
ICANN Transcription

GNSO Temp Spec gTLD RD EPDP – Phase 2

Thursday, 9 January 2020 at 1400 UTC

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ANDREA GLANDON: Good morning, good afternoon, and good evening. Welcome to the GNSO EPDP Phase 2 team meeting taking place on Thursday, the 9th of January, 2020, at 14:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you are only on the telephone, could you please let yourself be known now?

Thank you. We do have apologies from Alan Woods of the RySG and Amr Elsadr of the NCSG. They have formally assigned Beth Bacon (RySG) as their alternate for Alan Woods. Alternates not replacing a member are required to rename their line by adding three Z's to the beginning of their name and add in parentheses their affiliation-alternate, at the end of which that means you are automatically pushed to the end of the queue. To rename in Zoom, hover your name and click Rename. Alternates are not allowed to engage in the chat, apart from private chat, or use any

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other Zoom room functionality, such as raising hands or agreeing or disagreeing. As a reminder, the alternate assignment must be formalized by way of a Google assignment form. The link is available in all meeting invites.

Statements of interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak now.

If you need assistance updating your statements of interest, please e-mail the GNSO Secretariat. All documentation and information can be found on the EPDP wiki space.

Please remember to state your name before speaking. Recordings will be circulated on the mailing list and posted on the public wiki space shortly after the end of the call.

Thank you, and over to our Chair, Janis Karklins. Please begin.

JANIS KARKLINS:

Thank you, Andrea. Welcome, everyone. Happy New Year. This is the first in 2020, so I wish to all of us a very successful conclusion of the work sometime in the middle of this year.

We have the proposed agenda that has [not been commented by the call]. The question is, can we follow that agenda as proposed?

I see no objections, so we will do so. Housekeeping issues. Update the work of the Legal Committee. A meeting took place on Tuesday, the 7th of January. If I may ask Becky to brief the team on the outcome of that meeting. Becky?

BECKY BURR:

Thank you, Janis. Good morning, good day, good afternoon to everyone. The legal team did meet yesterday. We continue to work through the Tier 2 questions. We're quite close to be doing. Our goal is to circulate the final questions by the end of this week among the legal team and then forward them to the plenary in advance of the Thursday meeting next week, if humanly possible. The notion would be, if we can get the plenary to sign off on the questions, then we would try to get as many answers in advance of the Los Angeles face-to-face as possible.

JANIS KARKLINS:

Thank you very much. Any questions for Becky in relation to the update?

I see none, so then let us move to Sub-Point B: The status on the draft initial report. If I may ask Caitlin to launch this sub-item. Caitlin?

CAITLIN TUBERGEN:

Thank you, Janis. I wanted to note that, as all of you received the updated draft initial report on December 20th, that is largely similar to the first draft initial report you received, with the exception of updates made after the first initial report came out. We received feedback within the Google Doc from the NCSG, the GAC, and ALAC, as well as the ICANN org liaisons. Additionally, a couple of groups sent their feedback via separate documents. I believe that includes the ISPCP, the IPC, and BC, as well as a proposal from the Contracted Party House. Going forward, it would be helpful if

groups could provide their feedback via the Google Doc. That way, all of the feedback is in one place.

As you received yesterday, the support staff sent out an e-mail with documents for today's meeting. One of the documents included a staff-developed list of topics that need to be covered between now and the face-to-face meeting. That list has all of the feedback that was received on the initial report organized into one document. So everyone should have received that yesterday.

Back over to you, Janis. Thank you.

JANIS KARKLINS:

Thank you, Caitlin. Let me say that it is a bit difficult to work if we are not following the same agreed-to working methods – all of us.

That said, if I may ask those groups who have submitted separately their comments to do a copy-paste exercise and then bring them to the document, which is used by those groups who have followed instructions and the agreed-to method of work. That would help us simply to view the document, working on one, not on several papers. So that's one observation under question [inaudible].

Secondly, I think it would be good to discuss now a little bit in this conversation how to proceed forward – whether we should really reopen those issues that have been agreed to when we were closing preliminarily the building blocks, or if we should look only to inconsistencies and maybe missing elements that should be brought into the initial report. That would help make documents more user-friendly and better readable because otherwise we will

engage again a second time in the same conversation that we had during the discussions and agreements on building blocks. That probably is not very good, especially taking into account how much time we have at our hands. That's simply my observation and question to the group because whatever everyone wants to raise we should. I cannot prevent raising those issues, but it would not be helpful, in my view, to try to reopen those topics we already reached consensus on. Of course, I understand that not everybody may like what we reached as a consensus. Nevertheless, we are working all together as a team, and not everyone will get everything that they want.

With this, I would like to open the floor now for any comments team members would like to make in relation to the draft initial report, the proposed way forward, or how we could better work between now and Los Angeles and how we should also work during Los Angeles to get to get a consensual initial report. So the floor is open.

James?

JAMES BLADEL:

Hi, Janis. Thank you, and Happy New Year, everybody. I actually wanted to speak to your last point, which was a proposal of how we approach our work in the run-up to Los Angeles and during the face-to-face, if that's okay.

JANIS KARKLINS:

Yeah, yeah. Please go ahead.

JAMES BLADEL:

Okay, great. I just wanted to remind folks that, the last time we had a face-to-face in Montreal, we – this isn't a criticism; it's an observation – spent a lot of time at then table wordsmithing and editing live documents. My own personal view – I've shared this with some of the other contracted parties – is that that's not then appropriate activity for a face-to-face, where our time is much more scarce than, for example, working intercessionally on the mailing list or during our calls.

So I had an idea that I'd like to just propose. We reserve the face-to-face time in Los Angeles for decisions and discussions that would lead to compromise positions or synthesizing feedback, and we consider as a group that any drafting or editing of documents on the table would be considered out of bounds and perhaps not an appropriate use of our time, and that sort of thing should be moved to the list outside of that room where we have more time and more folks can see that happening asynchronously.

So I just wanted to make that proposal because it seems like there's a hierarchy of interactions we have. Either we have all of the time in the world – of course we don't, but let's pretend we do – on the list, and then we have this limited time on our weekly calls, and then we have very, very precious time in face-to-face. I just ask us to consider defining what activities belong in which of those scarce buckets and to keep things like editing out of face-to-face meetings.

So anything that we can do to prepare for that and mitigate the need to do any sort of editing or wordsmithing on the table I think would be helpful. That was proposal. Thanks.

JANIS KARKLINS:

Thank you, James. I think you're right that we have a number of systemic issues that we need to discuss and agree upon, starting with the model itself but also then how information should flow, depending on the model, and then to incorporate those fundamental decisions in the document.

That said, I would say it is inevitable that we will do some wordsmithing because, ultimately, as a result of the face-to-face meeting on Wednesday, ideally we need to say this is a document that goes to public comment and then move to Priority 2 issues in the meantime. So I think you are right in terms of prioritization of topics for the face-to-face meeting. We are working on it with that understanding, but inevitably we will be also doing the final reading of the text.

Anybody else?

Marc Anderson, please?

MARC ANDERSON:

Thank you, Janis. I just wanted to put my hand up and talk briefly about the Contracted Party House letter. I know we submitted the letter on Tuesday, so I don't know how many people had a chance to pull it up and look through it. So I'll just tee it up real quick for everybody.

When we had the first draft initial report, at least from a Contracted Party House perspective, one of the concerns we had and one of the reasons why we did not think it was ready to go to public comment was because fundamentally we didn't answer the question on who is responsible for making the decision to disclose and ultimately what form the SSAD system will take.

In this new draft of the initial report, those questions still haven't been answered. So, from a Contracted Party House perspective, when we were considering a new draft and considering our feedback, what we did is we put together this proposed path forward in order to start the conversation on making those critical decisions on creating policy recommendations for ultimately who is responsible for making the decision to disclose non-public registration data and what form the SSAD model will take.

I hope this will help us start that conversation. We're really far into our work and we're coming up on the L.A. face-to-face in a critical juncture where we need to make these decisions. So hopefully this jumpstarts the conversation. I hope everybody can take a look at our feedback and we can consider that in our deliberations.

JANIS KARKLINS:

Thank you, Marc. I read it very carefully – actually several times – and I was very pleased to note two elements of your letter. The first is that we're talking about a standardized approach to all elements of the process, starting with accreditation, submission of requests, treatment of requests, and then the response to requester. I also depicted an element – that we would have a central gateway – which would be run by the operator (most likely

ICANN) where also all the elements of accreditation will be dealt with and so on. Your proposal is to put responsibility for disclosure decision-making at the level of registries and registrars and not to put it at the gateway.

So I think we have two fundamental agreements in that. The third remains to be discussed [to] see whether that is the consent of the group. This is actually one of two options that we realistically have. Certainly that is my intention: to start the Los Angeles meeting with this fundamental discussion and [try] to get agreement. Either we go, during the initial report, proposing only one path, or we, in the initial report, propose two possible options, and go for one path in a final report but, in the final report, taking one of two options and nothing else.

I have Mark Sv next in line. Mark, please?

MARK SVANCAREK: Thank you. The CPH letter wasn't on the agenda, but it feels like it edges into the next agenda topic, which is the Belgian letter. Am I reading the agenda correctly?

JANIS KARKLINS: Yes, you do.

MARK SVANCAREK: Okay.

JANIS KARKLINS: We can take it together.

MARK SVANCAREK: Okay, good. There is a lot to like in the CPH letter, as you said, but I do think that it starts with a misrepresentation of the Belgian letter and the feedback contained therein. Is it appropriate for me to explain in detail why I say that?

JANIS KARKLINS: Yeah, yeah. Please go ahead.

MARK SVANCAREK: Okay. So here's the thing. We've received guidance that a data controller – this is a quote – shall remain accountable for ensuring compliance with data processing operations under its control and – quote – cannot abdicate the responsibilities arising from data processing under their control.

Now, if we're talking about co-controllers or joint controllers, and the responsibility is allocated, where certain processing is done by one party and certain processing is done by a different party, arguably the processing done by the other party is not under their control. So then you have to ask, if the processing is not under the controller, do they retain any liability before it? And if they do, is that liability assessed proportionally or entirely?

So I think what the CPH letter is saying is that the liability is 100% applied to both parties, even for processing which is not under their control. I don't think that is an answered question.

So I propose that we bring to the Legal Committee this exact question. So, in the E.U., according to the appropriate, competent authorities, is the processing done by a different party considered to be under the control of their joint controller just by having a joint controller agreement? If a different kind of controller agreement is set – some sort of a co-controller agreement – would that also be true? Most likely, that would be even less true. If they were considered to be under their control, even though they're not, strictly speaking, under their control, would the liability be assessed identically to both parties? Or would there be some sort of a sliding scale?

Those are the questions that should have been more clearly asked in the letter to the Data Protection Board, which, by the way, none of us got to review in advance. And those are questions which still can be answered.

So, by starting the letter by asserting, "We have received the following feedback," I don't agree that that is exactly the feedback that we got. So there is a basic assumption in the CPH letter which pushes them down a particular path, and I think that that assumptions should be challenged. Thank you.

JANIS KARKLINS: Thank you, Mark. Stephanie, please?

STEPHANIE PERRIN: Thanks very much. In my case, this will be a broken record because I have been going on and on and on about who the controller is because it underpins every decision we make.

I'm sorry, but I disagree with Mark. I agree that we've got no clarity from this letter, but [inaudible]. Controllorship is not something that you sort out in a contract to get rid of liability. It's a question of fact. I don't think we're going to get clearer legal opinion. We have to grasp the nettle and figure out how this works.

In actual fact, there's a lot of writing from the EPDP on the matter of losing accountability when you set up processor agreements, and they've made it abundantly clear that a controller can never contract its way out of responsibility for the individual's data.

So this is fundamental question and why it's almost pointless to make comments on the final document – hence our lack of alacrity in sending you comments on the part of the NCSG (at least my part, anyway) because, without knowing who the controller is, all the other things are up in the air. Thank you.

JANIS KARKLINS: Thank you, Stephanie. Matthew?

MATTHEW CROSSMAN: Hi, everyone. Just to respond to Mar[k], the first thing I would say is the DPAs are not our legal advisors. They're not there to provide us necessarily with legal advice on the type of question that you've raised. So that assumption that you flagged in the response we've written is not really an assumption. It's based on the advice that we have received from our legal adviser, Byrd & Byrd, where we presented them with considering a model that is fully centralized, where ICANN has taken all responsibility for the disclosure decisions.

What sort of liability remains with contracted parties? If you look back at the memo on that, Byrd & Byrd is very clear that, even under that strict set of assumptions where ICANN has taken full responsibility for that decision-making, contracted parties still controllers of that data and are still liable for those decisions.

So I would flag that that's not really an assumption. It is based on the guidance that we've received from our legal counsel that I think is on point to the question already that I think you're raising. So I suggest that maybe we go back and reread that guidance before we think about re-asking some of these questions where I think we already have fairly clear answers on those issues. Thanks.

JANIS KARKLINS: Thank you, Matthew. Mark Sv?

MARK SVANCAREK: Thanks. Now, the attorneys I've showed this to ... Again, really you need to focus on the elements of "under your control." So let's assume that ICANN is a controller and the contracted party is a controller. We received feedback that this is most likely going to be the case. So the contracted party, for example, is collecting the data and storing the data. Processing under their control includes storing it securely and providing breach notices if the data is compromised.

Now, ICANN does not store any data. They didn't collect it. They're not storing it. It is not under their control to store it successfully. You would assume that they would not be liable for

mistakes made by the contracted party in storing the data securely.

This is the assumption here: that the joint controller is not responsible for the processing which is not under their control. So this is a different interpretation than what I'm hearing here, and the Byrd & Byrd memo does not actually contradict that assumption. I think that's point that we should be checking.

Also, as to that the DPA is not our technical advisor, that's another thing that you really need to rethink about. The DPAs are saying, "We cannot judge the organizational or technical implementation. That's not our job." I agree with that. It's not their job. It's too bad, again, that the ICANN letter is structured in such a way that there's so much focus on organizational and technical capability or organization implementation.

It is reasonable to ask the Data Protection Board or a DPA for a really fundamental assessment of the law itself, namely, if you're in joint agreement and the allocation of processing is between the two controllers. As Stephanie said, it's not under debate who's the controller. They're both controllers for the sake of certain processing. Does the liability for the processing by one party accrue to the other party who actually has nothing to do with that processing, just by the nature of being entered into an agreement? If there were two parties doing processing, you wouldn't assume that they were accountable for each other's behavior. Does the fact that they ventured into agreement now make them accountable? That is the question and that has not been answered. We do not have feedback on it. It is the kind of

question that is appropriate to ask Byrd & Byrd, or, more appropriately, an authority in Europe. Thanks.

JANIS KARKLINS: Thank you, Mark. There were a couple of hands up while Mark was speaking and then they disappeared. Now only the hands of James Bladel is up. James, followed by Thomas.

JAMES BLADEL: Hi. Thanks, Janis. Thanks, Mark. I guess I'm the brave one or maybe the dumb one, I guess. I take what Mark is saying, and, without getting too wrapped around the axel, I do think he might have a point. I think there is some ambiguity. But I think that misses the overarching point of the letter or the proposal coming from the CPH, which is that we are on the clock. We have a very limited amount of time to come up with something workable and practical, not perfect. Waiting for the clarity or the eureka moment that we get from either a DPA or legal adviser or for somebody to come in and answer these questions in such a way that removes all doubt and satisfies all parties? I think what we're trying to say is that's not coming. It's certainly not coming soon.

So I think the proposal in the contracted party approach is we're trying to hold onto two ideas simultaneously: this centralized model and this hybrid model. In order to have any hope of reaching some of our commitments in terms of timescale, we have to make a choice. Not 100% -- maybe not even 90% -- but 85% of the advice and the data and the research that we've done to date says let go of the centralized model and pursue the hybrid model

with all possible haste because otherwise you could be here next year with nothing and still trying to hold onto both. I think that is what we're trying to avoid with that proposal. Thanks.

JANIS KARKLINS: Thank you, James. Thomas is next.

THOMAS RICKERT: Thanks very much, Janis. Hi, everybody. I lowered my hand in the meantime because I thought that it might not be good for me to repeat what I said over and over over the last year or so. But I think everybody who was waiting for the European Protection Board or the Belgian DPA to write us a confirmation that any of the parties would have a free ride will be disappointed. I guess, regardless of how we're reframing the question, in this joint controller scenario, which I think we have present – there's more and more evidence that this is the case – there is nobody completely out of the risk of being held liable.

But, again, the question is, how do you manage this? How do you set up a contractual relationship in order to make the risk there is manageable for the parties involved?

Also, again, I think what we need to remember is that we have two levels of potential liability. Yes, the joint controllers are jointly and separately liable, but that would only be for civil claims or claims raised by aggrieved data subjects. What happens then is one of the parties is held responsible or sued by an aggrieved data subject [inaudible] they internally would seek indemnification from

the other parties, particularly the party that was responsible or actually doing the breach or the wrong thing.

The other thing is being [censured] by the authority. There, the authorities would go after the wrongdoer. So, if we have a joint controller agreement, if we allocate functional responsibilities to joint controllers corresponding to the roles that they'll play, if we have the proper agreements in place and the proper safeguards, both financially – we've discussed the security bond or an insurance bond and things like that – then I think everything will fall into place.

But what our [rudeness] failed to achieve so far, because nobody was willing to blink first, more or less, is to come up with such an arrangement, where everybody can see who's responsible for what and who is going to compensate who if something goes wrong at whatever side of the table. I guess that's symptomatic. We're not seeing three different models in our draft report. I've said from the beginning that I hope to come up with a consistent centralized model that has manageable risk attached to it. The contracted parties think that obviously this risk is a little too big for them.

So I think we can either leave it as it is – we will for sure not get further than a hybrid mode – or we put the cards on the table, come up with a contractual arrangement, and then we can potentially go a little bit further. Thanks for that.

JANIS KARKLINS:

Thank you, Thomas. Brian King followed by Alan Greenberg.

BRIAN KING:

Thanks, Janis. I appreciate the contracted parties putting this together. I think I agree with some of it and disagree with some of their interpretations of the Belgian DPA letter. I think it's important to note that the letter from the Belgian DPAs doesn't answer any of the questions that the Strawberry paper proposed. I don't think it forecloses any of the options that we were looking at either.

We all [made a comment] to each other that we would move forward in good faith and take that leap of faith that Ashley suggested at our last face-to-face in L.A. and work together on this. I just would implore the contracted parties not to give up on us. We have an opportunity here to deliver a real SSAD – the hybrid model that leaves decision-making in the hands of the contracted parties, presumably without ICANN Compliance being able to compel disclosure. From where we sit, it doesn't look any different from what we have today. So it feels like we spent a lot of time here working toward an outcome that just says we'll submit requests in a similar-looking way that also get ignored or denied as they largely are today.

So I would really implore our contracted party colleagues to stay the course with us. Let's keep working here. Until we get some advice that says we can't do what we're trying to do, please, let's keep working together on this. Thanks.

JANIS KARKLINS:

Thank you, Brian. Alan Greenberg?

ALAN GREENBERG: Thank you very much. I guess I'm coming down somewhere in the middle between the two sides that are presenting their arguments here. I believe that the hybrid model is indeed the way to go, although my definition of hybrid is somewhat different than what's presented in the contracted parties' letter. I believe there are some decisions that are going to have to be made by the contracted parties, and there's no choice.

But we're also looking at, in our building blocks on automation and things like that, the potential for some decisions being made based on patterns and experience being made almost automatically. Those could be done in the centralized model.

So I believe, ultimately, we will have to rely on contracted parties to make some things. How we address the issues that Brian raised of making sure they actually do it and do it in a timely manner is something I think we're going to have to work on.

But I also believe that there are some that can be made in the centralized model and responded to virtually instantaneously. I think the model has to be able to handle both of those modes. Thank you.

JANIS KARKLINS: Thank you, Alan. We are talking about standards. So, whether the decision will be made at the contracted parties level or made at the gateway level, they would follow a standardized approach. It may entail some kind of automated program that is run either at the gateway or run by 2,000+ contracted parties, where some level of automation could be built in.

The difference is that, of course, the trend will be [more quickly] visible at the gateway rather than at 2,000 points of decision-making at the contracted parties level.

I have Mark Sv, Margie, and Hadia. Maybe then it would be time to conclude this conversation and move further on our agenda. Mark Sv, please?

MARK SVANCAREK:

Thanks. I'll just leave you with two points. One, if you were listening to Thomas, you'll notice that he substantially, if not entirely, agreed with my point. So it's not just me.

My second point is, if we agree that we're running out of time, then offering us a 30-day SLA, which is what I think the last line of the CPH letter is, is not an 80% solution. That's a 0% solution. We're not going to accept a 30-day SLA. A 30-day SLA is derived from all the assumptions earlier in the thing about the distributed authorization. So, because of the initial decisions, you wind up in place where the SLA is just really, really, really, really long, and we can't accept it. So there's no sense rushing into that. It doesn't actually save us any time because we won't be able to get a consensus on it. Thanks.

JANIS KARKLINS:

Thank you, Mark. Margie?

MARGIE MILAM:

Hi. The thing that I also wanted to remind everyone was that, when the Belgian letter came out, if you recall, we have [Elena] from staff come talk to us about what was going on what were the next steps. She indicated that ICANN was meeting with the Belgian DPA in January and that they were expecting a response after that.

So I think some of the assumptions in the CPH letters are incorrect because we at least should take [Elena] at her word that that is what is happening and, at a minimum, receive that input, whatever it says, before we start really making statements that one model is the one that's going to comply with GDPR versus the other.

So I just wanted to remind everyone that that is my understanding. Unless staff has some update that they can give us about that timeline, that is what they told us.

JANIS KARKLINS:

Thank you, Margie. Hadia?

HADIA ELMINIAWI:

I agree with Mark [Sv] said. I also agree with what has been said: that the Belgian letter does not provide any [contracted] [inaudible]. I also understand where James is coming from and what he's proposing.

Looking at the centralized model and the benefits that we could get from consistency and predictability, we have an authorization.

I get the sense also that contracted parties would like to be part of the decision-making.

In the centralized model, we have a centralized gateway and identity provider and an authorization provider. The authorization provider is basically the entity that makes the decisions. We haven't yet determined who is this entity or who is going to make this decision.

What if the contracted parties are actually part of this authorization entity? It would give us the benefits of both models, where contracted parties do take a role in making the decision if they do want to have this.

Meanwhile, we have this system which is consistent, predictable, and built according to agreed-upon standards. Just a thought. Thank you.

JANIS KARKLINS:

Thank you [inaudible]. In the meantime, we have a few other requests. But if I may ask you to be as quick as possible. Georgios followed by Franck and then James, who'll have the last word. Georgios, please?

GEORGIOS TSELENTIS:

Hello, everybody. Sorry for my late joining. I would like to tell you how to interpret the letter, at least from our side. I'm talking now as the GAC but also as the commission: we should not come to conclusions.

The preference for one of the three possible alternatives that we have highlighted in our initial report, to our understanding – this is from several discussions that we had so far, also internally in the commission – we interpret this letter as a clear indication from the DPAs to work further on the possible options, not that this is a clear preference towards the hybrid or the decentralized or the centralized model.

So this is how we read the model, and we believe in this sense that it is giving back the ball to the EPDP in this sense to decide on the specifics of each one of those options or to provide an option before the DPA can give a more elaborated opinion on that.

So I think, in this sense, what we received from the contracted parties is, in a sense, jumping prematurely into some conclusions, if we are not yet deciding on what I have said in my previous interventions about deciding on the processing activities, the controllerships, and clarifying those issues to the extent possible. So there is a lot of work to be done inside the EPDP before we can have the verdict that we believe is said in the contracted parties letter. Thanks.

JANIS KARKLINS: Thank you, Georgios. Franck?

FRANCK JOURNOUD: Thank you, Janis. I wanted to make a couple points. One is to object to the notion that we have received all the guidance that we need and that all the guidance that it's going to be joint controllership because, in fact, we haven't because, if you look at

the Belgian DPA letter, it says, “Well, you’re really not giving me enough to go by, so I can’t say.” But the references that they make to joint controllership on the basis of an opinion that the working parties [inaudible] [was given], I think, two years ago, if not more. And that opinion wasn’t based on any details that we’re developing here. The Strawberry paper doesn’t have all the details. It just presents a technical model because it couldn’t prejudge the outcome of the work that we’re doing. So to say, “Well, they’ve spoken”? No, they really haven’t. The Belgian DPA says so explicitly.

To the point that Stephanie made earlier, I think she’s entirely right: you don’t decide whether you’re a controller or not. You don’t say, “Well, I’m a controller because I state so,” or, “I’m processor because I state so.” It is the fact of what your control over the means and purpose of processing that will determine whether you’re a controller, a joint controller, or processor.

So, if we keep putting more discretion, more decision-making authority, in this SSAD that we’re trying to develop on the contracted parties, then, well, hell yeah, they’re going to be a controller or joint controller.

So it’s paradoxical to say we want to diminish liability for contracted parties while maximize their discretion, their authority, and their control over the means and purpose of processing. It’s just completely contradictory. I wonder what it means about what we’re really trying to achieve here. Are we in fact trying to diminish liability? Are we trying to make the system more effective and efficient? Or not? Because, right now, it looks like, by saddling contracted parties, which are often small, which often don’t have

the resources, whether legal or operational, to do this in a timely fashion, we're clearly going against the purpose that we said we're supposed to pursue.

JANIS KARLINS: Thank you. James?

JAMES BLADEL: Thanks, Janis. I'll try to be brief. I think perhaps naively and in the spirit of the holidays that the contracted parties were hoping that this proposal would be received as an olive branch and as a way forward to get us out of the quicksand and get us towards something that we could implement in a reasonable timeframe that would be maybe not perfect but better than the status quo. It's becoming clear from the previous five or six interventions that that's not going to be acceptable to a large part of this group.

Again, the letter does not rule out the idea [that] a centralized model essentially says that the preponderance of advice that we've received so far points us in the direction of a hybrid model and, rather than chasing the mirage of a centralized model, which could take another six months, another 18 months, or another 24 hours months, that we should move quickly now on a hybrid model. If that's not where we're going to go – I guess we're part of the ride, too – we'll go along with that.

I think the key here is that outside parties are viewing this process to determine whether or not ICANN has an effective policy development process to address these tricky problems. I think I'm starting to hear the answer: probably not. As long as we consider

to pursue academically pure ideas and abandon the practical approach, I think that doesn't bode well for our work. So it's unfortunate.

I would encourage folks to maybe, after this call, have a cup of coffee and maybe go back and take a look at what we're trying to say in the letter because we're not trying to rule things out. We're trying to find the most expeditious path towards something that's better than what we have today. Thanks.

JANIS KARKLINS:

Okay. I said that James would be the last speaker. In the meantime, Volker and Stephanie are asking for the floor. But, please, be very quick. We still have a few other agenda items to cover. Volker, please?

VOLKER GREIMANN:

Very briefly, I think the DPAs have spoken by not addressing any of the models because they told us basically, "We can't tell you what you should do. You must determine it, and we'll look at it afterwards." I think that's very clear. That's very clear because it supports all the advice that we've gotten so far.

As liability goes, yes, we would like a situation where we have no liability, but we are increasingly faced with the reality of this: that the liability cannot be reduced. If liability cannot be reduced to an acceptable limit, then obviously we must control the risk of that liability. That means that we control who gets the data and who doesn't.

Now that we [inaudible], we can have a model and some mechanisms that would give the interested parties in that data some level of control and some level of assurances that they will get some data if their requests are good. That's something beside the point, but James is right. We want this process to lead to a successful result. We can spend ages debating on ideals, but we need to reach a conclusion, and soon. The longer we discuss options that will not happen, more time will be wasted.

JANIS KARKLINS: Thank you. Stephanie?

STEPHANIE PERRIN: Thank you. I just wanted to remind everyone about the fact that the contracted parties control the customer experience. Unless ICANN takes on control of the customer experience and makes the contracted parties processors, in my view, then inevitably the contracted parties have the major role in defending client rights. We talk about a consistent user experience. We're really talking about the people who want access to the individual's data – their experience.

But, from a data protection perspective, the primary focus out to be on the customer experience and the handling of their data. So far, contracted parties are in control of that. ICANN, in order to control it further and provide the kind of response rate that Mark Sv legitimately wants for security reasons, would have to take on a much greater role in terms of the customer experience by basically uploading a lot of the decision-making. I don't think

ICANN can do that, which is why I've always been focused on an external model. Thank you.

JANIS KARKLINS:

Thank you, Stephanie. I think we have come to an understanding that, for the moment, we have a continuous divergence of opinion on what would be the right way forward. So I do not see a lot of [inaudible] first of all, because the European Data Protection Agency and ultimately the Board are not the ones who determine ICANN policy. That is the community, and we are the representation of that community who works on this policy development. But they provide advice that we need to factor in in our conversation and our decision-making process.

I also read in this Belgian letter that this is preliminary comments that have been submitted. The [Board and] Belgian Data Protection Authority may take a formal decision at one point.

We also heard from Georgios and also from ICANN org's Strawberry Team that further engagement and conversation with the Belgian Data Protection Agency staff will take place. We may have formal legal advice from the agency and the Board itself at one point.

Nevertheless, it may take some time, but we don't have too much. The end of January is the deadline for the submission of the initial report, and June is the deadline for the submission of the final report. We need to do whatever we can to meet those deadlines.

That said, I think that the way forward would be, for the moment, to reflect on what we heard and come to the Los Angeles meeting

with an open mind. There we'll have a constructive engagement, discussing it further, because this is a really systemic conversation that needs to be organized by seeing each other. That's much better than on the phone.

In the meantime, we continue working on those elements of standards that would be applied in either models and we build those elements in a consensual way and bring them together in the initial report.

I would suggest that we move to the remaining agenda items – one on financial sustainability and the second on audit. For the next two meetings, we would propose the elements or points out of that 31-page document that has been circulated to the team list and we would take them one by one, trying to iron the existing divergence on elements composing the standardized approach.

With this, I would like to propose that we go to a discussion on financial sustainability. Thank you. If I may ask to put that document on the screen and maybe Caitlin to walk us briefly through the document, since we had the discussion on financial sustainability a while ago and there are a few remaining elements that need to be addressed. Caitlin?

CAITLIN TUBERGEN:

Thank you, Janis. I wanted to note that the text that you see on the screen – that was circulated yesterday – represents the text that was in the initial report Google Doc and the comments that were received on that.

As you may remember, following our last discussion of the financial sustainability building block, Janis had proposed a couple of the questions that were sent to ICANN org. ICANN org has replied since the last discussion. There is a link to that response in the agenda that was circulated.

In terms of today's discussion, we'll take a look at the comments that were received on the initial report of the text that's on the screen, also noting if anyone on the team believes that changes need to be made based on anything that was received as part of ICANN's response.

Thanks. Back over to you, Janis.

JANIS KARKLINS:

Thank you, Caitlin. Let me maybe start by giving my impression of ICANN org's response to our letter. First of all, it is obvious that there hasn't been so far any very precise calculation of the cost of the system and that, in order to engage in that, we or ICANN org needs to hire a company that will do those calculations and that that may take some time.

Secondly, my takeaway from the letter is that, since we are talking about the stability and proper functioning of the Internet, costs of anything should not be determining or preventing factors for making a policy proposal.

Therefore, I think we need to assume – this is what I tried to propose during the previous conversation on the same letter in Montreal – that we make, let's say, an educated guess that the operation of the system would cost of a certain amount of money

– a reasonable amount of money – and build the policy with that assumption. So, if that will turn out being a billion[-dollar] operation, then we will make a conclusion as we will receive any financial cooperation. But, at the moment, we need to assume that the system will be run by, let's say, a dozen people, if that is in a centralized model, and will be run by probably 2,000 or maybe 3,000 people if that is a decentralized model. Those 3,000 people would be assigned either fully or partially to perform the function of disclosure decision-making.

With this, I would suggest that we look at those elements of the text that has been commented on and see whether we can agree on or modify them.

With this, I would suggest that we go to the first paragraph and see Mark's comment: "When implementing SSAD, an unreasonable burden on small operators should be avoided."

Mark, do you want to talk on your concern?

MARK SVANCAREK: Mark Sv?

JANIS KARKLINS: Yes, Mark Sv, of course. That's [inaudible].

MARK SVACAREK: Yeah. Just checking. I think my comment is self-explanatory. The phrase "unreasonable burden" needs to be defined better because someone could say, "Even hiring a single person is unreasonable

for me. There's only one person in my company. I'm a small-time player. I'm a reseller (or something like that)." Let's not think about resellers. I think that's wrong. But a very small company could say, "I only have a few employees, and hiring one or contracting to a lawyer to do this is an undue burden on me," meaning that there's no way you can get a reasonable SLA and you probably can't even get a high quality of decision-making anyway. So "unreasonable burden" needs to be defined in a less broad way. Otherwise, this won't work and we'll just wind up with terrible outcomes.

We had a lot of discussion on this topic for the last several week: the unlikeliness of smaller players hiring anybody or even being able to hire people from the available pool of resources, which is, of course, a reason that I push towards a centralized model. Sorry to digress on that. Thanks.

JANIS KARKLINS: Do you have any editorial proposal, Mark?

MARK SVANCAREK: I'd like to see something from the Contracted Party House on this. So, no, I don't. I don't think I could say anything that is more specific than what I've said before.

JANIS KARKLINS: Okay. Thank you.

MARK SVANCAREK: But I can go back and think on it again. I apologize for not having verbiage ready at hand in response to my own comment. My apologies.

JANIS KARKLINS: Okay. Thank you. Stephanie, please?

STEPHANIE PERRIN: Thanks. Bearing in mind I'm a privacy consultant and I've done a lot of this, quite frankly we need to determine, before we start talking about unreasonable burden, just exactly what functions the under-resourced, small-time operator would need to do and then how you meet them. The contracted parties could set up a training squad, run through ICANN auspices, and there could be an outsourced capability for helping with decisions because it seems to me that the difficult things are the balancing tests.

There are many, many things that can be run in a streamlined manner through a hybridized system that don't require the end operator to have an in-depth knowledge of data protection law and how to do a balancing test. It's the difficult ones that you need to provide help for. You can do that through all kinds of ways. You can do mandatory training. You can do online training. You can do chat functions with skilled operators to help them out.

So we're getting down into the weeds here, but you absolutely have to split out which tasks are going to be the burden and which ones can still be managed in a centralized way, cost effectively. Thank you.

JANIS KARKLINS: Thank you, Stephanie. Brian?

BRIAN KING: Thanks, Janis. A friendly amendment on this I think might take care of what the contracted parties are looking for. What Mark is thinking about here is probably if we say a disproportionately high burden on smaller operators. I think that can probably do the trick there. Thanks.

JANIS KARKLINS: Thank you. So Brian is proposing to change “unreasonable” to – sorry. I heard some echoes here. Brian, could you repeat? “Unreasonable” changed to ...

BRIAN KING: Sure, Janis. I said “disproportionally high.”

JANIS KARKLINS: Disproportionally high.

BRIAN KING: Yeah. I think that gets to what we’re doing. Thanks.

JANIS KARKLINS: Thank you. Whether that would be something we could live with: instead of “unreasonable,” “disproportionally high”?

So, for the moment, no one – Volker?

VOLKER GREIMANN: Well, to me, from a legal perspective, “disproportionally high,” would be even a lower bar than “unreasonable” because “unreasonable” sets quite a high bar. But “disproportionally high” could be anything. So I’m not sure you want to go that way.

JANIS KARKLINS: Okay, thank you. So there’s arguments from Volker that “unreasonable” is legally more sound than “disproportionally high.”

Franck?

FRANCK JOURNOUD: Sorry. I was looking for my mute button. It’s not clear to me whether this paragraph and, in general, this sentence in particular, refer to ongoing costs of running the system or whether we’re talking about the initial cost of deploying, installing, etc.

It seems to me that it actually is about the latter – about the initial cost of setting up – because, when you look at the proceeding paragraph, it says, “distinguish between development and [operationalization] of the system and the subsequent running of the system.” Now, the paragraph that we’re talking about now talks about developing deployment and operationalizing. So that seems to me all about the start of costs – initial costs.

So I don’t know whether others think otherwise because they just assumed we were talking about something else or whether there’s

something in the language of this paragraph that is about ongoing costs.

JANIS KARKLINS: I think it is more, at least in my understanding of this sentence, about daily running costs – permanent costs of running the system – rather than putting the system in place and deploying it.

Mark, when you heard the explanation of Volker, would you be willing to live with “unreasonable”?

MARK SVANCAREK: Well, Volker makes a good point that “disproportionately high” doesn’t actually help us. So “disproportionally high with regards to the available resources to treat such a request” seems like it’s just a longer way of saying something that isn’t good enough.

So, at this time, although I remain concerned about “unreasonable” or “unreasonably,” we haven’t received any language that’s better than it. Thanks.

JANIS KARKLINS: Thank you. Marc Anderson?

MARC ANDERSON: Thanks, Janis. I’m just going to point out I’m surprised we’re spending so much time on this. This is advice to the implementers of SSAD that is a “should.” It’s not a “must.” It’s, “When implementing the SSAD, an unreasonable burden on smaller

operators should be avoided.” This should be a fairly reasonable piece of advice that we could give in our recommendations.

When somebody makes a suggestion like this, I always try and read the opposite of it. So, if the problem is “unreasonable,” then that implies that you’re arguing that, when implementing the SSAD, smaller operators should be expected to take on an unreasonable burden. I don’t think that’s what any of us want here. I think this is just a practical and reasonable thing to say that we should be able to find ourselves okay with.

JANIS KARKLINS:

Okay. So maybe we can keep “unreasonable burden” with the understanding that Marc explained.

I have two hands up. I don’t know whether they are old hands or new hands. Volker and Franck?

VOLKER GRIEMANN:

New hand. With regard to the previous comment regarding the running costs, I think there’s two levels to that, which entirely depends on which road we go down. If we decide to have a service that channels the requests in some form or shape, that would probably incur additional cost. If we, on the other hand, only have the requesters doing directly to the parties and there not being anyone in between there, that would be another level.

I think most contracted parties can live with the scenario where they would have to pay for the staff that is responding because it’s a legal obligation in most cases to respond to disclosure requests

anyway. But we would not be happy with any solution that we would also have to pay a service comparable, let's say, to the TMCH or other services that regulate disclosure of certain information or a channel is currently employing.

So, if there's another service in the [field] there that channels these and provides additional add-on services, even though the [inaudible] [easier], we would not be happy to pay for those.

JANIS KARKLINS: In a context of SSAD, Volker, we know what those services would be. That would be accreditation and providing an interface to submit the request in a similar format – the standardized format.

VOLKER GREIMANN: Exactly, yes. That's something I would see outside of our scope because that's not the service that we provide. Therefore, it would have to be taken care of by the requesters or some other third party that has yet to be defined.

JANIS KARKLINS: Okay. [Clear]. Franck?

FRANCK JOURNOUD: Janis, I apologize, but I'm going to go back to the point that I was making earlier. The paragraph that follows the paragraph we're talking about talks about the subsequent running of this system. It is not clear to me – if it's clear to everyone, let's say this paragraph is about ongoing and not about startup. It's just the

language between the first, the second, and the third paragraph is not consistent. I don't see why we're not clarifying it.

Once we've done that, then – as [I said], I think we should – we should also understand why we have Paragraph 2 and Paragraph 3. If they're dealing with the same thing, why do we have two different paragraphs dealing with the same thing? It seems like overlapping ways ... There's just not a lot of clarity between those paragraphs.

JANIS KARKLINS:

Okay. I will maybe ask staff to look at it and do some maybe very light twisting while keeping the notion of unreasonable burden on small operators.

I would propose to move on to the paragraph of "The EPDP recognizes that the fees associated with using SSAD may differ for users based on cost causation." Franck's comment is that cost causation is unclear. If I recall, that was Milton who suggested the use of cost causation in the first place.

Milton, could you explain your proposal to use the term "cost causation"?

Maybe Milton has dropped off. Oh, well.

Volker?

VOLKER GREIMANN:

Sorry. Old hand.

JANIS KARKLINS: Sorry. Marc Anderson, your hand was up and then disappeared.

MARC ANDERSON: Yeah, Janis. I raised my hand initially because I guess I wasn't quite sure what Franck was saying. He seemed to be confused about the intent of the second and third paragraphs, which, to me, seem pretty clear. So I wasn't quite sure where his confusion was. So I had raised my hand initially to try and ask for clarification on that, but I dropped my hand when you moved on to the next paragraph. So I'll leave that there.

JANIS KARKLINS: Okay. Thank you. Brian?

BRIAN KING: Hey, Janis. Thanks. I can speak to the cost causation point because it's the same point as the next sentence that I had a comment on, if that works for you.

JANIS KARKLINS: Yeah, yeah. Please go ahead.

BRIAN KING: Okay, thanks. I think what Milton was getting at here was a concept that we pretty strongly disagree with. The concept that Milton has put forward here is that the users of the SSAD are

responsible for the cost – (the SSAD service-to-benefit) – the folks that are requesting the data and using the SSAD.

It's just a wrongheaded way to look at this. The users of the SSAD are using this data in order to help advance their own interest but also in the interest of law enforcement or consumer protection and the greater good that serves or contributes to consumer confidence and trust in the DNS. So this is a necessary feature of the DNS. It's not a nice-to-have and it's not something that benefits some folks that want to poke around and want to find out who's behind domain names. This is an integral part of the DNS. We've made that clear several times here, so I'm not sure why this keeps getting represented in this way. It's not consensus. There's no general agreement that this for the benefit of just a few parties who want to go on phishing expeditions. That's been clear, as I've commented there. Thanks.

JANIS KARKLINS: Thank you. Milton?

MILTON MUELLER: Can you hear me? I'm not sure my mic is working.

JANIS KARKLINS: Yes, we can.

MILTON MUELLER: Good. Yeah, we do have a fundamental difference here. I understand Brian's position. I think he caricatured what I'm saying.

I'm not saying you all want to go on phishing expeditions and just poke around. I am saying that, for this system to be effective and well-designed and efficient, there has to be an economic calculus involved in which those who create costs by making demands on the system, by using the system, are encouraged and incentivized to optimize what they do.

So, yes, making it free would encourage indiscriminate and many forms of unnecessary use of the system. Having some kind of cost causality principle embedded in the policy would discourage that and make sure that people are using it for things that were actually necessary.

The fact that ... We all know this. If you have to pay for something, you think about what it's really worth to get it. If you don't have to pay for it, you just go out and ask for it and you get it. It's just a lot a good way to design a system. I can't understand why you would not accept that as a principle. It just doesn't seem reasonable.

You are creating costs if you're making a request. You are making somebody evaluate the request. You are putting a capacity constraint on the system. So we want to encourage people to have a rational calculus as to what it's really worth for them to be making this request.

This occurs in all kinds of situations for things that have a general public benefit. Indeed, we charge ... Let's say, just to use a fairly innocuous example, if you have a community beach, you might charge a membership fee or some kind of gateway fee to people in the beach to make sure that those who are using it are actually

responsible for it in helping to sustain it, and not just anybody can show up and overcrowd the beach and so on.

So I really am going to continue to strongly advocate for this principle. I think it's absolutely necessarily to make this thing work. Thanks.

JANIS KARKLINS:

I don't think that anyone is speaking that there should not be any recovery of costs involved. I think everyone is ready to pay. The question is, how much and who is paying for what? That is what our conversation is about because there is no free lunch. As I tend to say, only the cheese in a mousetrap is for free. The rest has some cost associated.

MILTON MUELLER:

To respond to that, that's true. Of course, everybody knows this has to be paid for, but we are arguing about the principle of cost causation. So users are the one who are causing many of the costs, and they should be responsible for those costs. So we're arguing about, yes, who should pay, not whether there should be payment.

JANIS KARKLINS:

Yeah. Okay, thank you. Next is James, followed by Mark Sv.

JAMES BLADEL:

Hi. Thanks. I want to agree or, let's say, emphatically agree with Milton that this is not going to be free to develop. It's not going to

be free to operate. The direct beneficiaries of this system must bear the cost and not those subjects who are contained and whose data is essentially being transacted.

I take what Brian is saying about this greater good and the overall confidence in the ecosystem generally. Awesome. Tell me what their address is and I'll send them a bill because the real cost in real dollars are going to land on our businesses and on our customers.

I think Milton makes an important point: one of the fundamental principles of the Internet is that any free resource will tend, over time, to be abused. Costs are not just only a way of assigning or allocating the burden of operating a system but it's also a way to ensure that is used judiciously and necessarily.

I can appreciate that folks believe that their requests would always be necessary and no one would make unnecessarily requests, but I think our experience, even just looking at WHOIS, is that that is most certainly not the case. It's very difficult to find the small fraction of legitimate and necessary request that are buried in a tsunami of unnecessary or superfluous requests or automated requests.

So I think we, particularly registrars in contracted parties, are holding the line on this idea that the beneficiaries of the SSAD must bear the cost of the SSAD, full stop. We can't put that burden on the data subjects. If you put that burden on contracted parties, they're going to pass it to big-data subjects. If you put it on ICANN, they're going to tax our data subjects through increased

fees. So there is really one party here that makes the most appropriate sense for this. Thanks.

JANIS KARKLINS:

Thank you. I'm really reluctant to talk about free Internet resources. There are none. To run each resource entails some cost. The question is how we are paying for those that are perceived as a free Internet resource. So, ultimately, it is passed on to the final user in every circumstances. So the question is how much users of SSAD should contribute, together with the general good that this system will do for the Internet.

Let me take Mark Sv and then Franck.

MARK SVANCAREK:

Thanks. I do think we're talking past each other a little bit, but I feel the need to weigh in. I'm sorry. I'm hoping that, for future discussions, we can avoid, as Janis said, references to the tragedy of the comments – what happens when you have a free resource? – because I don't think we're talking about that anymore. There is definitely an idea that people who use the SSAD will be contributing to the operation of the SSAD.

The real concern is when there are statements like, "Direct beneficiaries" – a thing that's not really defined – "will bear 100% of the costs." That's where you start to see the arguments that the direct beneficiaries, if they're defined as trademark holders and copyright holders and cybersecurity people, they're not really the only ones benefitting. I would make the point that Microsoft is not making a lot of money by detecting Iranian or Korean hacking of

our election systems. Am I direct beneficiary of that? I don't know. It's debatable.

So let's not continue to throw up the example of the tragedy of the commons or the abuse of free resources. I think we've moved long past that. The real concern is the statement that certain users of the SSAD should bear 100% of the operational costs and the assertion that only certain mechanisms of cost recovery will be acceptable, specifically the per-request mechanism of data recovery. There are other methods. My mobile operator gives me a data plan. It does not give me a per-byte cost. They used to do that, but now it's economically viable to give me a data plan. So we should constantly be considering other ways of cost recovery. It just seems like, as soon as we talk about this topic, we go down two paths. One is the tragedy of the commons. The other one is, "Here is how we're going to recover the costs," even though we haven't really discussed it any sort of detail. Those are the pitfalls I'm hoping we can avoid if we have discussions on this topic. Thanks.

JANIS KARKLINS:

Thank you. Last is Franck. I would like to also hear an answer on whether now the cost causation is clear to you. I'm speaking about the third paragraph in the text.

FRANCK JOURNOUD:

Right. I'll address that last point first. It's not clear because, with the sentence, "may differ for users based on cost causation," it's not clear whether it says differ between users depending on ...

And cost causation is ... I understand the concept of cost causation, but it's a fairly broad concept, and there's a lot of different ways that you reflect cost causation, as Mark actually just said. So having this general sentence that's very vague I don't think is terribly helpful. The policy that we're developing should state more clearly how we're going to do that. Is it going to be per-request? Is it going to be, as Mark was saying, a flat fee and you get all you can eat in terms of having as many requests as you want? Or are we increasing payments for accreditation? There's a lot of different ways to do this. A general sentence about "[reflect] cost causation" I don't think provides much guidance. That's one point.

The broad point that I wanted to make is that I don't know to what extent it's going to be helpful for all of us to discuss who's really benefiting from this SSAD. Is it us, the requesters? Is it everyone? Clearly, the position of the IPC is that, no, it's not just the requesters. It is everyone who is involved in the system: the contracted parties, ICANN, the requesters, of course, and the registrants. It's a system of accountability, ensuring that bad actors who use the system – I don't mean the SSAD system; I mean the entire ecosystem life cycle of domain registration, operation, and use ... It benefits everyone.

So we can continue to have what seems almost like a religious war over this issue, or we can just look at the fact. The fact is that, on the requester side, at least for IPC – I can't speak for the BC – we're not going to agree to a system that has us bear all the costs. That's like a political reality. I understand there are people on the other side who have the opposite view. I think the way that we

[slit] this baby, so to speak, is to talk about cost sharing rather than saying it should be just us [inaudible] just me or it should be just you because, if that's the position that others ... We could say, "You know what? We file a request for data because we are being victimized (either as copyright holders or as cybersecurity researchers who are shut down cybersecurity threats, etc.). Why should I pay to essentially report a problem to the police, so to speak?" I'm happy to take that position, which leaves absolutely zero common ground with folks on the other side of this issue.

JANIS KARKLINS:

Thank you. I think we're going a little bit in rounds here. I think we agree – all of us – that running SSAD should not be a business for profit but that we need to put as a principle that the costs associated with running a system should be recovered. I'm intentionally saying "running a system" because I would like to dissociate development of the system and putting the system in place from the daily running costs.

But how this cost will be recovered today probably we do not know and we will not be able to agree until we will start trying. So it may happen that, over a period of time, in one or two years, the costing system should be changed from one, as was mentioned, paper request to a plan as [talk] operators offer for voice and data. If we would stay at the level of these types of recommendation, I think that would be wisest because we will not get done to a decision on whether that should be a fee per request or that should be a cost plan because we simply don't know what volume we're talking about. That would be, in my view, an implementational issue rather than a policy issue. A cost should be recovered. The cost

should be shared in a proportional way from those who make request, but also the cost associated with running the system that's providing the answer also should be factored in because that is also a contribution to the running of the system. I would suggest that we stay at that level rather than talk about who pays how much for what.

With this, Milton is next, followed by Stephanie.

MILTON MUELLER:

Thank you, Janis. You stole some of my thunder there. I do agree with you that, when Mark and others talk about bundling usage packages into certain tiers, like in cellphone plans, we're getting way into implementation. What we want to establish now are certain policy principles, which is why I think the statement about cost causation is appropriate and necessary.

I think, just to put the two things together, we want to two principles to be established – number one that cost causation is one of the basic principles for recovering or determining usage charges. I would note that the language says very specifically that the fees associated with using SSAD may differ for users based on cost causation. So whatever differentiation of user costs there will be will be based on cost causation.

The next thing – we think this is a very important principle, although it may be overstated – is that under no circumstances should data subjects be expected to foot the bill for having their data disclosed to third parties. We could get rid of the rest of that sentence, at least from my point of view. I haven't consulted with

other NCSG members. I think, if you have this cost causation period principle established and you make it clear that in no way are you going to dump all of the costs onto the data subject, we would be happy.

Then the details – whether you get bundled pricing, tiers, volume discounts, or volume negative discounts – is an implementation question for sure. That needs to be worked out. But we do need to establish these principles. I think we can moderate the language on the second paragraph, but we need to have both the cost causation and the principle that end users – or that is to say, data subjects – are not going to have pay for their own surveillance. Thank you.

JANIS KARKLINS: Thank you, Milton. Stephanie?

STEPHANIE PERRIN: Thanks. Largely I agree with what Milton just said. I just wanted to point out that, once again here, we are caught in the paradigm of building a replacement for WHOIS. It's a gestalt that overrides everything everybody thinks about. That's not what we're doing. We're coming up with a system to streamline access to information under GDPR. As such, it hinges on legitimate interest.

I actually don't like the "under no circumstances" in that line because what we will get down to in the implementation – I do want to save it for the implementation phase, but we need to understand policy principles here – [is that] some releases are entirely in the interests of the registrants. I would say that fighting

cybercrime and looking after malware and phishing attacks definitely come in that category. You could justify a generalized tax upon the entire [system] that the users (excuse me; my dog is dropping his bone)/registrants would pay for.

But then you get into much more difficult arguments when you start talking about law enforcement and trademark enforcement and those sorts of things. In those circumstances, it's going to be different.

You cannot justify attacks on the entire system for the benefit of the registrants. So we have to be prepared to set policy for how we're going to slice these costs. Thank you.

JANIS KARKLINS: Thank you. Brian?

BRIAN KING: Thanks, Janis. I apologize if I took us down a bit of a rabbit hole. I could have been clearer. The IPC expects there's going to be some costs to the users, whether that's a per-query cost or a cellphone plan data threshold-type cost. I don't care. That's for implementation. So I should have been clearer about that.

What we need to sort out here – Milton has hopefully taken us a step closer to that – is that a blanket prohibition here on – this says data subjects, and I think what we really mean is registrants – ICANN or any centralized funding that, as I put in the comment, that flows through to registrants is inappropriate. There's no reason the policy should prohibit that. We're happy for the policy

to say that users are going to have to pay something. I think we're onto something with the comment that we have here in the cost causation sentence. I think we might need some work there to get that to say, "based on cost causation. It could be based on user groups." I'm mindful that law enforcement may have difficulty. If you ever tried to get money out of the government, the government contract to get law enforcement to pay for this on any kind of basis could be tricky. So there's probably other ways that we need to work on the fees here.

But the primary point that we wanted to make is that it would be inappropriate here to put a prohibition on any funding coming from ICANN or the community at large. Thanks.

JANIS KARKLINS:

Thank you, though I don't see that there would be any prohibition of any kind. The sentence we're discussing for the moment suggests that there will be differentiation of running fees depending on the different types of users of the system. So that's all this sentence says. Actually, it was agreed on and we're discussing only the cost causation to clarify for Franck – the term. But now we are reopening it and again going a little bit in circles.

Volker?

VOLKER GREIMANN:

Sorry, I was on mute. I think there is a bit of a misconception there. Law enforcement will probably have to have some form of special access anyway, simply because, when they make a request based on their legal obligations to pursue certain crimes,

their legal rights to request certain information will have an expectation of certain information to be provided for free. If they avail themselves of the SSAD ...

JANIS KARKLINS: Volker, we lost you. At least I did.

VOLKER GREIMANN: Hello? Can you still hear me?

JANIS KARKLINS: Yes. Now I can hear you again.

VOLKER GREIMANN: Okay. So law enforcement probably has a little bit of a special case of a user because they have certain rights to request such data, at least the law enforcement of the appropriate jurisdiction of the closing party. I would at least assume that would be the cause.

Therefore, I don't think we should use law enforcement as a reason why disclosure or use of the system by the requester should be free. There should be a differentiation here. Once we make that, that problem is solved.

JANIS KARKLINS: What I would suggest for the time being, taking into account that timing is running and we're spinning wheels here, is that we maintain this sentence as is. In the fourth paragraph, we would

simply state that under no circumstances should data subjects be expected to pay for having their data disclosed to third parties, full stop, and delete the second part of the sentence. So we would take into account the different uses suggested in this conversation.

I see Franck's hand up. Franck?

FRANCK JOURNOUD: The words "under no circumstances" are a problem, if there's no recognition that cost can in fact be shared. Financial support for this system is, can, and actually should be shared, not just between users/requesters but also with contracted parties and ICANN. That's not something we're going to be able to ... Right now, we're not only talking about the source of money being requesters and places where money shouldn't come from – data subjects. Since everyone is implying that having contracted parties pay means they'll reflect all that cost to the registrants, I don't see how we're achieving the balance that we're advocating for.

JANIS KARKLINS: Okay. In that case, I would suggest that we maintain the third paragraph as is and put the fourth paragraph in square brackets. We will revisit it at the next opportunity.

Can we do that? Because I really would like to go through at least this agenda item, and we have 20 minutes remaining.

Okay. We will revisit the fourth paragraph here. Let me see if we can find a solution for [that].

The fifth paragraph: "SSAD should not be considered as a business opportunity or a profit-generating platform." This is what we agreed to. Now the question is whether operational costs be shifted onto ICANN or directly to registrants or contracted parties.

There is objection to this sentence. One way would be simply to delete it and stay on the level of the principle that SSAD should not be considered as a business opportunity for profit raising/generating. As a further clarification, it is crucial to ensure that any payments of SSAD are related to operational costs and not simply an exchange of money for non-public registration data.

Can we agree to delete the middle, which is marked in the text?

I understand Stephanie's hand is an old hand. Or that's a new hand, Stephanie?

Hello? Can you hear me?

STEPHANIE PERRIN: Old hand. Sorry.

JANIS KARKLINS: Okay. I see no requests for the floor, so I take it that we can delete this part of the sentence.

Let's then go to the next – Marc Anderson?

MARC ANDERSON: Hey, Janis. Sorry for the late hand. Can I ask that you just put it in brackets? I'm having a little bit of internal back and forth with my colleagues. If you could just put in brackets and we could get back to you on this one.

JANIS KARKLINS: Okay.

MARC ANDERSON: I'm not prepared to respond either way. I guess we need a little more time.

JANIS KARKLINS: Okay, thank you. We will then put in brackets.

Let's clarify the understanding of the next paragraph – Alan Greenberg, your hand is up.

ALAN GREENBERG: Yes. Sorry. My hand was up and somehow it got put down by someone. My question is about the first sentence in there. "SSAD should not be considered a business opportunity." Does that imply that ICANN cannot subcontract it to a for-profit company? I understand the second part: it shouldn't be a profit-generating platform. That implies the whole thing, but a business opportunity could be construed that it can't be subcontracted to a for-profit.

JANIS KARKLINS: I think at least my understanding and reading of this sentence is that they're linked together. This is a not a for-profit business opportunity but just a community service.

ALAN GREENBERG: But that does not imply that it cannot be subcontracted to someone who actually plans to make money on the contract.

JANIS KARKLINS: No because we're talking about that ICANN may consider to subcontract certain functions.

ALAN GREENBERG: Okay. Thank you.

JANIS KARKLINS: In other building blocks. Stephanie, your hand is up.

STEPHANIE PERRIN: Yes. Sorry. I just find this really weird wording. It expresses how we feel. We don't want this turning into a profit-making venture for somebody, but if you leave that language in, it implies that we're going to set up a non-profit or set up some kind of a not-for-profit entity that will do this or have ICANN do it. I think that presumes a bunch of different scenarios. So I haven't got a suggestion, other than to delete it. I think it's problematic.

JANIS KARKLINS: What is problematic?

STEPHANIE PERRIN: The language about that this shouldn't be a for-profit. Then what are you suggesting? A not-for-profit agency? A standards organization? ICANN [inaudible]?

JANIS KARKLINS: This is the way how to say that the SSAD should work on the cost recovery rather than being a profit-generation platform. That's all it says. This was the understanding that we reached already a while ago.

STEPHANIE PERRIN: Yeah, which means you can't outsource it.

JANIS KARKLINS: Why?

STEPHANIE PERRIN: Well, because that's a profit-taking organization that's going to be interested in building this. Just ignore me if you like. I just think it's problematic.

JANIS KARKLINS: Okay. Alan, your hand is up again?

ALAN GREENBERG: Thank you. I was willing to accept your first comment saying the platform itself, but I think Stephanie does raise a good point: if ICANN says, “We’re going to outsource the whole SSAD,” does this preclude it being outsourced to a for-profit company? I think we need to come up with wording that addresses the issue. Maybe explicitly say, “That does not preclude the outsourcing of part or all of it to a for-profit company.” But I don’t know how you word it to still address the concern that we shouldn’t be making huge amounts of money – outrageous amounts of money – on this. But it might be done by a for-profit company. I think we need to address it. I’m not sure we can wordsmith it during this meeting.

JANIS KARKLINS: Can we simply delete “a business opportunity or,” and say that SSAD should not be considered a profit-generating platform?

ALAN GREENBERG: Perhaps adding the word “for ICANN org” addresses the issue. I’ll defer to Stephanie, but—

JANIS KARKLINS: “Profit-generating platform for ICANN”?

ALAN GREENBERG: Yeah. Well, the wording that someone inserted I think perhaps addresses the issue.

JANIS KARKLINS: Okay. I will think about it. Again, we have now further requests. Thomas and Mark Sv?

THOMAS RICKERT: Thanks very much, Janis. I guess what we're trying to say is that there should be sufficient funds to recover the costs for the system. There should be costs to outsource functions to subcontractors at market cost. In this, we had the ISPCP's comments already. And to collect some money for a legal risk fund.

So why not positively state those three components that are permissible? I guess that, per se, excludes the option for ICANN and others to make this a revenue-generating business where everybody can get filthy rich.

JANIS KARKLINS: Okay. Thank you for your proposal, Thomas. Mark Sv. And please think of whether we could replace the first sentence with what Thomas proposed, indicating three costs associated. Mark Sv, please?

MARK SVANCAREK: Yes, I think Thomas' suggestion is fine. I just seem to recall that this sentence originally came from the concern that, as costs were reimbursed back to a contracted party, a contracted party who had a disproportionate amount of requests against its data would somehow be – I hate to use this word – rewarded in some way, that there would be a perception that they were being rewarded

for having a lot of data that people had interest in because of bad behavior.

I thought that that was where this original concept had come from: that a so-called bad actor registrar – I apologize for using that term – who would not be generating disproportionate profits just by the nature of the fact that people are requesting their data more than other people ... I thought that was the original source of this, but now that we've gone down this path and start specifying what ICANN can do, I think that that's probably a better direction. Thanks.

JANIS KARKLINS:

Okay. If no one objects, I would then, for the next reading, propose a substitution of this paragraph with a clear statement based on what Thomas suggested: outlining what those costs will be.

I see no objections. We will give it a try for the next reading.

Let me now turn to the next paragraph for Sub-Point A and B in relation to the accreditation framework. "An accreditation applicant may be charged a to-be-determined, nonrefundable fee proportionate to the cost of validating the application. Rejected applications may reapply, but a new application would be subject to the application fee."

Brian?

BRIAN KING:

Thanks, Janis. This one I would just like to update to be consistent with the per-request concept and how those are treated. It especially seems important here. I'm guessing at how this is going to work, but I would imagine that accreditation would be much more expensive than a one-off request.

So, if we're able to a small amendment on a per-request basis, it seems silly that we wouldn't do that when the stakes are much higher in accreditation. It seems like you should be able to correct an error without needing to incur an entirely new application fee.

Now that I say it out loud, it's probably too close to implementation detail and how that could work. But, if we're going to speak to it in the policy, I think it makes sense to have that same concept as we do in the per-request: [the be-able-to-update] concept. Thanks.

JANIS KARKLINS:

Thank you. Anyone else?

Marc Anderson?

MARC ANDERSON:

Thanks, Janis. I think Brian [inaudible] getting maybe a little too far into implementation here. I don't read what's there now as saying an applicant couldn't correct a small error in an application. That doesn't seem to be what this is saying, at least by my read. It's just saying, once an application has been rejected, it's over and done, and a new application is subject to a new fee. That doesn't, to me, imply or state that existing applications can't be modified if

there's a small error, as Brian puts it. But, again, maybe, to his point, this is too far in the weeds for implementation.

JANIS KARKLINS:

I think it speaks about rejected applicants. We had this conversation. If, for one reason or another, the applicant has been rejected, either for forging documents or doing something that causes rejection, I think we have even in the accreditation building block specifics on what may constitute rejection. Then the rejected applicant may reapply, but that involves, again, the cost because, each time when an application is reviewed in full, that generates certain costs. So that's all this paragraph says.

Brian?

BRIAN KING:

Thanks, Janis. I think it's a combination of the non-refundable fee and the explicit point here that the new applications will be subject to the application fee. It's really giving me heartburn.

Why we do need to be so prescriptive here? Couldn't they accreditation body decide whether they want to charge a new application fee if you get something wrong and they have to reject your application? Why do we need to be so in the weeds here? Perhaps we could just get rid of that second part of that bullet and make us feel a lot better about it. Thanks.

JANIS KARKLINS: So your suggestion is that we keep the first part of Sub-Point B – “The rejected applicant may reapply, “but the application will be subject to an application fee” – right?

BRIAN KING: That’s right, Janis. Thanks.

JANIS KARKLINS: This section is about financial sustainability, so if we delete the second part, then that becomes a principle of the accreditation itself. Then it should be moved to the accreditation part, saying that, after rejection, the entity or individual can reapply. That’s it. So here is whether we need to charge for reapplication after rejection of the initial application. So simply the question is the placement of this. If we to agree to delete, then it should also be moved to the accreditation building block.

Any reaction to Brian’s proposal?

Marc Anderson?

MARC ANDERSON: I’ll just note there is a proposal to change the “will” to a “may.” I think that may be a good compromise here, in looking at chat.

JANIS KARKLINS: Okay. Thank you, Marc. Would that, Brian, be acceptable?

BRIAN KING: Hey, Janis. Yes, I think that would be fine. I don't think we need to specify at whose discretion there. I see the language. Yeah, that's better out of there. Thanks.

JANIS KARKLINS: Okay. So then we have a deal, right? We change "will" to "may" and we consider that this is an agreed-to set of principles. Thank you.

Unfortunately, we have exhausted all time and we didn't get to the agenda item on auditing. There were a few questions to resolve, but we will take them up then during the next meeting, which will be on Tuesday, the 14th of January.

It remains for me thank all team members for active participation in this meeting. We will propose the agenda for Tuesday's meeting possibly early on Monday.

Thank you. With this, this meeting stands adjourned.

[END OF TRANSCRIPTION]