

KOBE – GAC: WHOIS and Data Protection Policy (1 of 2)
Sunday, March 10, 2019 – 13:30 to 14:30 JST
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MANAL ISMAIL, GAC CHAIR: So good afternoon, everyone. I hope you have enjoyed your lunch and I'm sorry to have missed the morning sessions. I had to join a board meeting. So we're having now our GAC session on WHOIS and data protection policy and the session scheduled for 60 minutes but with respect but before handing it over, I invite Kavouss to join us on the panel.

Let me thank each of the members of the working group for the efforts and enormous time they have dedicated to this process on behalf of the GAC. It was a loaded process within a very tight time frame so thank you and thanks to everyone, of course including Fabien whom I understand has been instrumental in keeping this group focused, productive and on track. So I would ask you a round of applause for the small working group and I will hand it over.

[applause]

FABIEN BETREMIEUX: Fabien Betremieux from the GAC support team and I will start the presentation with some introductions and background and then

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we will hand off the floor to the GAC representative of the EPDP. So a quick reminder for the GAC membership that this is one -- discussion this have topic on the GAC agenda and as you can see here on the slide there are a number of other sessions on this topic as well as engagement with the GNSO, the board during which these topics expected to be discussed. So won't spend too much time here but this is for a reminder that again, this is the first discussion on its topic here for the GAC.

So in the GAC briefing there are a number of action that were proposed by the GAC leadership for consideration by the GAC here in Kobe, I will just provide a quick highlights and again, this is available in your briefings so a first set of actions was around the discussion of possible concerns in the conservation for the GAC provide further advice for the board or other forms of input and that's in relation to prior GAC advice in particular the GAC Panama communique quoted here on the slide.

The other set of action was to prepare for the engagement with the ICANN board, and there was a specific question asked to the ICANN board about GAC leadership and this was be discussed further in the upcoming sessions, in particular the preparation for the GAC board discussion.

And finally, there were a number of more practical action that were suggested for conservation by the GAC such as responding

to an ICANN board letter sent to the GAC chair at the beginning of this meeting for input from GAC on the EPDP final report. There is a proposal for potential GAC statement on the EPDP. And there were also questions around the participation of the GAC in the upcoming phases stemming from the work of the EPDP so far.

In terms of latest developments, and I will here refer to the briefing material that the GAC was provided in [indiscernible] of the meeting where these latest developments are more detailed but as given a set of developments that GAC members should be aware of when discussing this matter, the adoption of the temporary specification in May 27, 2018, temporary policy in effect for only one year and this was in response to entering of the eu [indiscernible] -- May 2019. As a consequence of this board resolution, adoption of the temporary specification a GNSO policy developing process, the EPDP you have heard about was initiated to replace, eventually replace the temporary specification before its expiration on the 25th of May 2019.

As part of the EPDP deliberations you are certain certainly aware that the GAC had a set of representatives in the EPDP who participated in the very substantial work of the EPDP team and the EPDP team concluded its work in late February and provided a final report with a number of recommendations adopted by the GNSO council on the 4th of March shortly before the meeting and this adoption in effect is set in motion a number of other elements

among other events, in particular the upcoming vote by the ICANN board on these recommendations provided by the GNSO council.

In terms of GAC input, you may recall that the GAC had noted a number of concerns with the temporary specification in the GAC Barcelona communique. The GAC provided input on the EPDP initial report and finally the representative of the GAC in the EPDP team provided input on the final report of the EPDP and it is actually part of the report as annex to the report.

Hopefully this provides enough background for members of the GAC to proceed with the discussion that we will turn to the members of the GAC's small group who participated in the EPDP to take you through a set of the number of the recommendations that were adopted by the EPDP team and on which the GAC, those members of the GAC and EPDP team provided comment in that statement we referred to before.

So I will happy to pass on the floor to any of the members of the small group to discuss the recommendations? And in the meantime, I will load as a reference the comment that was provided to the final report.

ASHLEY HEINEMAN:

So hi, this is Ashley with the US, and I think I will do my best to kick this off a little bit. There's a lot that was in this final report, it's not particularly an easy document to read so good for you if you took the time to try and read and comprehend it. It's dealing with a lot of complex issues and really wasn't probably any good way to present it in a report that was easily digestible but just starting with recommendation 1, essentially referring to has referred to as purposes and under GDPR, to be compliant, if you are going to process data you have to have processing purposes, have to articulate why you are doing it and under what legal basis, essentially. So a lot in here that may or may not be of interest to you, from our perspective we focus a lot of time on what is referred to as purpose 2. And that was very we wanted to make sure there was something to build off in terms of an access model and in our view while this is not a purpose that says that access will be provided to third parties, it does recognize that it is within ICANN's remit as articulated in its bylaws to lookout for the public interest and to do its best to avoid things like DNS abuse harm to the public. So indicates there is a role for ICANN, they have a processing purpose to basically enable access.

So for those not terribly familiar with WHOIS, there is no single database of registration data, that simply doesn't exist, this information collected by registrars and there's hundreds as far as I'm concerned the different registrars out there with that

information and under GDPR, for these registrars to transfer data to ICANN, that needed to be captured in a policy that recognizes there is an actual processing purpose for that transfer because a transfer of data is processing to occur.

If you look at it in the context of we as GAC have long-standing advice, we think a union for identification unified access model is necessary and at least conceptually this idea that ICANN can be the head of this unified access model they could in theory be the point in which the request for redacted information could go through them. So in order to do that you needed to be sure ICANN could have the information transferred to them so that's with purpose 2 was really important from our perspective in terms of getting into this document, and it wasn't very easy. We did get it and there was disagreement on it.

So I don't know if anyone else at the table wants to talk about the other purposes, a lot specific to ensuring that the contracted parties are able to do what they do in artful manner and aren't necessarily a priority for the GAC, or we can leave that for questions later, I will stop on that particular subject.

CHRIS LEWIS EVANS: -- and this was including ICANN's office, the chief –

KAVOUSS ARASTEH: [speaker away from microphone] no, go ahead, please.

CHRIS LEWIS EVANS: This was a late input into the situation and trying to cover research that ICANN could carry out whether under compliance or research to how the do E domain system was working or further improvement to further a capture for future work carried out by ICANN. This was not met with great level of enthusiasm from the contracted parties and some of the other parties in the room but it did make it through to recommendation and nothing -- most of that however is been pushed onto the second phase so really in a Phase I part it's in there as a holder and some of the details they want to get from ICANN is exactly what are the purposes for this research and the understanding the sort of data they might require. What recommendation to [indiscernible]. Thank you.

GEORGIOS TSELENTIS: With the European Commission sitting on the EPDP. There was a discussion about the accuracy. So we tried to base or argumentation that the GDPR is specific has an article 51 D that states that personal data must be accurate and where necessary kept up to date and every reasonable step must be taken to ensure that personal data that are inaccurate should be rectified without delay. So we tried to argue there were several positions

from the community that were reporting that this was solely referring to the right of the registrant half for accurate data and also we notice that had any effort to have accurate -- reasonably accurate data would impose a certain burden and costs probably to the contracting parties to rectify those data.

Having said that you will, the question was more whether the existing policies and procedures that are established within the contracted parties are sufficient for having accurate data. In this context, there was also sought legal counsel, advice because in the EPDP we have sought legal counsel advice on several issues and the accuracy principle was one of those and according to the analysis which was made there it was concluded that the existing mechanisms and procedures in place are -- shouldn't always be changed for the moment so what stands now in the recommendation number 4 is that the EPDP team should keep the accuracy principle as is and not be affected by the policy developed in the EPDP.

The GAC believes that we should recognize the importance that ensuring information of inaccurate data is essential for serving all the purposes there and although it should underscore what the accuracy refers to the data subjects, at the same times it is very important also for those who rely as third parties to access this information for their legitimate purposes.

LAUREEN KAPIN:

So we are moving on. I do want to underscore the importance of the data accuracy that was an issue that the GAC championed and George in particular championed it and for me the two big takeaways the contracts already require data accuracy and we wanted to be sure the EPDP work didn't compromise those existing contract provisions, one, and two, data accuracy not just important to the registrant whose information collected but also the public at large has a strong interest in making sure that information is accurate so we're very glad about the way that has started to [indiscernible] in the working group and the GAC commented improvements could be made.

Moving on to recommendations 5 and 7, this falls for the category of the EPDP being a product of compromise. There were many different positions expressed, a lot of negotiations, and in the end not every constituency got what they wanted. In terms of the data elements to be collected, one issue that is of concern to the GAC is regarding the issue of technical contact, so this is not the registrant, registering the domain responsible for the domain. This is another field, another contact field, technical contact which often, especially in a larger entity, would be the person you go to if a technical problem, i.e. something not working or something not working the way it's supposed to work. This is often a separate person. However, this information is not

required to be collected. It's optional. So the GAC remains concerned about this because the WHOIS at least was intended to in part provide contact information for network operators, computer incident response teams, responsible for dealing with sort of emergencies to the domain name system and those who need to be able to contact someone again, in the event of problems. So it has security ramifications, practical ramifications, because now this information is optional to be collected, and we're not talking about publication, this is what must be collected. This is something the GAC has flagged as an important issue to follow up on. I don't know if -- do you want to add something, Chris?

CHRIS LEWIS EVANS: [indiscernible] it could create a situation of fragmentation for records and that goes back to previous GAC advice and highlighted in the group by the SSAC group, so that's why it's a main concern for us.

LAUREEN KAPIN: The other topic that falls within these two recommendations about what information is to be collected relates to the organization field. Again, this is an optional field for the registrant to decide whether -- sometimes registrants get it the wrong, sometimes compromises their personal information, that was the

concern expressed and as stands now that recommendation leaves it optional for the registrant to decide whether to provide information in that field -- -- it's important for the public to know whether they're dealing with an individual or organization and we believe if the entity we're dealing with is an organization, that information should be required to be collected and we're hoping that during our Phase II discussions that there is room to deal with this very important.

MANAL ISMAIL, GAC CHAIR: Anything else from other members of the group. Kavouss, would you like to add something?

LAUREEN KAPIN: We're not going through every recommendation but the full comment was circulated for your review and approval and you have it in your briefing materials, so please take a look at it because if you have questions or concerns, you know who to bring them up to, your hardworking EPDP team.

Recommendation 17 dealing with the difference between legal and natural persons was a topic of a lot of heated debate. As a starting point the GDPR itself treats personal information as something that's to be protected but if the information relates to a legal organization that doesn't necessarily have the same

protections. So the topic became very controversial because the contracted parties have legitimate concerns about liability, because sometimes it's not so easy to distinguish between a legal entity and a natural person. And again, sometimes even the registrant gets it wrong so basically there was a recommendation that further study be pursued to figure out the best way to deal with this. And this slide sets forth some of the topics that are going to be studied. So the feasibility and costs of differentiating between legal and natural persons, examples of industries and organizations that have successfully differentiated between legal and natural persons, because those are in existence, privacy risks to individuals. If the distinction is made and other potential risks to the registrars and registries if they have to differentiate.

And again, this is going to be something that's discussed in Phase II but one of the things that the GAC has noted is that as currently phrased, this is very much in the court of let's study this and let's really consider what risks are going to happen. However, the GAC is of the view that making this differentiation could also have many benefits, and the benefits relate to the public knowing who they are doing business with, especially in the context of an organization, not a legal person. As I started off on this topic, the GDPR makes this distinction and therefore the GAC has really advocated for having the policy reflect the distinction that's already baked into the law here.

I'm hoping someone else is going to be on deck now [laughing]

ASHLEY HEINEMAN:

Near and dear to my heart, recommendation 18. To back up and remind you all that the workings of this group articulated in the charter and the charter if you hear us bantering around Phase I and 2, while we were not involved in the drafting of the charter, there was an exercise of the GNSO, but the charter clearly articulated that Phase I was not going to be dealing with a unified access model conversation, and that was been largely a focus of what the GAC has been commenting on but we were not permitted to really have those conversations in Phase I of the EPDP.

But what was included in Phase I was how to handle the language in the temporary specification which had a reasonable access requirement and this requirement was very vague, basically said that the contracted parties were required to provide reasonable access to the redacted information. There wasn't a lot in terms of defining what reasonable access meant but in the absence of the unified access model that essentially is the one requirement that the users of WHOIS information relies upon to get access to this information. So it was a priority for us to make sure there was a little bit more meat on the bones of this requirement and the temporary specification.

Through our conversations we had discussions over what is the appropriate terminology here and there was some agreement that perhaps in terms of being consistent with GDPR the word access wasn't the right word, it was disclosure. So what you will see as a change from reasonable access, it's now something along the lines of reasonable requests for lawful disclosure. And what we were able to achieve in the EPDP, we didn't get everything we wanted but were able to at least bring some kind of better detail with respect to expectations and that was for both the parties that are requesting information redacted data but also to the contracted parties.

So what you will see in this text that was basically a [indiscernible] read at the very last minute and satisfied with details here with respect to [indiscernible] as an example I will law enforcement, but for the sake of the room you know what you need to put in your request, so we don't find yourself in a situation trying to engage with a registry and registrar, for example and they send it back and say sorry, that's not enough information. At least now we know what enough information is and be able to make progress in terms of a request.

There're also some further details with respect to what a reasonable response from the contracted party is which is they need to respond to the request itself within two business days, -- resolve request within 30 days. So a bit more clarity and to set

expectations here in terms of how to provide a request. A requirement for the contracted parties to have information on their web pages as to how to make a request.

So from our perspective this was a good start. This is not an access model but at least in the near term as well as in the future if you are not able to participate in a unified access model you at least know what the rules of the road are in terms of making a request for data disclosure. And I think I will stop there on that one.

In addition, in terms of our governmental role here, we wanted to ensure what ultimately goes forward as a final report and potential new policy that there an review that be sure whatever we put forward is consistent with the guidance we've already received from the European data protection board, previously article 29 working group. Because they have provided quite a bit of guidance to ICANN over the course of the year in terms of what the expectations are, what is acceptable and would not be acceptable so we have asked for there to be a review to take that guidance into account.

And even though we were unable to get into Phase II which includes unified access model, it's important we start the deliberations immediately and we actually met yesterday to kick

off those conversations, not really substantively but to try to figure out how to organize ourselves.

In addition to that, we want to make sure that when we start the Phase II conversations, and this is included in our comments, that they happen quickly and doesn't go on forever, -- because if you read the charter, it's not very clear, and at least I myself was under the impression, this was all part of the EPDP and Phase I and 2 would be completed in an expedited manner all within the time frame of May of this year. That apparently is not the case. Now that Phase I is done we have now been told that Phase II theoretically could go on indefinitely, that going back to the standard PDP, and that would be really unfortunate because while we've been very patient and constructive in Phase I, we strongly believe there's a lot of urgency to making sure there are predictable, efficient ways in which to request and get access to redacted information. So what you will probably hear from us later is we think there needs the continued expedited nature of the conversations need to continue, there should be milestones, a conclusion date so we continue on this pace and not let it drag out forever.

Something else that -- actually, I will leave it to Lauren.

LAUREEN KAPIN:

I want to underscore the importance of both an expedited time frame for Phase II deliberations and that the content of the Phase II deliberations really create a solution to what is now a very unfortunate situation where there is no uniform system for third parties including law enforcement and cyber security professionals and the public at large to get access each registry and registrar may have a unique system and aren't obliged to treat things in a consistent way and that is fragmented, inefficient and not necessarily reliable. So it's a real problem that demand a solution and that solution has to have an expedited and specific endpoint. And I know it has concerned members of constituencies within the expedited policy development working group and the constituencies at large within the ICANN community that there's some talk of not having any end point for this issue because it's complicated. And although I would agree that it can be complicated, for me the issue is how important it is and the fact that it is so important and has gone unaddressed for so long really means we need to get to work on this and conclude it quickly so that these important interests can be addressed.

So now I'm going to switch topics and talk about some potentials for improvement for future work. By way of context, this was the first time, very first time there was an expedited policy development process, and as with anything that's new, certain

things worked well and certain things could work even better. So we had some modest proposals for improvements.

First of all, this was a tremendous time commitment by the whole group you see on the stage. We had 90-minute phone calls which became two-hour phone calls twice a week which morphed into three-hour plus phone details and those were just the plenary phone calls, then small groups, people members more than one small group, went on almost continuously from July through February, so a tremendous amount of time. Even though a lot of hours spent, sometimes decisions were made and new text was provided on very important issues and the demand was made on [indiscernible] members to get ready and discuss a make a call very quickly and request complicated issues, particularly when devoting a lot of time to complicated issues, a demand to look at ever changing texts and make a call on new positions without even an meaningful opportunity to consult with your government and colleagues, it's just unreasonable and there were many times that the members of the working group were put in that position.

So as which enter the next phase of this project, one of our asks is that there really be sufficient time to consider new texts and new positions and to allow time to consult with colleagues in the GAC with your government constituencies before being asked to make a call, that is one thing that could be improved.

There could have been a more stringent approach to setting deadlines for changes to text and to avoid issues that were thought to be closed. A lot of time was spent looking at issues, again, that previously at least a lot of members of the group thought had already been settled. So we think a process point would be to really make sure that there's a strict view towards being clear when things have come to a decision point and not revisiting that.

Again, because of the length of the phone calls and sometimes a lot of time spent on issues that weren't necessarily on the agenda or arguably seemed to be tangents, we thought that there could be ground rules set for interventions being limited to an agreed upon amount of time so everyone would have the same amount of time to make their intervention.

And then finally an issue near and dear to my heart. As you know the GAC and all the constituencies had participants and observers and I think it's fair to say the observers were working very hard as well as the participants and often listening to the call at the same time, helping to collaborate on positions. But procedurally speaking the alternates could not have access to the Adobe connect room, they were put in a shadow room where they could hear everything going on but could not have scrolling rights to the real-time text, chat, and as you know, many times there's two streams of substance going on, one is what is being said and the

others are the interactions in the chat. The alternates could not scroll through that chat to see what was fully going on and also could not even scroll through the documents that were being projected on the screen.

So it was this very strange and, in my view, unreasonable separate and unequal treatment of the alternates in terms of getting access to the information in a reasonable way. And the suggestion for improvement would be to make sure that in this Phase II the alternates either have access to the same Adobe connect room, albeit labeled as alternates and not contributing to the conversation or to have an Adobe connect room that's actually functional, i.e., able to scroll through the documents and able to scroll through the chat and just by way of an aside here, the objections really seems to hint as a distrust that for all the constituencies, somehow the alternates will misbehave and not follow the rules of the road for alternates which is not to speak up when there is already a participant in the participant slot. And I think that frankly is infantilizing, treating us like children, speaking for all the alternates.

Everyone is an professional devoting extraordinary amounts of time to these important issues and I think a reasonable way to treat folks who are devoting themselves and their time to these important topics and trust they will behave and if they don't you can take steps to deal with that but this ridiculous situation where

put in this shadow connect room that doesn't even work properly really has hobbled the work of the alternates. Pressing for needed changes there.

MANAL ISMAIL, GAC CHAIR: Thank you very much, everyone, for this informative session. Yes, Ashley.

ASHLEY HEINEMAN: One thing clear because it's not clear in the text because it was more of a cover note when we sent these comments in, these are concerns that we have but we did not object to the report. So I just wanted to make that clear, it's not immediately obvious. While we think there could be improvements made and we didn't get everything we wanted, we think what is reflected in the final Phase I report sufficient to move forward, eager to start Phase II, didn't want to leave the impression somehow, we objected to the report or all of our concerns must be addressed before we move forward. Wanted to make that clear. Thanks.

MANAL ISMAIL, GAC CHAIR: Any questions or comments from GAC colleagues? The intention here is to bring everyone to speed so that we can have more substantial discussions during our GAC session on Tuesday

morning but also in our bilaterals with the GNSO and the board and to prepare for GAC advice and response to the board letter.

GHISLAIN DE SALINS: Thanks for the whole team and will alternates for your great work and interesting explanations. I had a question. As you know the compliance of WHOIS, GDPR is subject to pending GAC advice. I think the decision of the board on this advice was transferred until the -- postponed until the EPDP would terminate its work. Was wondering based on the recommendations we have now, has therein there been some kind of GAC analysis made to know regarding our pending advice what would be the result of the board decision based on report of the EPDP what part of the advice would be rejected, accepted, and so on, was wondering if she had any thoughts on that. Thank you.

MANAL ISMAIL, GAC CHAIR: Thank you, Ashley.

ASHLEY HEINEMAN: Thanks, this is Ashley with the US. You raise a really good point because I think years now, we've had consistent advice on this issue but also consistently evolved and I think in light in particular of the guidance we received from the European data protection board, we have found some of our advice was not consistent.

Might be worth our while that we perhaps go back and find a way to recognize that because if you look at some of our past advice you might think our advice wasn't accepted, but what we have learned, we would all love to have the registrant's email publicly available but the European data protection board has made it clear that's not going to be possible, maybe a way to revisit past advice to make it clear that we recognize our advice has evolved and things have changed.

MANAL ISMAIL, GAC CHAIR: Thank you, Ashley and thank you, Ghislain for the good points. We need to revisit the whole thing and ensure the topic is closed. So any other comments or questions? Okay. If not then thanks again to the small working group representing the GAC in the EPDP. Thanks Fabien, thanks to everyone. We will be reconvening in nine minutes at 2:30. Thank you.

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