
SAN JUAN – GAC Discussion: GDPR & WHOIS Compliance Models

Tuesday, March 13, 2018 – 10:30 to 11:00 AST

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CHAIR ISMAIL: So can you please take your seats? We'll be starting in a minute.

UNIDENTIFIED SPEAKER: Good morning. ICANN61 Tuesday this is the GAC discussion GDPR and PSWG compliance.

CHAIR ISMAIL: So, welcome back everyone. This is the GAC session 22 on follow up on our GDPR discussion scheduled to start at 10:30 for 30 minutes on Tuesday March 13th. So, thank you all for taking your seats, and let's continue our discussion, and let me start by asking GAC colleagues if they have any questions or remarks from the first session. Yeah please USA.

UNITED STATES: Thank you very much. I don't know if this is the appropriate time but I just wanted to provide some views from the United States with respect to the GDPR and how WHOIS is going to be dealt with in light of that as well as what ICANN has asked of the GAC, so if that's a good time I'm happy to carry on. So, from the U.S. perspective maintaining access to WHOIS is very important. We recognize that being compliant with GDPR is a necessity. We wouldn't expect any one to break the law

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in support of providing full access to WHOIS. So we recognize that, and I think we, as U.S. are fine with a tiered access model. I think we would still like to see as much of a rationale provided with respect to what information is going to be public and not public. Particularly you know citing specific GDPR rationales and that's consistent with the GAC submission on this issue and with respect to what ICANN has asked of the GAC, and it's become clear that there's many different interpretations of what has been asked and hopefully we can get more clarity from the Board when we meet with them later but I think at least with respect to the U.S. interpretation we kind of see it as 3 different tasks. The first being looking to the GAC as a vehicle to put together national sovereign lists of government users. And we see that as the U.S. as a good opportunity, and we would not like to lose out on that opportunity. We don't see this as an opportunity for the GAC to accredit a governmental users or to be the body responsible for developing the list, but more or less just a mouth piece for governments to go back and do what they need to do to ensure that their governmental users will continue to get access, and I do recognize that not all governments are part of the GAC so perhaps we need to consider how we can communicate this message broader to other governments who are not here at the GAC. To what the U.S. considers as a second task. Which is defining user groups I see this probably a bit less restrictive is probably not the right word but not as literal as some are interpreting it in that we have to define groups that will be eligible. I think this is probably an opportunity for the GAC to indicate some examples of user groups that correspond with purposes because at the end of the day I agree with my European

colleagues with respect to GDPR what matters are purposes, but I think there are some obvious categories of users that align clearly with purposes, legitimate purposes so I think that is something that perhaps we should consider as the GAC. Not to make it necessarily an exclusive list at this time. Perhaps it's list that could be modified later as we have more experience with this but I think it would be an opportunity to define some of those obvious user groups. With respect to what we consider to be the third tasking which is developing a code of conduct, we interpreted that task as more or less to not necessarily be the leader of that exercise, but to definitely be part of the conversation. I agree with my colleagues who have indicated that the GAC involvement in this exercise should be in line with what we've done in the past which is more or less at a but we could do high level with respect to what a code of conduct is and look at existing GDPR language that articulates what accreditation bodies need to do to be compliant with GDPR and provide a framework around how accreditation will proceed. But that being said, I think it's at least from the U.S. perspective it's important that we recognize that the GAC shouldn't be involved in accreditation itself. That it really needs to be up to the user groups who have legitimate purpose to organize themselves and determine what's best for them in terms of accreditation. And you know they could refer to the code of conduct that's developed within the GAC, but they too would have to have their own codes of conduct. So I will stop there because I know these quite detailed but I wanted to let the room know what the U.S. is thinking on these points. Thanks.

CHAIR ISMAIL:

Thank you very much U.S. And I think this is the type of discussion we need at this point in time so any other GAC views would be most welcome, and also to remind everybody that we are also having this discussion particularly on the accreditation model with the Board today, so please be ready to discuss this, and if you have anything that needs to go into the language of the communique, also please start sharing this, and please make Tom know so that we can arrange accordingly. So any further GAC views on this? So, if not, do we have something to share on the screen? So over to you, Lauren.

LAUREEN KAPIN:

Thank you. So I just want to take a little bit of a step back. Certainly accreditation is going to continue to be an issue of concern particularly in light of the interim models language about potential roles and responsibilities for the GAC, but just to go back to a larger picture, on remind you again of of where we are in the process, at the end of January the GAC actually responded to ICANN's proposed models. There were 3 variations, and the GAC actually submitted a very precise comment about what it supported and what it had concerns about in the models and then we proposed a model of our own and just as a visual I wanted to put this helpful slide up on the screen to show you where the GAC model sits in terms of what would be available to the public, and what would be behind the gate. And that's just to give you a visual model, but what I want to do what I want to do now is talk about the concepts behind the issues that

fueled the GAC model, and really what's at issue now is not any of these prior ICANN models. Model 1, model 2A, model 2B, all of that you know wiping the slate and actually what's at issue now is ICANN's proposed interim model so if we can Fabien go back to the slides we were on, what's at issue now is ICANN's interim model released a week ago, and again the GAC mobilized very quickly to provide a comment on this, and I thought that it would be helpful if we could just review at a high level the issues that the GAC's comment noted about the interim model. There were certain aspects of the interim model that had positive elements, there were certain aspects of the interim model that we had concerns about and then there were aspects of the interim model we have questions about. And starting with the positive because that's good. There's framework to address law enforcement needs and that's a good thing. There's continued collection of... data and you no he to explain some terminology. When I say thick WHOIS data we are going to include all the menu analogy that would be all the elements of the menu. It would be the and advertiser. The main course and the dessert. That would be the thick WHOIS data. It includes the whole meal. All the elements. There's role for GAC in advising on potential accreditation system. That's a hot topic I know we are going to discuss that further. There's also a role for the GAC in advising on codes of contact for access to nonpublic data by users pursuing the legitimate interests. Who might those users be. We talked about that earlier and it was a big topic. Consumer protection advocates and, of course, there's also the public at large which has an interest. And maintaining current data protection requirements. That of course and actually that, that may be actually a little bit after typo.

I think that is maintaining data protection, maintaining current data protection retention periods. That's a typo. Apologize for that and I will ask for that to be corrected in the final slides. Maintaining current data retention requirements. Current requirements are set at I believe 2 years beyond the contract, and that is retained and that is something that is a positive element. Again, another positive element. Any future accreditation system. There is currently no accreditation system but there will be one in the future. And that will maintain access for law enforcement, and also this system will maintain anonymously WHOIS questions. What does that mean? It means when the local police force is investigating a bad actor that bad actor is not going to know about it. They are not going to know about the WHOIS query. It's going to remain anonymous. Next slide please. Concerns. So there are also a number of of concerns. Of the there is, there is a need for further explanation, particularly the choices ICANN's interim model in what remains available to the public and what is behind the wall or masked. What there is a curtain over so there is a significant amounts of information that the interim model deems to be nonpublic, and that includes the registrant's name. Again the registrant is the one that buys the domain. The registrant's name. Registration of legal entities. Not individual entities but the legal entities and including the name. And to go back to the analogy this means that information in the yellow pages not the white pages about individuals but the yellow pages about corporations that that would be nonpublic. Certain information. And administrative and technical contents state province and country and here there's little bit of internal inconsistency in the interim model because the individuals

state, province and country actually is public in the interim model but for some reason the administrative and technical contacts state, province and country is not and that may be an error. And moving to the next concern, and this is a big one when the interim model comes into play, there is currently no accreditation system. We've heard questions about that where we have concerns about that about what that might look like. The GAC's role, but the bigger issue is that in order for any one to have access to the nonpublic parts of the WHOIS system and this temporary model puts a lot of that behind the gate. It's made being it's nonpublic in order for any user group to have access and that includes law enforcement cyber security researchers IP holders etcetera etcetera there has to be something in place. There has to be a temporary system, there has to be something that is temporary, a path for use are groups with legitimate interests to be able to access that data for their legitimate purposes, and right now the interim model does not address that. It does not require some sort of temporary system, whatever that may be. There isn't any requirement for something to be in place as soon as the interim model takes effect so on may 26 which presumably is going to be the date when the interim model is effective there isn't anything in place to let the legitimate users access that nonpublic information for their important purposes, one of which primarily focuses on protecting the public against deceptive and, malicious conduct. So that's a big issue and that's something that we address in our comment, and it's certainly a highlight of our concerns. Another concern is whether, in fact, ICANN's interim model over complies with the GDPR. IE it goes beyond what the GDPR requires? And in this regard, the GDPR is really

focused on protecting the information of individuals, of protecting that information, but ICANN's model protects the information of illegal entities as well so there's concern that there's over compliance with the GDPR. And then finally an absence of any measures to improve data quality and accuracy, that has been a big topic of conversation in the years past in the GAC. It's still an important issue. And, in fact, the GDPR has provisions that focus on data accuracy and requiring that, and then finally a lack of clarity of the GAC role. So that's sort of a summary of issues of concern that were identified in the GAC comment that we filed just a few days ago last week. So, the real work and the real task next slide please is going to be then what we are going to identify in the communicate, what we want to, what we want to communicate as advice, and we have some potential spring boards for discussion here. One thing that we thought would be prudent is that since we authored and came to consensus in record time I might add with a very detailed comment reflecting GAC views, that it would be advisable to actually attach that to the communicate because on a practical level, these comments are somewhat buried in the ICANN universe, and avalanche of data so they are listed with all those other comments. They are hard to find on website. It's hard to know where they live, but when something is in the communicate, one it's easy to find, but two, even more importantly it rises to a certain formal level that requires the Board to respond to it. So the we believe, and strongly recommend, that this comment, perhaps with some minor updates to reflect you know current events, which include the publication of the cookbook should be attached to the communicate as GAC advice. And other issues that we might consider highlighting,

but certainly we welcome views, edits. Additions, disagreements on this to condition implementation of any interim model, whatever it looks like, on required temporary on a required temporary system for access to nonpublic information by law enforcement and user groups. That if ICANN is going to implement an interim system there has to be a method in place to deal with access for nonpublic users at the same time. There can't and gap. There can't be a big section of WHOIS data going dark for members of the community that need access to that information. And then I think the last point for GAC advice is really focussed on defining the role for the GAC, and this accreditation issue, which is something that we have signalled generally that the GAC wants to be involved in this process, that the GAC is uniquely position today provide advice on those important public policy issues and so we are well positioned to provide advice and guidance, and help develop high level codes of conduct with other members of the community for access to nonpublic information, so that certainly is a good message to consider putting in the communique, so this just gives a brief overview of some of the concerns of the interim model and some possible alternatives for GAC advice, and then I think the rest of it really should be the topic of discussion and consideration by folks. So I will stop now.

CHAIR ISMAIL:

Thank you Laureen, and thanks for the potential GAC advice that we have on the screen, and I encourage everyone because today is the time to consult on the language of the communique because tomorrow we don't have any GAC sessions scheduled. We will get into

this room directly for the drafting of the communique, so today is a good time to fine tune the text, and consult. So any comments or requests for the floor? Yeah NOI please.

UNIDENTIFIED SPEAKER: Perhaps I should inform that at 15:15 we have Ahmeting with the ccNSO for newcomers. You might not know who they are but they are the country code at support the organization. The CCNSO, and they will among other topics address their take and their work on the GDPR. It might interest a lot of governments.

CHAIR ISMAIL: Thank you par. So any comments? Oh yeah France please.

FRANCE: Thank you Manal. I would like to take the community again to thank Laureen and Cathrin for the great work to send a response to GAC ORG and I think we managed to do that in an efficient way. Surprisingly because of the time constraint. My only comment regarding the GAC advice would be that you know by nature GAC advice is different than a GAC response or a GAC comment to a specific issue, GAC advice is sent to the ICANN Board in a role that is in aligned in the bylaws of ICANN whereas the GAC response was sent to I can ORG so in my opinion GAC advice we can't just take our response and put it in a GAC advice because it has to be somehow reformulated. So my suggestion would be that we actually try to extract some high level principles from our GAC response especially since as you said Laureen

since our GAC response has been some more developments such as the cookbook. So I'm willing to work with anybody interested to try to extract some high level principles from our GAC response, and maybe identify a few points that are of really high importance for GAC to, to give to the consideration of the ICANN Board. And I think it would be a good way forward. Thank you.

CHAIR ISMAIL:

Thank you France. And, yeah, this is an excellent point because we've already agreed that I mean, the three points are very good points, but the way they are drafted, they are more for the... rather than with an explicit ask for the Board, so we can work on the phrasing or rewording and also guided by what France said. I can see Netherlands and then Switzerland.

NETHERLANDS:

Thank you Ghislain you said the right thing. There's another reason ... say our analysis of the whole GDPR the second point is that still we have some the model. The cookbook says some new things. Specifically about the list and operational role of the GAC. As Ghislain said we should also put down something there specifically about that, and I would like to join if it's possible for the drafting. Maybe in a small drafting group. I think Ghislain you talked about that. We can prepare something.

CHAIR ISMAIL: Thank you Netherlands and please reach out to Ghislain if interested to be a part of the drafting of this advice. Switzerland.

SWITZERLAND: Thank you Manal. Jorge Cancio for the record. This afternoon we have a very important meeting with the Board where the WHOIS discussion will be probably the star topic, so as many of the issues mentioned in the GAC comments, and in the proposal made by Laureen, and Cathrin, will be touched upon in that discussion with the Board, as we have seen also from the e mail that Tom Dale sent us one hour ago. I guess it would be very useful to digest the responses from are the Board because they... what we provide as GAC advice more specifically. So I would suggest perhaps in the wisdom of our GAC leadership whether perhaps a half an hour somewhere tomorrow before we start with the GAC advice proper could be allocated to this elephant digestion process. Thank you.

CHAIR ISMAIL: Thank you Switzerland. And, yeah, we can definitely arrange for that at the very beginning of the communique drafting. I don't think we have many pieces of advice, so we can spare some time on this one. U.S. please.

UNITED STATES: Thank you. This all sounds very good and looking forward to participating on the drafting group. If possible. Just one other idea and we don't have to go into details now but just something else that

perhaps the GAC can consider in terms of being as constructive as we can at this point considering the may 25th enforcement time frame. And that is perhaps the GAC could send a communication to article 29. We could discuss what the contents of that letter could be but it could be a good opportunity to inform them and supplement what ICANN has already done in terms ever are indicating what the ICANN community is intending to do in terms of its compliance about GDPR and seek any feedback from them if they have any and perhaps pose other questions if appropriate so I just wanted to propose that as perhaps another conversation to have in the drafting group if there's not enough time to do so at the plenary. Thank you.

CHAIR ISMAIL: Thank you U.S. So it's going to be an agreement in principle and then the drafting can take its time, right? Sorry, yeah Cherif please.

CHERIF CIALLO: Thank you I am [Interpreter Speaking] I simply wanted to make a comment about the WHOIS session that will take place tomorrow in room 202 between, 6:30 and 8PM. This will be a session conducted in French and there may be some discussions in English, but perhaps this could be a session of interest to many governments. We expect to have a lot turn around actually from 6 to 8PM. In room 202.

CHAIR ISMAIL: Any further comments before we close? We are a little bit delayed, but that's okay. So if not, then this concludes our discussion on the GDPR.

I hope you will reach out to Ghislain. I am sure Laureen and Cathrin also in the drafting team we have Netherlands and U.S. and we look forward to having a quick discussion at the beginning of the communique drafting as well. So with this, this this concludes the discussion on GDPR. Please remain seated as we will proceed directly with the following session. Thank you.

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