SAN JUAN – GAC & PSWG Discussion: GDPR & WHOIS
Tuesday, March 13, 2018 – 09:30 to 10:15 AST
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CHAIR ISMAIL: Can we start the following session now? Okay. Thank you. So good morning, everyone. And welcome to GAC session 21 on PSWG and Whois privacy session. So thank you to our public safety working group, and I'm sure it will be an interesting discussion on GDPR as well. Wondering if we can quickly and briefly say what is GDPR.

GDPR is the general data protection regulation, and it intends to strengthen and unify data protection for all individuals within the European union. And I stand to be corrected, of course, if anything is not as accurate as it should be. It should be effect on the 25th of May, 2018, and the aim of the GDPR is to protect all residents of privacy and data breaches. Pertains to all companies. [reading] accordingly, it was important to make sure that ICANN contracts are GDPR compliant so that ICANN register registrars, breaching privacy regulations.

As you have witnessed, the discussions, some people would like to see as many public information as possible and others as minimum public information as possible. So there is a wide range of discussion here. And of course the main thing is that

whatever we arrive at should be GDPR compliant. So this was very quickly brief to everyone because I understand we have so many new representatives, and I was not sure whether they even know the term and what it stands for. So I have France first and then -- go ahead, France.

GHISLAIN DE SALINS: Speaking for the newcomers not familiar with the technical terms of ICANN, how the GDPR will impact ICANN is because of a database called Whois, database includes data including some personal data of the registrants, someone or some organization, and you will see the distinction might be important later that registers domain name. And the database is maintained by registries and registrars for the contracts ICANN has with registrars and registries, and the issue we have, or ICANN has realized recently the Whois system now is not compliant with the GDPR. So a few months ago [indiscernible] a process to make sure the Whois system compliant with GDPR, hired a law firm to help in doing that, and they've designed a new system to replace the Whois database. And as you will notice soon, the pace we're in is extremely fast because ICANN has produced documents recently, so on the 28th of February they released some documents called the calzone, a food metaphor, so we were encouraged to give a response before this meeting. It's why we organized a [indiscernible] last week to analyze this

proposed interim model and see how it fits with GAC's interests and objectives and [indiscernible] document on the 8th or 9th of March, cookbook, 607 pages exploring ways to make the Whois system compliant with GDPR, gives you a broader picture.

CHAIR ISMAIL: Thank you, very much, Ghislain. And one more piece is who should get access to nonpublished data. So before handing to Cathrin and Laureen to kickstart the discussion, and sorry to take time from the discussion, hoping to have more interactive feedback. Also having discussion on GDPR after the coffee break so we still have time to discuss. So we can simply continue the discussion because we had the session after the coffee break to follow up on the cross community session of yesterday, and we have this discussion now. So both could feed into each other of course. So over to you, Cathrin or Laureen.

LAUREEN KAPIN: Thank you. It's a lot to digest, isn't it? Thought we would start in little bites. How do you eat an elephant? One bite at a time. So we can take this in small bites. Some are very familiar with these issues, know all the jargon, and for some it's a bit indigestible, so I thought we would -- for the newcomers, I hope it's helpful. What is the Whois? It's like a telephone book, a telephone book for who owns domain names and a lot of other

information about particular domains names. Who has used a phone book here? White pages and yellow pages? Maybe it's a little dated, but this would be the virtual system that provides a telephone book so some of the information you can find in the current Whois system that anyone can find by using one of the various portals, that let you find information, who registered the [indiscernible] technical contacts to reach out to and the email for that technical, administrative contact. You can find out when the domain name was registered, the registrar, typically the individual that sold that domain name to the individual or corporation. You can find out a lot of information about a domain name. And in a sense, it's like both yellow and white pages, again, to continue with this metaphor, it contains information about individuals like the white pages and also information about companies, organizations, about legal entities, like the yellow pages.

So why is this important? Why do we care about it or that it might change? There are a number of important public policy concerns about the information that is available to the public at large in the Whois. There are privacy concerns that this information can be misused, that this isn't appropriate to be disclosed to the public, and there are also concerns from users who want to keep as much information as possible public because of legitimate uses and legitimate purposes. For

example, law enforcement uses this information when there are malicious activities to investigate who might be controlling a domain name being used for counterfeit, for, example, can provide basic starting information, who owns it, who is the registrar. Law enforcement can also look at an email address and pursue further investigative efforts. For example -- and we heard this in the community session already -- for example, to figure out if other domain names that have that same email address in common are being used for malicious activities. So it's an important step one. But this is not just about law enforcement, all sorts of other groups that use this information and rely on this information, the cyber security practitioners whose focus is keeping the Internet safe for you and I, everyone in this room. They use this information for all sorts of activities that keep the Internet a safer space for us, sort of an early warning system for problems they may see concerning the security and stability of the DNS and detect and act on those problems, and some of the key information that they use for their important work is in the Whois. And if they no longer have access to that information or if it's very difficult and time consuming to access that information, it could have a negative impact on public safety.

Who else uses the Whois system? You and I may use it. The ftc where I work, the federal trade commission, United States

leading privacy and consumer protection. The agency collects complaints from consumers when they have been ripped off and want us to know about it, and when we look at those complaints and read the narratives, I paid $400 to buy this timeshare and they didn't know who I was and when I tried to contact the folks who sold me that timeshare, they didn't respond. The next sentence often reads, so I looked up the domain name in the Whois, and I found this is the person responsible. We know this, because we looked at our complaints and did a search of it and over a multi-year period we found over 4,000 complaints that referenced the Whois system to when the public wants to try and resolve its own complaint. And the public uses this for due diligence. If I'm going to buy an $800 purple lighting fixture and before I give my credit card over to that company, I may want to find out a little bit more information about this company, since I'm not going to home depot, my brick and mortar store, going to the one that sells the lovely purple high-tech fixture that I can't find anyplace else but on the Web, I might want to find out about this company and if it's legitimate. If I find the name, I might put that on the Internet to see if it's been the subject of complaints. Again, the Whois system an important tool to use that, and right now today I can still do that, find out an registrant name and other information to contact that registrant. So I wanted to sort of bring an issue that has a lot of jargon and technical terms down to a real world perspective.

I also want to let you know there are many privacy concerns implicated. You and I might have received lots of spam in our email boxes, enticed to click on a link, and that turns out to be a link that is trying to dupe us into providing sensitive information like bank account or credit card number and it may be that that information has been harvested for example from public information in the Whois if you or I have bought a domain name. So sometimes this information can be abused. And our privacy colleagues point to examples where information in the public Whois is used to harm people who are engaging in protected political speech.

So lots of different equities at play here, and not one right answer. This is work, this is a dialogue, a lot of thinking about where do we draw the line? And indeed, the general data protection regulation, which has been the catalyst for the recent ICANN activities, really has shone a light on these issues, and also baked into this legislation is balances. So even though it's called the general data protection regulation, it doesn't just protect personal information, it mandates that you have to balance the interests. There are legitimate purposes that are recognized under this regulation, certainly law enforcement interests are recognized, the fight against fraud and deceptive conduct is recognized. Public interest is recognized, but things need to be balanced, to be proportionate. Purposes need to be

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defined. And I know my colleague, Cathrin is much more immersed in the admitted nitty gritty than I am, but wanted to talk about this as a high level to tell you a little bit about who the Whois is and the balances baked into the general data protection regulation by way of background.

I'm going to take a pause. Because I still think that perhaps people just may have questions about what I will term some of the basic foundational issues, and I want to make sure we're providing pauses for folks to ask questions if we can explain things further.

So hopefully people are still digesting, and what we can do now is give a little bit of background information about some recent activities just to catch people up on particular key activities that have gone on and bring us to where we are today. And I will turn it over to my colleague Cathrin for that.

CATHRIN BAUER-BULST: Thank you so much, Laureen. This is Cathrin for the record. For the overview of what the Whois does and what the GDPR does in relation to these types of data, I just want to take one moment to highlight the particular situation we are in here which is part of this challenge that we're now facing on making sure the Whois is compliant with data protection rules. We are working as governments in a sort of private public setting here. So we

have the Internet governed for the purposes of DNS allocation and administration by a set of private contracts to which we as governments are not party. And nonetheless, these private contacts also have to serve a public interest, and that is why we are all here, to make sure the way the DNS is administered is done in such a way to take important public policy into account and Whois provides accountability -- but also in the security and safety of citizens and in the fight against crime. And the importance to the community as a whole of the Whois is also recognized in ICANN's bylaws in various places. And just to highlight, the Whois gets its own specific review where we are currently engaging whether the meets specific number of criteria, and included in the bylaws is the ability of Whois to meet needs of law enforcement agencies and promote consumer interests. So those are considerations even baked into ICANN's very backbone into the community's backbone in terms of how we work together and the strong importance of these issues to ICANN I think was highlighted in the exceptionally high attendance we've had on these last minute phone calls on reacting to the proposed model that ICANN has put forward, and I think GAC can be quite proud of its record turnaround time to have submitted comments just one week after the interim model proposed last Thursday.

That brings me to the timeline, puts everybody on the same page. You have a detailed timeline of all the fascinating history of the rapid -- in your briefing materials for agenda item 21, I would encourage you to refer to that for more details, want to highlight a couple of main points here, and as Laureen has said, the GDPR has served as a catalyst for discussion started back in 2003 at the very latest when the commissioners [indiscernible] there were concerns in particular about a language of limitation for possible abuses of that information.

Now, as you may be aware, there were several failed efforts to revise the Whois policy and a new policy based on expert working report launched a couple of years ago and still ongoing in efforts to underlying change to the Whois policy. Because it became clear this change would not be effected in time, make a decision about interim compliance. The GDPR will come into effect on May 25th of this year and on the basis of several legal opinions, the Whois not now compliant. We are looking for an interim solution, and on the 2nd of November ICANN announced it was planning to no longer enforce the existing Whois policy which had proven to be noncompliant with data legislation protection. If the contracting parties would provide other solutions that they consider to be data protection compliant.

Now of course what we want to avoid is a [indiscernible] approach to the Whois, so in parallel with this announcement

ICANN started efforts to come up with one model that would serve as sort of the interim model for compliance purposes to meet requirements of the GDPR and other data protection laws around the world and at the same time preserve the existing Whois policy to the extent policies and this would be in place until the more permanent design process would conclude.

I think we can go to the next slide. So in an effort to advance discussions on this interim model, ICANN proposed on the 12th of January three possible versions of an interim model which you will remember we also presented to you on a number of calls. So these models were also discussed between the GAC and ICANN in a joint call, and the GAC provided comments on the interim model as did the European union in a separate submission, and there were a number of governments from among the GAC who provided separate comments on this model.

There were also a number of community proposed models, and ICANN took the three models published for discussion and the different models that had been proposed by the community and came up with its own now one proposed interim model that was shared with us almost two weeks ago now, ten days ago now, on which the GAC commented last week, and as Ghislain de Salins said, published in the cookbook, and now we have to consider what next steps we can take and as a starting point, it might be

helpful to go through the position the GAC has taken on these issues in which many of you were involved just to recall some of the key points and see how they apply in view of the new information just at the end of last week, and I will give the floor back to my colleague, Laureen.

LAUREEN KAPIN: Any questions about any recent developments or anything anyone wants to add about that?

CHAIR ISMAIL: Yes, just trying to trigger the discussion. So can we, for example have an essence of how the proposed model compares to the GAC proposed model so that GAC members can weigh in their views, whether this is -- I mean, I can see also nonGAC members in the room who maybe would like to share their views as well so that we can get an interactive and constructive discussion I hope. Because I think the cookbook was posted very recently. It's like 50 pages maybe, I'm not sure everyone had the chance to read the whole thing. Sorry, I didn't want to surprise you and put you on the spot.

UNIDENTIFIED SPEAKER: We're just trying to find a visual to support the discussion. We will have that up in a minute.

CHAIR ISMAIL: I think there was this excel sheet that's very helpful I think. Perfect. I think this is a good starting point for the discussion. Thank you. Yes, Thomas, please.

THOMAS RICKERT: Thank you very much, thank you for opening up the discussion to the entire audience of this room. I think ICANN has made huge progress publishing the [indiscernible] model as well as as the cookbook. ICANN leadership is asking GAC for assistance in making this system work, particularly when it comes to gated access, now working under extreme pressure, and my question is how likely for the GAC to come up with legal rationale for making gated access possible in compliant fashion and whether you think the GAC will deliver this or individual governments likely step in and come up with answers.

CHAIR ISMAIL: So I'm far from being an expert here, but let me share my understanding, and I will defer to my colleagues as well. So what I understand is that the proposed accreditation thing right now which is, again, a very high abstract proposal. I think we didn't get into the details yet, but I think there are more than two categories of accreditation, the law enforcement and other

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parties who have legitimate purpose to access the nonpublic data. For the law enforcement I think the proposal is that a list is being compiled at the national level by the different governments, and then the only role the GAC has is to compile those lists into one big list and share it with ICANN.

Again, in principle the GAC is willing to participate and get involved and provide advice but not to get into an operational day-to-day role of course. The more challenging -- but again, we can think of how to update the lists and how frequent would this happen and many more other things. The other challenge is the second category, if I may call them so, because, I mean -- and this, I think there is a proposal for a code of conduct. Again, the GAC is willing to participate as one of many participants with the community. I will stop here, and Ghislain?

GHISLAIN DE SALINS: Thank you, Manal and Thomas, for your discussion. In my understanding and opinion, the GAC, as it's acronym says, we're an advisory committee to the board and the broader ICANN committee on [indiscernible] matters, which means we are not ICANN's general counsel and don't represent European dpa's, we're here to advise the board to [indiscernible] as Manal has just said, I don't think we are willing to have a heavily operational role in the design of the [indiscernible] programs

but don't want to prejudge the discussion, but my feeling is that we really want to focus on our advisory role and willing to work with the community on that, but we are not asking for any operational role at this stage. But again, that's my understanding.

UNIDENTIFIED SPEAKER: This is much appreciated, particularly GAC not willing to take on operational role. Be likely governments will offer responses in time, by May 25th, and if you are for providing lists, does the GAC envisage to have lists detailed or is the plan to grant every access to all data that is not publicized?

CHAIR ISMAIL: Yes, please, Laureen.

LAUREEN KAPIN: The GAC had the opportunity to discuss it among ourselves, that is what these discussions are about. And while I appreciate your valid questions, we're not in a position to answer them yet because we're assessing it and haven't reached conclusions, so it's too early to answer the questions.

UNIDENTIFIED SPEAKER: Thanks very much.

CHAIR ISMAIL: Yeah, I have Brazil and Netherlands, Brazil please.

BENEDICTO FONSECA FILHO: One thing I've been hearing is the capacity of the GAC to deliver inputs, one thing I would like to say is the GAC has [indiscernible] we try to be responsive to demand. We have not been working with all countries on that issues but a group of countries working diligently and this will come up to the group at some point. We cannot prejudge whether the [indiscernible] possible but it is possible because this is a mechanism and very intensive work going on in that regard. So as we receive the demands, we'll try to deliver as we try to each and every instance thank you.

CHAIR ISMAIL: Thank you, Brazil.

DEAN MARKS: With the coalition for online accountability. We found the GAC comments on the proposed model to be very helpful. I think certainly the coalition is in agreement with them, and I believe also the intellectual property constituency and the business concept we see largely agree with those comments as well. It's our understanding the proposed interim model is proposed and

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not set in stone yet, and a number of us are coalescing around the notion that it would be very helpful if in the proposed model that gets decided if the registrants' email address can still be made publicly available to help find a balance between the legitimate interests of law enforcement and antichild abuse and human trafficking and other human rights issues implicated by making a Internet a safe and secure environment, to keep that publicly accessible in order to facilitate quick remediation of those sorts of abuses. We hope that will still be considered and we hope that's something that the GAC will consider weighing in on with ICANN.

In terms of accreditation, do you know that constituents and members of icbc would welcome working and cooperating with the GAC on accreditation system for private nongovernmental entities to get your input on how that could be done in a way to meet the deadline but in compliance with the GDPR. And so we would welcome exchange and we are willing to put a lot of work into that on the table as well. Thank you so much.

CHAIR ISMAIL: Thank you, Dean. Netherlands?

NETHERLANDS: Thank you so much for the comprehensive explanation, because this is really an elephant, a European elephant but now worldwide, a lot to digest. Would like to come down to a certain topic very much at stake at GAC and that's the certification scheme which is now proposed. And I think it's not has been thought through in the cookbook because it's on the end and says GAC should come up with lists, not very well thought out, and I think we should be very much aware that let's say the responsibility according to the GDPR to come up with legitimate purposes is on the side of the controller and joint controllers of the data, meaning this the ICANN and the registries. So defining legitimate purposes we have guidance, but probably also they are responsible of granting access to who meet criteria, meaning this is not a responsibility you get just by asking lists transferred to governments. Because I think Google enterprises, other process data, they do not do this, ask governments to come up with a list; they do their homework and take responsibility. So I think in the first place, ICANN should very much define purposes and criteria.

Then secondly, governments can very well assist, but governments, for example, the GAC rep, we are not all the governments of the world, a lot outside that are not here. If we took only the GAC as a some kind of [indiscernible] we will not cover and have comprehensive list at all, and then there's a

second part of the working with the list. This is a static thing; somebody has to maintain it. I think we have experience with mechanisms within ICANN which work in which for example the clearinghouse for trademarks works, all of central thing in which people can according to criteria accredit themselves or be accredited on the list, transparent and open to the public. I think there are a lot of parallels with what we want to achieve here. So instead of having a bureaucratic system in which from all the world lists come, it's better to have a kind of repository organized and managed by ICANN which then can be filled or filled directly by these organizations who want to be having access.

Of course you can then think about being vetted or validated by the government. But this system is much more foolproof, more bureaucratic, and well, you can think of those mechanisms, but just coming up with lists for countries is something which I think is the worst way to handle this thing. Thank you.

CHAIR ISMAIL: Thank you, Netherlands. I have Norway, but it's also time for the coffee break. So Norway, is it really brief or would you like to wait until after the break and take your time?

NORWAY: It's really brief.   We would like to underline the important principals of the GDPR, that it's the data collector or the holder that has to see the granting of the access for the stored register data and that this granting is based on the GDPR article 6.   So one of the big challenges that was mentioned by Thomas Rickert, I think it was the concept of the list and how this could be in compliance with the GDPR because of blanket [indiscernible] you only produce a list and don't specify what kind of data.   It's not worth anything really because you have to go into the list and see every request for information on every level, is it based on article 6.   So that is one of the big challenges that we have to discuss in the GAC, how to manage and be able to work on the list concept, as such.   Thank you.

CHAIR ISMAIL: Thank you, Norway.   So yeah, it's time for a coffee break now. So this ends this part of the discussion on GDPR.   We will reconvene at 10:30 and continue on the same topic.

[BREAK]