**Transcription ICANN62 Panama
GNSO: NCSG – GNSO Board Members Meeting
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Rafik Dammak: Okay, guys, so I think it's time to start hopefully your first meeting in this policy forum in Panama. So my name is Rafik Dammak. I'm chairing this session on behalf of Farzaneh who couldn't make it unfortunately.

But first, I want to thank our guests, the board members, Becky, Matt, and Sarah who joined us for this discussion today. So it's a good opportunity to share thoughts and a position from NCSG about some issues, probably those we are going to cover in this week.

So we can start maybe have some kind of topics we want to discuss. I guess the elephant on the room is GDPR and in particular, what was started about access model. So as you know, we have that consultation that started last week just prior to ICANN meeting. And so we have some kind of ideas and positions we want to share with you on this matter.

So I think from the NCSG standpoint, there is no reason - we don't see emergency to focus work on the accreditation. But first, we see a kind of separation between the access and accreditation as issue. So we may work on the access and something maybe you could see that with some proposal from some of our members regarding the access. I think this Milton maybe can talk later about this, Milton, to talk about that.

So we want just maybe to talk about this to folks but also to the EPDP in general to get some of your views as we will spend a lot of time in the GNSO Council to discuss about this topic. And if we are going to talk about the access model, so what will be the impact on the policy mark.

Okay. So maybe if you want to share some thoughts perhaps.

Matthew Shears: Just, first, just to say it's a pleasure to be here and it's great that we meet in this formal setting, but I'd just encourage you all to reach out to us whenever you want, whenever you need. I think it's very important for us to understand what's happening in the community and to understand what your challenges and what the opportunities are. So you shouldn't just see this as one-time. So please do feel free to reach out.

I think it would be useful to perhaps hear in a little more detail what specific points on the access model that you're interested and/or have concerns with and then maybe we can start the discussion that way. So perhaps that's the best way of going forward.

Rafik Dammak: Thanks, Matt. Just in the beginning I want to highlight what we want to talk about in the beginning. So I think one of the issue is the process on itself, how it was started usually, at NCSG, we believe any kind of - those kind of process should be community led and within the existing process.

So if it's really (unintelligible) it should be within the PDP. So we may understand it's an emergency but we really want to follow the process.

So this is, first, one of the not substance but the process. In terms of substance, I think it's really to kind of separate access issue and accreditation. I think the accreditation, it's something that long-term work that needs more discussion.

But I think access is something that can be done. Also back to the EPDP with how it's going to start. So we need to be careful to not put that much on the existing EPDP in terms of scope. So we can understand some groups, they have interest in the topic, but that should be done later on.

It's kind of something that was discussed in the GNSO Council as to how this idea for theme one or theme two. We understand it's something we need to discuss but maybe not now and tackle it later on.

So maybe for access, one I would access Milton as he had some suggestion about one, the access model. So this is also something we're discussing now.

Milton Mueller: Thank you, Rafik. I think we do have some ideas, talking points regarding what we would like to see in an access model. And I think the main feature of it is that it is very oriented to limiting the requests for revealing WHOIS data to specific domains with specific problems.

In other words, when we think of getting past the non-public WHOIS data, we think of somebody with a legitimate need says, you know, for this particular domain, this domain is a spam source and we want to find out who the owner is and we want to prosecute them.

We do not like the idea of a generalized right of access. It has to be specifically focused. And for that reason, we're very concerned about this whole notion of accreditation because we just kind of figured out what other constituencies mean by that. And what they mean is I conform to some

general class. Let's say it's a trademark owner or a law enforcement officer. And therefore, I, by virtue of being in that class can go into the WHOIS and getting anything I want, everything I want at any time in any way. We're totally opposed to that. We think that that's not GDPR compliant. We don't - even regardless of the GDPR, we think that's not the right way to do things because of the privacy issue and this sort of due process issue.

So accreditation, just to take the strongest case for accreditation, you might say, well, of course, law enforcement officers should have accreditation. But again, by virtue of being a law enforcement officer, do you have an unlimited blanket right to look at any information, anywhere, any time. I think under most legal systems, you don't even for a law enforcement officer.

And so we really want to push the accreditation issue away from the immediate problem and we want to set up an access system first. And the question is what kind of access do you get, what kind of safeguards are there, how is it monitored, how do you enforce compliance with whatever rights you give people. And then you can deal with this class-based accreditation issue, which I think is going to be an incredibly complicated discussion, by getting the GAC to tell us how they're going to recognize legitimate law enforcement (unintelligible). It's going to take 18 months at least I would think, literally. It will take the GAC 18 months to decide who to put onto a committee to do that maybe. I shouldn't say bad things.

I think the main thing we are confused about now is just the process by which anything gets decided here. We have these emanations from the ICANN Corporation that say here's an accreditation model or here's a this model, universal access model is what they're calling it now. Here's a calzone. Here's a pizza. We know that there are issues that need to be decided. We think they should be decided expeditiously but we want there to be a process by which the community actually makes these determinations and reaches consensus. We don't want to be just handed stuff and then have it happen somehow.

That's all I have to say.

Rafik Dammak: Thanks, Milton. Just in terms of housekeeping, I forgot, so if you want to speak, just raise your hand. We will try to keep the queue. So before moving to Stephanie, you want to make two comments or? Okay, Stephanie, please go ahead.

Stephanie Perrin: Stephanie Perrin for the record and let the record show that I'm saying that Milton is an optimist here because I don't think a year and a half is going to solve the accreditation problem.

As I've indicated in the past, the University of Toronto, with whom I'm affiliated for this project, has got research funding from the Office of the Privacy Commissioner of Canada to investigate standards for accreditation. And one of my jobs, I guess on the panel this afternoon, will be to try to clarify the difference in some of this terminology. Because in my view, it's all getting mushed together that is typically ICANN but not really very satisfactory.

And I point out, I'm raising my hand on is ICANN has got to stop existing in a parallel universe. Procedures for law enforcement to get access to government data well known. In my country, they need to specify, not be precise investigation, but who the officer is and the kind of legal action that they're doing. Usually it's under the criminal code for these kinds of things, it's bot nets.

We need more transparency and more data about what this kind of abuse is and I'm a victim of the RDS group. We fought for two and a half years. Did we ever get hard data on how many investigations, what data you needed. A lot of the cybercrime stuff could be done with encrypted data, with the persistent indicators. It doesn't have to involve the entire globe putting their personal data out there.

Yes, they will need to get access to personal data to identify victims or people who have been abused. That's separate to the accreditation model and to the actual system we're building. So what we see right now with this access model is really what should have come out of an IRT after a policy development process for these policies that determine who gets access, when, how, how small the purpose has to be limited to, to be accepted under the GDPR.

So I mean that's the kind of work we'll be doing with the standards thing. I'm completely open minded on what kind of a standard it ought to be, but there ought to be a management standard so that a second party, in other words, a data controller, data processor, a registrar, a registry can with confidence transfer that data, for which they are libel, and be sure that they will not have to go in and audit these guys, to make sure they didn't give it to a criminal gang.

We're well overdue for this. So I wish ICANN would stop using these silly terms like calzone, and pizza, and picket fence and get some clarity about what we're talking about. This is serious stuff. We are in a parallel universe acting like governments are not evading their own constitutional requirements for due process. It's got to stop. It doesn't fit under an accountable regime. Thank you. I'll stop now.

Becky Burr: So let me just say, I agree with you on the terminology, except for the picket fence, which I will defend. That was (unintelligible).

Stephanie Perrin: Can you define it?

Becky Burr: Yes, I can and happily will do so again. Let me just say a couple of things. First, on the scope of the PDP, the scope of the PDP is going to be determined by the GNSO. But Rafik is right, it has to be done in 12 months and if it's not done in 12 months, there is no temp spec. So I don't think either the Board or Org should presume the outcome of those discussions.

But we are quite mindful that whatever the scope is, it has to be doable in that time period and that may mean we cannot boil the ocean. That probably almost certainly means we cannot boil the ocean.

Second of all, the Board is still getting up to speed on this issue. We did spend quite a while over the weekend talking about it. What I'm going to say is sort of what my understanding, how I am thinking about the UAM, but it's certainly not a Board position at this moment and Sarah and Matthew may have their own.

My view is we put out a temporary specification and the temporary specification says, contracted parties, you must provide reasonable access to those with legitimate interests that are not outweighed by the fundamental privacy rights of the individual. Okay, that's fine. That's a standard. That restates the standard in the law but it does not give ICANN any understanding about what that is. Right now, contracted parties, individual contracted parties make those determinations consistent with their understanding of the law.

But at some point, we're going to start getting complaints that say, so and so is not being reasonable about it, or I have a legitimate interest that it's not. So it is appropriate for ICANN as a matter of its own compliance with GDPR to understand what the scope of its authority that there is. Now, I think that completely jives with your understanding.

First, you have to have an understanding of what the universal legitimate interests are. You have to know who has a right to claim that one or more of those legitimate interests, under what circumstance and then fourth, you need to know what the safeguards are that ensure that it's the right person asking for the right data under the right circumstances.

The fourth one to me is probably the accreditation prong, maybe, or I don't even know. It's at least part of the safeguards for how do you ensure that

people have the legitimate interests that they're asserting and that the circumstances are appropriate.

But all four of those steps are necessary and ICANN does have, as a matter of its own compliance obligations, an interest in getting some legal clarity on those points.

So to this extent that however it should have been named or whatever the UAM means, to the extent that this is an exercise to attempt to get some clarity with respect to those things, it seems to me it is within ICANN's purview and it should not pre-judge the outcome. Now, that information may be useful to this EPDP or another PDP down the road, however the GNSO goes. But I think we should think of this as a separate undertaking to get some legal clarity with respect to those answers.

So that's the way I'm thinking about it. I'm not claiming to think about it.

Stephanie Perrin: If I could just…

Rafik Dammak: So just, Stephanie, I need to make housekeeping. I was asked to remind people to say their name before speaking for transcript purposes.

Stephanie Perrin: Stephanie Perrin for the record. Just to clarify, and I know Becky knows this, there is a lot of complaining about how wooly the GDPR is. Actually, I think the GDPR has done us all a favor by its clear attempt to get beyond boilerplate. If you know what I mean by get beyond boilerplate, there have been catch all phrases in contracts and arrangements, and I would include the RAA in this, compliance with law. Well, what the heck does that mean?

So now, the GDPR, particularly in the liability and figuring out who's liable for what, and breach disclosure requirements, that gets beyond boilerplate. And to think that we could do that in an expedited PDP this year on top of the other expedited PDP, I will protest because we haven't done it yet.

Nobody has done it yet. We have not tested what the major corporations have indeed come up with because they're well aware of this requirement to get beyond boilerplate.

And so that's why I think we're talking years and that's why I think we need ISO standards because there are all kinds of things in there, such as data retention, access rights, et cetera. So just to clarify, and if you have comments on that, Becky, I'd love to hear them.

Becky Burr: No, I think we all know that we need to get a little bit more concrete here. But as I said, the scope of the EPDP is in the GNSO's - that's for the GNSO to decide. That's not for the ICANN Board or ICANN Org to decide and we hope - I hope that this information that ICANN can get the information that it's seeking and that that will be useful. It will certainly be useful to ICANN for non-compliance and enforcement of the temp spec perspective, and hopefully it will be enlightening for however we choose to, however the community chooses to take on the access and accreditation issue.

Rafik Dammak: Thanks, Becky. I think while we are talking about all this internal scope is that if you see the consultation through the universal access model, there is a date that by December 2018 that there is something to be done. That's why we are asking if you really think that can be done. So if I understand you correctly, you are saying this consultation is just to maybe kind of groundwork but does not preclude what the GNSO will do if they initiate the PDP. I think we need more clarification here. I'm not going to say (unintelligible) but that's what the Board is thinking.

Tatiana Tropina: Yes, thank you very much. Tatiana Tropina for the record and actually my question is a follow-up on what you just said. So Becky, thank you very much for confirming as a board member that the accreditation and access is up for community to decide within the scope of GNSO.

And - but what we see and what we think, we have to operate mostly really upon gossip right now. We are getting mixed messages from ICANN Board and ICANN Org. Like, for example, we were thinking that access and accreditation within the scope of GNSO, what GNSO is doing, despite some of the parts of the community trying to come up with another model on (unintelligible).

But now, we are getting this (URM) issue from the ICANN Org for comments and we're just, frankly speaking, we are a bit lost, what is the goal here, what is the purpose? Id ICANN Board is going to impose something on us, if ICANN Org is going to impose something on us. What is the actual process? Who is going to be in charge of this? Thank you.

Becky Burr: So just to clarify, ICANN does have - ICANN Org does have a role in enforcing the temp spec and that does include understanding what reasonable access for those with - understanding all of the pieces of that. So a policy on that is obviously within the GNSO and if you want to include it in the EPDP or not, all those decisions are there.

I understand that the messaging has been confusing, and I think that generally it's confusing. I did ask Goran whether, I said, "Here's my understanding," and it was sudden, and we were told yes, this is an effort to get some legal clarity with respect to these things. It can be useful for the GNSO in developing policy but obviously, there's a more immediate ICANN compliance and enforcement issue.

I know that the messaging has been confusing. I mean, we're all moving too quickly and part of that is just that that's what we're having to do. So I hope we can use this week to get some clarification on what the messaging is, because I don't believe that there's an effort to usurp the authority of the GNSO. And in any case, if anybody had that in their mind, once, you know, this community is very good at quickly disabusing people of those kinds of notions.

Milton Mueller: So just a scenario. So we have the EPDP and the temp spec expires in a year. And as I understand what you're saying, the Board's concern is that when this expires, they have to - there has to be some kind of resolution.

Becky Burr: Well, it does expire in a year and I don't know what happens other than there is no temp spec.

Milton Mueller: So there's no constraint, X has to be done in one year. It's just that the temp spec expires.

Becky Burr: Yes, in which case there's no policy.

Milton Mueller: Okay. So that's something that since you are a veteran of the ICANN process and I remember the early days of ICANN, we were told that if there's no consensus policy there's just no policy. And that means that - it doesn't mean that the Board or the Org gets to make one up because the community hasn't decided.

It just means there's no policy and that means, effectively, in operational terms, that means the registrars would decide how to comply with requests for non-public WHOIS data. Is that right?

Becky Burr: There are contractual obligations and the registrars and registries would continue to be required to comply with those contractual obligations to the extent they were not inconsistent with applicable law. I think that's just a - but I mean, you know, I don't know.

Could the Board adopt another temporary specification? I don't know. I don't think we know the answer to that question. I think the more important thing is let's get the EPDP done in a year and that of course, requires scoping that's consistent with that timeframe.

Rafik Dammak: That's why we chose the EPDP because to shorten the whole process and just maybe to remind people that we have a high interest topic session today and one part is that people can give input about the scoping. So we have in the queue (unintelligible) and then we are keeping (unintelligible).

Sarah Deutsch: Hi, Sarah Deutsch. I would just - I would hope we can do something with the EPDP just because I think it's better for ICANN to try to solve its own issues than leaving this to a vacuum where there could be legislative models from other countries. There could be a lot of other mischief that gets thrown in the works. And at least we are able to control our own destiny here to the best we can. But you all are raising very interesting and difficult points.

Rafik Dammak: Thanks, Sarah. We have Kathy and then Colin.

Kathy Kleiman: Kathy Kleiman. So the idea of coming up with the access framework makes sense to me before we get to accreditation, all the details of who gets access, how they get access. That makes sense and we see that type of discussion going on throughout the world. We are getting problems with messaging and I want to raise a different questions.

So even for those of us who are veterans of this for a long time, which bouncing ball, it almost seems like a game of Monte where you have three cups and there's a ball underneath one of them and you don't know where the ball is, which ball to pay attention to because there are other PDPs going on, of course, now. There are other issues. We're trying to get out an applicant guidebook. This is getting kind of crazy.

So to see the framework elements for the united access model, and for those who don't know the acronym, when you're hearing UAM, it's this new united access model for continued access to full WHOIS data that came down about four days ago. So this is - so to know that that has to do with the temporary specification, that's linked to the temporary specification and not overriding the EPDP, the expedited PDP is very useful. So thank you.

Another confusion (unintelligible) there we have, and I'll just summarize the facts quickly for people who don't know and you can correct me if I'm wrong. There is a registrar of Tucows. Tucows is based in Canada. This is a registrar based in Germany and they've decided that under the data minimization aspect of the GDPR, they don't need to collect - there are three sets of data we collect: registrant data, technical data, contact data. And technical and contact, about 90% of the time are more duplicate registrant data. So they said for purposes of data minimization, as we've understand it, as they've been developing for about a year because the registrars had to do this many months ago because the ICANN community wasn't on top of the GDPR. So the registrars took their initiative.

And they said, we don't need these other two fields, and ICANN filed and said yes, you do. And the Court said no, you don't, and so ICANN said, we're going to appeal. And immediately, like two hours after the decision of the Court, there's a press release from ICANN, we don't like that decision.

We're going to appeal. And then ICANN at the appeal says, if we don't like your decision, we're going higher. What are you looking for? If you're looking for clarity, why does it look like you're looking for a particular decision? Could you shed light on this because it looks like there's a part of the community that you're supporting in this material and a part that you're not. That you're kind of looking for directed verdict.

Becky Burr: Look, you're a lawyer. You understand the way these things come up. They come up in sort of adversarial ways. So the current status of the court case, just to be very clear, is that ICANN's request was denied right away by the Court.

ICANN appealed that and in Germany that the - and it did indicate that, you know, ultimately it would seek guidance from the European Court of Justice with respect to sort of what these requirements are.

The Court that issued the decision has the right to either say, we stand by our decision, or we'll take it back and we'll reconsider. So the current status is that the Court that had rejected ICANN's request has now said we want to take it back and reconsider. I don't think any of us have any particular insights on why they did it, or what that means, or what will happen, or even how unusual that is. I just don't know the answer to that question.

So the current status is that the original Court that heard it is going to reconsider its ruling. Now, the point here is just to find the ways in which we can get clarity about what the data minimization standard requires, in this case in Germany, because, right, it's a - it may be that the requirements in Germany are different than the requirements in different places. We don't know but there's an attempt to get clarity.

And one could reasonably ask, okay, if the admin and the tech contact in 90% of the cases are the exact same information then the additional processing necessary to, you know, is that excessive? Is it proportionate? What does it mean? So some people are arguing, because it's the same in 90% of the cases, there's no additional value in processing it. And so under the data minimization standard, you shouldn't process it. Other people are saying, I mean I was just on a call that I think was open to the community the other day where somebody from Interpol made the assertion -- no idea whether it's true or not -- that in one particular investigation it turned out that the registrant data was incorrect but the admin and the tech contact data was correct, and that was relevant.

Now, if that's true that's an interesting and important fact. I have no idea. But the point is absent a community-developed policy on WHOIS, and we all know the history of this. We've been at it for a really long time. Absent that, ICANN has an obligation to defend WHOIS and to get clarity to understand what the law permits. And so the court case in Germany is an attempt to get

clarity as to what the law permits and what it doesn't permit. And that's all it is.

Rafik Dammak: Thanks, Becky. Collin then Stephanie.

Collin Kurre: Hi, Collin Kurre for the record. So I kind of wanted to branch off of what Milton was saying earlier and actually follow-up on what you were saying just now. We were saying that without a consensus policy, there should be no policy. And I think that - I don't pretend to be an ICANN veteran but in the short-term that I've been here, I've seen that consensus doesn't come easy. It's a hard fought thing from all parties involved.

So I think that with messaging from ICANN Org and the Board, it's really important to not pre-suppose the potential failure of this PDP because it really disincentives the kind of compromise and the kind of hard work that would be necessary to reach this kind of consensus policy.

So positing statements like absent community policy, ICANN has an obligation, to me, that already presupposes that the community led policy development process might fail. And I think that that just disincentives (unintelligible) the kind of compromise that we need and it furthers this kind of adversarial rule that seems to be emerging between ICANN Board and Org and the community. Thanks.

Matthew Shears: Matthew Shears. I don't think there is any sense that there's a presupposition that this is going to fail and that's not at all the intent of any kind of communication along those lines. We have every desire for this process to succeed. So just so we're really clear on that, there's no sense that in any way that we want this to fail or that we assume it's going to fail or everything else. Just to be clear.

Becky Burr: I would answer a theoretical question and I was answering a theoretical question.

Stephanie Perrin: Stephanie Perrin for the record. I just wanted to note a couple of things here. I think as Collin points out, one of the concerns that we are really alive to is the process and the accountability of ICANN and having these things come top down.

So we're strongly motivated to ensure that the next RDS thing actually works because there's a long history of them not working. And we don't have time to do a thorough analysis of what went wrong with the last RDS group because we had an awful lot of good people spending an awful lot of time. And we did reach agreement. This is one of the concerns I have with the actual grounds of this court case, and I do understand you have to take your set of facts wherever it lands, and this one landed.

But we had more or less agreed among the people who were working hard for consensus on the RDS that those two particular elements weren't necessary. So I don't see, myself, what ICANN gains by litigating this. Because there's enough stats to show they aren't necessary already, that we had uncovered in the poor failed RDS that we've got on life support in another room.

Having said that, you're a veteran. You understand ICANN's accountability regime, and what we're trying to do here, and how fundamental it is to true multi-stakeholder efforts working, how do we make sure that we don't have the same flaws that killed RDS and many before them happen in the next expedited PDP. I have suggested that given we had the ombudsman sitting on the RDS calls and that didn't work, we had a set of players in whose interest it was to rag the puck, if I may use that hockey expression.

We now, in the new process, have a different set of players who may have a strong interest in ragging the puck. How do we get people to reach consensus if they're being paid a lot of money to basically hold that line or rag the puck? And how do we get an independent dispute resolution team to

come in and say, wait a minute, you're not willing to give an inch. Because we're willing, well, some of us are, willing to give an inch here.

But I'm going to start tracking every blessed millimeter we give because we give, we try to be reasonable, we bring in outside research. We bring in outside experts. We kill ourselves on this and we get defeated by people who want to maintain the status quo. Status quo in terms of policy is a totally useless WHOIS conflicts with law, policy, and procedure, which are still online support in another room here. The GNSO Council still have a live action to move on that WHOIS conflicts with law.

But we have to grow up and try and do this in a mature way.

Becky Burr: So that's the $64 million question. I think that there's a fundamental sort of existential question that we faced in the community with respect to the policy development process in general. How do we make sure that incentives are properly aligned to come to the table and do something more than stand in the corner. I think that's why scoping on the EPDP is particularly important because we do have - there are some - there's a deadline and there are some things at stake here in a way that maybe if - maybe with proper scoping, the incentives will be aligned. We certainly have hope, and look at that, and take every opportunity.

So if the GNSO decides that, in fact, everybody who is on, that the EPDP team should be provided neutral GDPR training and maybe it's neutral trademark trading, whatever it is, so whatever those tools are needed going in that they're provided and available to do everything we can do make it successful.

But beyond this EPDP, I think the questions you're raising are critically important questions for ICANN in general.

Rafik Dammak: So maybe if I can add something, not a response necessarily to Stephanie, but I think at GNSO Council we discussed this and acknowledged this problem, and that's why we started the PDP 3.0 effort and tried to get lesson learned, in particular from RDS.

We - council leadership had many calls with the working group leadership and they are expected to bring some lessons learned why they think why they failed, what was the positive, and so on, positive points in the RDS working group.

So I think we recognize all this kind of issue and tried to work to solve them in the near term. And even for the EPDP, that's why we are discussing about the composition and many other things like commitment and so on in terms for the charter. So we ensure that we don't face the same issue that the RDS had. I'm not sure if we will prevent all this but I think we acknowledge that there are these kind of concerns. I think that that's the unknown. We have that understanding in the community and the council taking its role here as a manager of the PDPs to not have these kind of issues.

Kathy, please.

Kathy Kleiman: An existential question for you. Consensus versus compliance. We deal in consensus and for everyone here that's where we come together to create rules often out of (unintelligible) like the uniform dispute resolution policy. But now, we've moved to compliance. What does the law say and what do we need to do. And I want to make sure I understand what I'm hearing from you is that ICANN Org, presumably with the support of the Board, thinks that your job is to enforce existing contracts as they exist, as they were created under the consensus process, even though being told for many years that they weren't in compliance with the data protection directive.

Is that kind of where the ground level - and I'll kind of finish the question. So compliance, does that mean that those of us who want to comply with the

GDPR have to fight every step to say data minimization, access frameworks, dispute resolution for citizens? Is it our job now to fight for compliance against prior consensus that we knew was within the boundary? That seems like a really high obligation for certain stakeholder groups to take. We think maybe you should be with us on the compliance side of it.

Becky Burr: So I just feel like I need to jump in. I know we've known for you a long time and I know that there's some theater that we all engage in here. But I don't think that - I think that what I said was ICANN's job is to enforce the contracts to the extent permitted by applicable law.

That means full compliance with GDPR. It does not mean that anybody is trying to get around GDPR and I think the temp spec was an honest attempt to reflect what we understand the state of the world to be. And I don't think that it was really, I mean, I think we're all - let's all try to figure out - I can say enforce the WHOIS requirements to the extent permitted by applicable law. But the extent permitted by applicable law is what we need to decide and that's what ICANN should be trying to get clarity with respect to these questions.

And I don't think ICANN is prejudging that, at least not my sense that ICANN is prejudging it. It's an honest attempt to figure out what those words mean, legitimate interests not outweighed by the fundamental privacy rights and interest of the data subject.

That's what we have to understand and we all need to be on the - ultimately, unless we get some definitive word, it's going to be hard for us. But the goal is to all be on the same page on that. And I think that implies - I understand that people have taken the position for years, and I may agree not. It's not sort of my place to say. But I think that let's look at what's going on now.

We're trying to get a clear understanding about what those words mean in the ICANN context. It's an honest attempt to understand that fairly without prejudgment.

Kathy Kleiman: And just to respond, I'm not trying to engage in theatrics. I've been doing this too long to want to do that. I'm trying to understand where our starting point is and it clearly - it doesn't seem to be the Hamilton memos because ICANN did get some really good advice. And I see that as (unintelligible) being rejected, but from a European law firm that specialized in GDPR, and I see that being rejected.

So from the community perspective, what's the baseline of what's the law? And it looks like we're all seeking the same thing, and hopefully, we can do that together.

Stephanie Perrin: Stephanie Perrin for the record. On that particular discussion, I would just like to say that the law is not fuzzy but privacy is not like parking tickets. It's deeply contextual. That's why I think it's going to take quite a time to sort this one out. And I raised my hand because I neglected to mention one thing that I think the Board could help us out with.

When we see something that is emitted by ICANN during our travel plans to get to the meeting that is called a United Access Model, I don't want to take your time up in listing all the objections I have to that, but it was not developed by the community. It was developed by certain stakeholders within our community and put forward as a model,.

It is not, in my view, a united model except that they are trying to do what is one of my principal objections to the complexity of the access regime. Criminal and civil law are different in terms of their rights and we need to tease these things apart and stop having intellectual property advocates hiding behind the petticoats of law enforcement in my view. I think that this is

unacceptable. We have heard a lot about very heated rhetoric about how criminals are going to roam free on the internet.

Well, no. We can solve the law enforcement problem rather quickly if law enforcement would get down to the business of identifying who their access points are and if they would engage with their data commissioners in their own national states on how they're going to manage the data in that regime. And as I say, ICANN is operating in a parallel universe where we're ignoring precedent that exists in 120 nation states where there are data protection laws that set up the procedures for this kind of thing.

So disentangling that and stopping this kind of, oh, we've all come together and we have a united model (unintelligible). I've been talking about this standard since, I don't know, was it Copenhagen or was it Abu Dhabi? Oddly enough, my phone is not ringing. My inbox is not pestered with people asking me to speak on panels or explain things to them. I don't know. What is it? Is it something I said? This is not a community effort. Thank you.

Tatiana Tropina: I would actually like to make - it's not a question. It's rather statement because I would also like to make it clear that we don't agree, not even content wise, because Stephanie gave a brilliant intervention about the difference between infringement of civil rights, criminal offenses, and the legitimate need to get data in all these cases and different process for these.

But I would like to highlight again that we disagree with the BC and IPC model because we repeatedly, repeatedly said that this is not a cross-community effort.

And being presented as such just because maybe a couple of - we sent a couple of people to maybe a couple of meetings just for damage control. We were not involved in any development of this model, and although I can go through model personally because I'm a criminal lawyer, you know, to some

extent, and argue with everything content wise, but I don't want to because I don't want to legitimize it by arguing with it.

But I would like to deliver this message loud and clear. We disagree with this model process wise. It shouldn't be used and we would like to warn ICANN Board about possible damage if one-sided model would be anyhow used or implemented, or taken just in the absence, in the vacuum. It shouldn't happen. Thank you.

Matthew Shears: Matthew Shears. Completely understand. Thank you, Stephanie and thank you, Tatiana. All I can say is that at this juncture, I think it would be incredibly helpful for this community to respond to the unified access model paper, not focus on the models that are compared therein, but focus on some of the questions that are being asked in the paper. It may not be an ideal process but it's the process that we have in front of us. And I understand that that may not be very appealing but I think it's important still to make the case that you're not comfortable with the process, but to please engage in the process.

Milton Mueller: So that was good, Matt. I actually got some concrete guidance on process. That was what my question was about. I'm still a bit vague and I'm still a bit confused about the process because it seems to me there's three moving parts here. There's the comments on the unified access model, right. We will do that. We will give you more comments than you want. We will comment on it. I promise you.

But then there's the temp spec. Now, let me explain a very fundamental background fact about this whole process going back to 2000. In the past, there was a debate about how much data should be there, who should have access to it, and the people who wanted non-discriminate open access for everybody had what they wanted.

And this was the reason we would never reach a consensus. Because why would you ever agree to give up if you already have what you want. So a

substantial segment of the stakeholder community had what they wanted, refused to budge, and we spent 15 years flittering around that. And now, as I understand, the temp spec, which I agree was a step forward, means a lot of WHOIS data that was easily accessible is now blocked.

And so that's the default, right. After a year, if we don't do anything to change the temp spec, we're still stuck with the temp spec, right, or what we're doing now. Is that right?

Becky Burr: I think what happens is the contracts exist but they are enforceable only to the extent permitted by applicable law. So if you think the temp spec reflects what's required under the contract limited by applicable law then that would be the outcome. I don't know - I can't say that I've done the analysis but it's not like the temp spec will continue to live. What will continue to live is the requirements in the contract to the extent they are compatible with applicable law.

Now, just remember there are some things in the temp spec that do go beyond applicable law. For example, registries and registrars have the right to extend - to limit publication of data to people who are outside of the European - registrants outside of the European economic area and they have the right to extend this to legal entities without sort of looking at each line to see whether it contains personal data.

So I think the temp spec probably goes beyond what, in a sort of a - it is a rational interpretation of what's practicable but I think it probably does go beyond what a literal application of the European, the General Data Protection Regulation is. Is that helpful?

Milton Mueller: Okay But sort of what I'm getting at is if we have an EPDP - we do have an EPDP and what we're debating now as we I understand it is do we include access in its scope or not, right. So I'm unclear about what happens if EPDP

does or does not include the access model in its scope. Let's suppose that it does but we can't do all that in a year. I'm confused about what happens.

But suppose it doesn't, there's a separate process and we finish the EPDP in a year but we don't finish the other process in a year, I'm confused about what happens. You understand what my process concerns are. Sure, we'll respond to the unified access model as a discussion document. No problem. But these PDPs are actually making decisions about what happens next. I'm totally confused about how we handle that still. Sorry.

Becky Burr: The scope of the PDP is up to the GNSO. It's up to the GNSO and you can include access or not but whatever. If, for example, the GNSO said we're going to limit the scope of the EPDP to four corners of the temp spec and we'll deal with other issues in a subsequent PDP, that's also up to the GNSO. I don't think we know what comes next. What we hope comes out of this is questions for which legal clarification can be sought and acquired that will inform ICANN's ability with respect to compliance and could inform whatever procedures, development, you guys decide on.

Rafik Dammak: Maybe just to clarify to Milton. So the temporary spec initiated hat process at GNSO level and we agreed to go with EPDP because it's the short. So that's why we will have this session to work on the scope. And I think maybe from our standpoint, we don't want to add access because it will, in terms of (unintelligible) overload.

So I think the process from GNSO is either to confirm the temporary spec or to replace it, to come up with a consensus policy within one year. So yes Tatiana?

Tatiana Tropina: It's a very quick question. Let me narrow down from what Milton said. The fear (unintelligible) starting to doubt right now is that if we don't come up with access as a part of this EPDP or parallel process of this EPDP, the Board or the Org will impose something. And this is the big issue I think that capacity

wise, it is also most unrealistic to handle two processes within one or within parallel in one year and there is a big discussion on this.

But the fear is that if we don't come up with something, there would be something coming either from the Board or the Org. And I do understand that it's very hard to seek these answers and clarity from you right now, because as you pointed out already, you're also getting the mixed messages.

But just to deliver what we are having now, where we are standing, and why we are so worried. Thank you.

Rafik Dammak: Okay, so just maybe add a comment here from remote comment from Farzaneh. She said, we are concerned with where the ICANN Org is going with access model and we are concerned that the Board just approve it. Considering what Becky said is not going to happen, Board won't just approve an access model that's not community led. Did I get that right?

Becky Burr: The Board has no authority to develop policy. That's the job of the GNSO. The organization does have some authority with respect to compliance.

Stephanie Perrin: Stephanie Perrin for the record and not to belabor my point about the things on life support in different rooms here. The WHOIS policy does not exist at the moment. We have a sort of dead, unimplementable WHOIS conflicts with law policy that we know doesn't work and that some of us have been saying is not in compliance with how data protection law works in the first place. So it was ill thought out and ill conceived.

So we are back to the Frankenstein of body parts as each of these initiatives fails. I would humbly submit that the uniform, unified, united, whatever it is, access model, is not in compliance with data protection law. I'm not a lawyer, caveat, caveat, but I am sure that the registrars and registries will be consulting their lawyers as to whether or not they would be liable if they complied with this, and the answer is probably going to be no.

So then what happens, do you know? I honestly think that for those of us who care about the rule of law, due process, and indeed, I don't want to get hugely rhetorical, but how democracies make their decisions about the internet, we selected ICANN as a multi-stakeholder organization to run this thing. We have put expectations of accountability upon it. We are trying to get it to grow up to a higher maturity level. I disagree with some of my peers in this organization in the need to comment on some of these documents.

Where I see a document that totally is an abrogation of the multi-stakeholder model, I do not want to have at it because I don't want to destroy faith in the multi-stakeholder model. We have selected it. It could work. I won't say that it's working very well right now and I'm not pointing any accusatory fingers at the board members.

You know the situation we're in. Bad risk assessment, bad attention to detail, refusal to listen to the data protection commissioners over 20 years. We are where we are right now, but we don't want to, now that we are a bit of a laughing stock and a spectacle, I understand that the world does not read the (Reg), but we don't want to further undermine the integrity of the multi-stakeholder process.

And we're being forced to by the process. You can do little things like not endorse one stakeholder group's attempt to come up with persistent access, you know, status quo. That would help us so that we don't have to man the decks, and shoot this thing down, and prove to some of our peers who think ICANN is a bad joke that in fact they're right. Just making that comment.

Becky Burr: Can I just ask for clarification here whether this group thinks that the universal access model, whatever it is, was a -- uniform, unified -- was an endorsement of the IPC/BC? Because when we move next door the CSG, I guarantee you they're not going to read it that way.

Stephanie Perrin: Stephanie Perrin. All I can say is it looks like a duck, walks like a duck, quacks like a duck, likely to be a duck.

Sarah Deutsch: Sarah, just to jump in on that, I can guarantee you they are super unhappy with the unified access model. They would, like you said, would like the model they developed, which basically once you're in the door, you're in and you have access. The unified access model was created as a straw man to give the community something bigger and broader to comment on. So I would, again, like Matthew said, encourage you to comment on it. Because it is not the IPC/BC model and we're going to hear that in just a few minutes.

Kathy Kleiman: Kathy Kleiman. First, I haven't said it yet, thank you for being here with us, and spending time, and talking. And just this type of background is very interesting, what you're hearing from different sides. So to ask a different question. Over the weekend, you had meetings as a board, some of which were public and you just said that some of them had - most of us were en route. Some of us were stuck in Miami overnight and lightning storms so we didn't get to hear these meetings.

Is there anything you can share? You mentioned that you were talking about the GDPR. Is there anything you can share with us about new insights? Again, some of us have been following the Hamilton memos. Just background on what happened over the weekend that would share kind of common legal insights for those of us who are wrestling with all the - we're all wrestling with the same questions.

Becky Burr: I don't think we heard any new legal insights. I don't think that ICANN has any particular insights on what the decision on the Court in Germany takes the case back means. We're all obviously very curious about it, but I don't think that there was - I think even serious German lawyers would be speculating about what the meaning of that is. Because I have no idea what will happen there. And I think it was really more about sort of what the

purpose of the straw man, straw being, strawberry, right, is supposed to be and sort of - and what the conversations were going to be.

We also talked about strategic planning. We talked about in the board governance committee, we started talking about the results of the board self-evaluation. What were the other topics we…

((Crosstalk))

Becky Burr: Yes, a bunch - we had a public session on internet governance issues and sort of the variety of policy topics that would be here in play at the summit. So it was three long useful days but the Board is spending a lot of time thinking about strategic planning, contemplating those things. Ron may have some…

Ron da Silva: This is Ron da Silva. We really did not spend a lot of time on GDPR over the weekend. Our focus was on a lot of the other business of the Board, especially on what are we doing the next five years. How does that feed into the strategic plan and the operating plan that we need to develop, right. The one we currently have in place expires 2020. So we really need a 2021 through 2025 plan. So there's a lot of focus on, really, looking at that and not so much in the mechanics of where are we legally in GDPR land and what steps do we need to take. Those kind of operational bits we didn't actually focus a lot of our time this weekend on.

Becky Burr: But we were constantly apprised of the status of Mexico and Sweden in the soccer games.

Rafik Dammak: Okay, thanks. I think we have five minutes left. So we covered the temporary spec and the access model. I guess we go there for a while. So maybe at the end, if there is any question or comment that you want to share or also anyone that we want to ask - I mean some of the board members.

Okay. Yes, Matt?

Matthew Shears: Matthew Shears. Rafik, do you want to touch on the first bullet because we didn't get to that and we'd like to hear that.

Rafik Dammak: Yes. So this is just yesterday we had capacity weighting costs for NCSG and its constituency. So the calls on facilitation and negotiation and on this because we had - it was before the NCSG policy writing just to give more newcomers some tools to help them involved in drafting. And this is more like, in particular it's involved (unintelligible) in the leadership position so we can get those kind of toolkit, and basics, and facilitation, negotiation, conflict management, and so on.

So - and this is important. We wanted really to highlight because we are using additional budget requests in a way that we have that capacity weighting for our stakeholder groups so we can involve more of our members and so on. So we want to highlight to show that there is something concrete. We are using this (APR) and you understand from the NCSG comments in the budget that we were concerned that there was a lot of cut on this community funding that help us as stakeholder group to give us more, how to say, to get our members to be more involved with them, to give them the tools so they can participate effectively in the policy development.

So this is why we wanted really to give this update. Do you have any questions?

Matthew Shears: I think it's a great initiative. Coming from NCSG, I fully support it. I just wanted, perhaps just to wrap up, if that's okay, just make a couple of comments. Again, thank you very much for having us. I wanted just to say a couple of things because we've got a couple of messages from this that I think are important for us to take away. So I'm not trying to wrap up for you, Rafik.

So on the messaging, how messaging is confusing. These are things that we'll take back. That's the first one. The second one is the roadmap, what's the roadmap, what happens after the temp spec, what happens in a year's time? I certainly agree that we need more clarity on what that is, if it's possible to actually determine what that is.

And I think those are two kind of key things I think that came out of this. And just to reinforce what I said earlier on is that please do contribute to the unified access model and the questions that it raises. It's very important. I know, Stephanie. I see you, despite - recognizing what Stephanie said, I still think it's important. Thank you.

Rafik Dammak: Okay, thanks, Matt, for this point. Yes, we - I can ensure you that we try to participate and to be constructive and share our input. So that's why we expressed in the beginning the concern about the process. Because get the process right makes life for everyone easier and then we don't spend time to complain about the process. We have no more time. I do count Stephanie. So okay one more.

Stephanie Perrin: Stephanie Perrin. EPD budget.

Rafik Dammak: You are quite jumping. So I think what she's talking about, it will be covered in the high interest topic today. We are going to talk about the (unintelligible) and we need to get input from the community what they need us, in terms of resources, what are the requirements. And I think the response from the Board was clear that we need to be clear what we require, what we need, and then they will - they can work on the budget.

Okay. So I think we have kind of concerns that maybe better messaging and this probably - we really want to hear more from the Board about all this issue because what we are getting is more announcement for the ICANN Org. And this (unintelligible) kind of (unintelligible) the concern who is going what and

we are not sure if you are on the same page and so on. So really, if we get the message right, it will alleviate all the concerns.

So with the last, I think we reached the time. I want to thank you for coming and listening to us. This is one of the rare opportunities that we can discuss with you guys. I hope you didn't find it - we didn't give you a hard time. That was not the intent.

It was really to interact with you and to help this dialogue. So I hope that you heard from us and also, we heard from you, and we get this - I'm not going to guarantee. I know that has strong meaning but this is kind of commitment to communicate better and to - yes, so thank you again.

Group: Thank you.

                        END