON MUELLER: Actually we have. We did that ten years ago. We had a proceeding on the purpose of WHOIS, and we actually came up with a consensus recommendation from the GNSO.

STEVE CROCKER: And was that adopted and made formal through the IETF processes? Because WHOIS is much broader than just the GNSO.

MARKUS KUMMER: Avri would like to react, please.

AVRI DORIA: Just a quick point on that. It was a majority decision. We didn't quite reach consensus, and that's why it didn't end up going further.

MILTON MUELLER: It was consensus as defined by GNSO procedures, that is to say it had two-third -- a supermajority -- required supermajority of the council.

AVRI DORIA: I believe we have to check. I think it was only a majority.

MILTON MUELLER: I'm quite sure of it. I was on the council at the time.

AVRI DORIA: I was, too.

MILTON MUELLER: It didn't get implemented because the GAC didn't like it, that was the problem.

STEPHANIE PERRIN: For what it's worth, I think Avri is right, Milton. It was barely over the line. And we're in the same -- exact same situation on the RDS committee right now. There are those who would want that technical use and then there were those who would want that wide open any other use that would be beneficial for a wide interpretation of stability of the Internet. So I don't think that's going to be resolved anytime soon, and people should give Chuck Gomes another Ethos Award because he deserves it for chairing that committee.

TAPANI TRAVAINEN: Thank you. We have a couple of people who still want to speak. We don't have much time for discussion but let's at least get those on record. Maybe for further consideration. Raoul.

RAOUL PLOMMER: Okay. To answer Goran's comment on whether ICANN is a data controller, I think there's not actually a shred of doubt that it is. For example, ICANN started an open data initiative that is still in its early phase but it couldn't exist if there was no data to open, right? I would actually use the moment, also, to ask for the data topics that ICANN does store because that moment is very hard to work on the opening data of ICANN since we don't even all the types of data it has.

TAPANI TRAVAINEN: Thank you, Raoul. And Rafik.

RAFIK DAMMAK: Thanks. Rafik Dammak speaking. I was going to ask Goran about -- since he made or give a lot of update on the (indiscernible) GDPR I was going to ask him about the status of the task force, GDPR task force that was created, because we don't have that much information what's going on there and it's not clear about its future. And also, I was going to ask about that -- the meeting that was supposed to be held in Brussels last

month with the Data Protection Authorities and it was post -- postponed to indefinite date. So I was going to ask those and looking for answers maybe later on.

MARKUS KUMMER: Thank you for the question. I wonder if Becky could answer some of them.

BECKY BURR: So we -- Theresa Swinehart and I went to the international Data Protection Authorities meeting in Hong Kong. We participated in a side session that was organized by the Council of Europe but attended by quite a number of Data Protection Authorities from around the world, including Europe, including the United States. And there we mostly took the opportunity to talk about the exercise that we had -- that ICANN had undertaken in collecting user stories so that we could essentially have the pieces of information that were necessary to conduct the proportionality analysis. In other words, I -- I refer to this as user stories, for the software developers in the group. But as a this kind of a user I need these -- I need to access these data elements for the following purpose. And the notion would be, you would take that and -- and balance it and see if the fundamental rights of the individual with respect to privacy outweighed the purposes, the legitimate purposes being offered there. So we -- it was --

that was -- that's a necessary exercise. You really can't get anywhere unless you have that data collected and you had the clear purposes articulated.

We also took the opportunity to meet in side conversations with a number of Data Protection Authorities in significant measure with a goal of trying to get them to help us publicly talk about how you would apply the proportionality test to those very -- various user cases.

Unfortunately, we weren't very successful, and it's not completely surprising. The view of the data protection commissioners that we met with was largely, you know, figure it out and we'll tell you if you're wrong. I think that's not a shocking response from a regulator in any particular area, but they did provide some kind of anecdotal confirmation of what the Data Protection Authorities who came to Copenhagen said to the RDS working group which is the same thing that the advice that -- Hamilton's advice said the same thing, that the Data Protection Authority in the Netherlands recently said which is, it is pretty hard to justify -- that's a very polite description of what they said -- publicly available to anybody for any purpose WHOIS data. But we didn't get much further than that with them. And we also talked a little bit about the GDPR has a -- it turns what is now an advisory body into a body with authority in May, the European data protection board. And it -- we talked a

little bit about the provisions in GDPR that would allow you to come to the board with a proposed Code of Conduct and get some universal buy-in from that would solve some of the -- the various ways across different member states that Data Protection Authorities might want to think about this in -- in our context.

Now, we're quite a ways away from that because we would have to obviously have -- right now that we're engaged in is a compliance exercise, but ultimately there would have to be a policy development process before you could proceed. And ICANN policy is not exactly like a Code of Conduct but it had some interesting applications. So we did have some interesting conversations about that. I didn't participate in the conversations in Brussels. I think John and Theresa and Akram and Goran all had various meetings with different parts of the European Commission. I think it is fair to say that the European Commission is still internally -- having an internal discussion about what GDPR means for WHOIS, and that is not going to be particularly a source of enlightenment in the short term. Moreover, the European Commission at this moment, although it would have a seat on the data protection board, the enforcement of the GDPR is going to be by the individual member state Data Protection Authorities. So whatever the

commission says, that's important and interesting but doesn't answer the, how will it be enforced question.

We did, I think, manage to convey an important message, which is that this is a live issue that -- that the ICANN community, that ICANN as a -- as a -- in its contractual relations with registries and registrars is taking it seriously, it's devoting energy and attention to it, and committed to finding a solution -- I'm sorry -- that is compliant with GDPR and facilitates legitimate use of WHOIS data.

Those conversations are continuing. We do have a DPA who has engaged, I think that would be a fair way to describe what -- the action of the Dutch data protection commissioner. And so to the extent that our goal was to be able to get authoritative input into this, I think, whether it was a result of our outreach efforts or something else, we seem to have got their attention now.

MARKUS KUMMER:

Thank you, Becky, for this comprehensive overview. I hope, Rafik, you are satisfied and know a bit more, but as you can see there's a lot of work going on behind the scenes. But we are at the beginning. It's very clear that we're trying to figure out how to move forward. Well, we come to a close, I think, of our meeting. I wonder, Steve, would you have a few words to say as

it will be your last meeting with the noncommercial stakeholder group?

STEVE CROCKER:

Well, I'll miss these. But more to the point, these engagements, as I'm fond of saying, are an opportunity to have frank and candid discussions, get to substantive matters. The first part of this meeting went too smoothly, in a sense of just agreement with everything. But I manage -- I think we managed to squeeze in a certain amount of rigorous dialogue, which is good. So I think all sides of this are in good hands. I think the NCSG is in good hands, and I know the board is in good hands as I depart. Thank you all.

MARKUS KUMMER:

Thank you. Steve, let's give him a good hand.

[Applause]

Let me also add a few words, as it's also my last meeting. I think I could not agree more. I think it's important that we can hear your voice in the ICANN tent. It's important to have the noncommercial stakeholder group engaged, that we hear the voice of civil society, and the ICANN tent is big enough to accommodate you. It was a pleasure and an honor serving on

the board and was always a pleasure engaging with you, and I think we stay connected. Thank you. And the meeting is --

TAPANI TRAVAINEN: Okay. Guess I'll have to also note and say something. This is also my last meeting, at least in this role. I'd just like to thank you and thank the board and everybody else here that for getting -- and Steve in particular. It was very -- an honor to have been in the same meeting with you even. (Indiscernible). That's all. Thank you all.

MARKUS KUMMER: The meeting is adjourned.

[END OF TRANSCRIPTION]