ICANN Transcription
GNSO Temp Spec gTLD RD EPDP – Phase 2
Thursday, 18 June 2020 at 14:00 UTC

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TERRI AGNEW: Good morning, good afternoon, good evening, and welcome to the GNSO EPDP phase two team call taking place on the 18th of June 2020 at 14:00 UTC.

In the interest of time, there'll be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone, could you please identify yourselves now?

Hearing no one, we have listed apologies from Amr Elsadr, NCSG, and no alternate has been named. Just for a quick side note, Owen will be the member representative for the RrSG and James will be the alternate for today's meeting as indicated in the Zoom as well. All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members, when using chat, please select all panelists and attendees in order for everyone to see the chat. Attendees will not have chat access, only view access to the chat.

Alternates not replacing a member are required to rename their lines by adding three Zs to the beginning of their name, and at the

end in parentheses, their affiliation, dash, “alternate,” which means they are automatically pushed to the end of the queue.

To rename in Zoom, hover over your name and click “rename.” Alternates are not allowed to engage in the chat apart from private chats or use any other Zoom room functionality such as raising hand, agreeing or disagreeing.

As a reminder, the alternate assignment form must be formalized by way of the Google link. The link is available in all meeting invites towards the bottom.

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

Seeing or hearing no one, if you do need assistance with 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 posted on the public Wiki space shortly after the end of the call. As a reminder, those who take part in ICANN multi-stakeholder process are to comply with the expected standards of behavior.

Thank you, and with this, I'll turn it back over to our chair, Janis Karklins. Please begin.

JANIS KARKLINS: Thank you, Terri, and hello everyone. Welcome to the 66th meeting of the team. Agenda is the same as previous two meetings, going through the "cannot live with" items. Is there anyone who cannot follow that agenda? Thank you. It is approved. I do not have any housekeeping issues, and I would see whether somebody else has any. None, then we can move to the next agenda item, and that is review of outstanding issues.

Yesterday, we stumbled across the recommendation on disclosure decision, how it should be done, what steps need to be done, and we run in the weeds. I said that we would continue the conversation today, but after the meeting, we had a brief sort of analysis what happened and then where we [slipped,] and my suggestion would be maybe to leave the issue a little bit open and then ask staff to see whether there is any rewriting possible based on our conversation yesterday, and we would take up that new version during the next meeting on Tuesday. And we would move to another piece of cake in our sort of list of recommendations, and that is automation. So we will get over this one. I think then we're almost done.

So with this, and looking if that proposal would meet acceptance, I see no objection, so then let's take issues starting with 35. And as usual, Marika will introduce the issue and then we will take it from there. Marika, please.

MARIKA KONINGS: Thanks, Janis. Just on the previous item, recommendation 6, staff has undertaken quite a radical rewrite of [inaudible] which we hope to share with you later today for review. I hope we can all

look at it with fresh eyes and maybe forget a little bit about how the previous version looked, because it had become pretty convoluted and a lot of things were intertwined, so we really tried to kind of clean things up, simplify things and hopefully it will also address a number of the comments that were made. So as said, we hope to share that later today and then you have of course an opportunity to flag any “cannot live with” items that we can then consider during Tuesday’s call.

Turning to the next recommendation, as Janis said, it’s a combined number 16/7 automation recommendations. Starting off with comment 35, this was flagged for discussion by the Registries Stakeholder Group. This relates to basically the second paragraph in that recommendation which originally read the SSAD must allow for the automation of the processing of well-formed, valid, complete, properly identified request from accredited users as described in recommendation 7. Of course, we need to update, because there is no recommendation 7 anymore, it’s integrated here. So that’s something we definitely need to fix.

That was changed at the suggestion of the IPC/BC/ALAC to “must allow for the automated disclosure of data in response to ...” And you see that here in redline, so it’s clear the change that was made. The Registries Stakeholder Group-noted that change has actually seemed to narrow the scope for which automation would be applicable and noted that may risk confusion as it could raise the question, what isn't part of the actual disclosure of the data? And why did, for example, why did the central gateway manager disclose this to the requestor? And they know that using processing captures the entirety of the processing involved with

the disclosure request, so from their perspective, that creates a wider net and the way that it is phrased now, it may unnecessarily limit the automation part. So I think the question here is, is there any concern from IPC, BC and ALAC if it's reverted back to the original wording with the understanding that the automated disclosure of data is part of automation of the processing of ...

JANIS KARKLINS: Thank you, Marika. So, question is clear. Can we maintain the original text? Would that be feasible? Alan, please.

ALAN GREENBERG: I admit at this point, I've lost track of what the original text is and what the changes are. However, my recollection is that we had requested that we allow for centralized decisions, not only ones that are fully automated. That is, decisions made at the SSAD potentially aided by human intervention at the SSAD.

Marika suggested some words to leave the word "automation" in as the sole one but with an assumption that automation could be human augmented. If I recall correctly, that is what Marika had proposed or staff had proposed to address our problem. That was acceptable.

If indeed the wording that we ended up with takes away the release of information by the contracted parties, which is deemed to be automated, then that was an error. The sole change should have been to make sure that SSAD decisions which are not fully automated are allowed in our policy.

So the original wording didn't allow that. The staff's wording, I thought, did. Reverting to the original one is not acceptable. Perhaps there's other wording that can do what we want. Now, I may have misunderstood because I'm getting confused at what the wording—what we're talking about here. Thank you.

JANIS KARKLINS: So, if you would look on the screen, you would see that we're talking about the phrase in the recommendation on automation, which suggested or in original version that SSAD must allow for automation of the processing of well-formed, valid, complete, properly identified requests from accredited users. So that is the original version.

So then there is a proposal from IPC, BC, ALAC to speak about not automation of the processing but automated disclosure of the data. And the contracted parties are suggesting that that narrows the scope of automation, because processing is not just a disclosure, processing involves also receiving the request, analyzing request, sending it for disclosure and decision, wherever it goes. And that's why the proposal or question is whether we could accept or you could accept the original version that SSAD must allow for automation of the processing rather than narrower automated disclosure of response.

ALAN GREENBERG: Okay. Marika in the chat has pointed out I was talking about something that comes later. So I withdraw all my comments, to be

reissued later if necessary. And I think what is being proposed is okay, but at this point I'll let the IPC, BC people speak.

JANIS KARKLINS: Okay. Thank you, Alan. Margie, please.

MARGIE MILAM: I think the reasons why this language was troubling to us is that we understood the language to mean that there can be automated disclosure decisions. That doesn't mean that you won't also do the other things that the contracted parties mentioned. So as long as it says that the SSAD must allow for automated decisions and all automated processing associated with that, then it's fine. But the concern with this language—and I think we see it elsewhere—is that it takes away the understanding that there can be actually automated decisions in certain cases.

JANIS KARKLINS: Okay. Thank you. Hadia, please.

HADIA ELMINIAWI: Thank you, Janis. Yes, I read the Registries Stakeholder comment, and yes, disclosure automation of processing is broader. However, we would like also to explicitly mention the disclosure of the data. And the reason for that is that in many cases, we are fighting for this automated end-to-end disclosure. And sometimes it's not understood as such. So in other places, when we talk about automation, we talk about the automation of

the processing excluding disclosure. And this happens, rightfully, in many parts of the report. And therefore, we think that in this part, disclosure should be explicitly spelled out. So maybe we could say automation, disclosure—we could say allow for automation of the processing, including the automation of disclosure of data so that disclosure is just spelled out.

And the reason, again, for that, that in other parts of the report, we do mention the processing of the activities and we do exclude disclosure from that. Thank you.

JANIS KARKLINS: Thank you. Mark SV, please.

MARK SVANCAREK: Thanks. I think it's been covered already, I should put my hand down. Thank you.

JANIS KARKLINS: Thank you. Milton, please.

MILTON MUELLER: I think, again, we are fighting about a fundamental policy issue in which there really is no agreement and people are trying to put language in that sort of makes it seem like we have agreed on something which we haven't.

So the original formulation of this which said "Must allow for automation of the processing," I remember that this part of the

policy document is really about the central gateway manager, and the receipt of requests, and everybody was okay with automating the receipt and processing of requests and indeed that was the fundamental compromise that was struck over having a hybrid model.

And now people are trying to insert language that completely alters the nature of that agreement by saying, “Oh yeah, you can automate disclosure too.”

But number one, that is out of place. A question of automation is dealt with in other recommendations more explicitly and carefully. And it’s also stepping over the line from the receipt of requests from requestors to the central gateway manager and into the disclosure decision. And there's a section right below that that is about automated processing of disclosure decisions.

So this paragraph that is now highlighted in gray on the screen has no reason to even be there if it’s about automated disclosure. It is dealt with immediately below, it is dealt with in recommendation 7. So either we stick with the original language or we delete this paragraph. There's just no justification for not doing one of those two things. The current modification is just unacceptable. Thank you.

JANIS KARKLINS: Thank you, Milton. I tend to agree what Milton said, and initially, I was thinking that sort of seeking a compromise to add after automation of processing, including, but indeed on automating processing of disclosure decisions is the next paragraph. And then

here, we have two very important elements that goes all the time with automated disclosure, that is, where technically and commercially feasible and legally permissible. So these are inseparable terms. So therefore, I would suggest that we maintain the language as originally drafted, and understand that that is about processing of the data. And then the next step is automated decision of disclosure. So I would plea your flexibility and understanding that the automated disclosure issues will be covered in this recommendation. Mark, can you accept that?

MARK SVANCAREK: Yes, we can accept that. Thank you.

JANIS KARKLINS: Thank you. So, then we maintain the original formulation and go to the next topic. Marika, please.

MARIKA KONINGS: Thanks, Janis. It's probably worth taking the next couple of items together because they're somewhat of a package deal that basically relates to the first sentence here under the heading of automated processing of disclosure decisions, and the footnote that is associated with this part—and I'm trying to find the number, I think it's 43. So basically, there are a number of comments here.

First of all, maybe a little bit of a background. I think you recall that one of the previous meetings in review of public comments, we discussed this particular part of the recommendation extensively, and as you may recall, it originally was "should," there was

conversation on whether it should be “must.” There was concern about a “must” where there would be no way for contracted parties to kind of get out of that if there would be certain circumstances, either local law requirements or risks that had not been identified.

So what staff did based on that conversation was kind of rewrite this recommendation and change the “should” to a “must” but with the additional footnote or provision that kind of outlines the process by which contracted parties could notify ICANN Compliance of an exemption from automated processing of disclosure based on the outcome of DPA they had undertaken that had basically identified risks that weren’t previously recognized or local laws that prevented that automated disclosure. And basically, from a staff perspective, we had hoped that that would provide a reasonable balance between having a requirement here for the automatic processing of disclosure decisions for those categories of requests for which it has been determined that they're legally permissible, which we have a number as a result of the Bird & Bird memo while at the same time recognizing that there may be specific circumstances under which a contracted party may not be legally permitted or may have a risk that wasn’t previously identified to not have to undertake the automated processing and instead manually review those requests.

So there are a number of objections that were received to this, so in 36, the registrars and registries noted that they have concerns about it and they have proposed specific language that they would propose would replace this paragraph. So their proposal is that it should read “where a contracted party has determined it is

technically and commercially feasible and legally permissible to do so, they must automatically process the disclosure decision."

The NCSG has suggested to change the "must" back to "should", and then there are also a number of concerns that have been expressed in relation to the footnote where we did apply a number of changes in response to comments that were provided by I think the Registrar Stakeholder Group or the Registries Stakeholder Group, I don't recall exactly, about that if there's conflict with local law, the contracted party cannot wait for an approval from ICANN Compliance to stop the automated processing, it would need to automatically halt that and as a controller, it would be their decision and not one that could be overruled as such.

So I think a number of groups have expressed their concerns on both sides of this, which I think is intended to be kind of a package deal. As such, it makes sensed to discuss those together.

JANIS KARKLINS: Thank you, Marika. Maybe if we may agree from up front that there will not be contestation of the, let's say, notion of automated disclosure decisions, because this was one of the early agreements, that the disclosure decision should be automated to the extent possible where it is technically feasible and legally permissible. So then the later stage also introduced commercially feasible.

So I think that that is a fundamental concept that is part of the package here, and we know that at this moment, there is very few cases where automated disclosure is legally permissible. And

what we are trying to achieve here is to say that there may be also some new information, new guidance provided in the future and that this fundamental principle that disclosure decisions will be automated where it is technically, commercially feasible and legally permissible, will be reviewed as we go and as we learn.

So I would really plead not to contest or object this early agreement we had and which is built in the system in general. So of course, whether that "should" or "must," that is a different conversation, and I know how painful that may be because in the end, we do also very frequently and that keeps us busy for weeks and months, sometimes years. With this introduction, I have a number of people requesting the floor. Laureen, Stephanie, Milton, Margie in that order.

LAUREEN KAPIN: Thank you. I am fully mindful of the fact that the law may get further clarification and we may want to be able to respond to that. Indeed, we pressed for this ability to respond in the recommendation 19.

And I also agree that there should be a way for contracted parties to basically put the brakes on if in fact they get guidance that what had been identified as appropriate for automated processing no longer is.

What I'm uncomfortable with and concerned about in the language in footnote 43 is that there's a way to put the brakes on immediately, but there doesn't seem to be a way to then assess whether that call to put the brakes on is indeed correct or justified.

All I see here is that as soon as a contracted party notifies ICANN Compliance, everything stops, and that unreasonable exemption notifications may be subject to review by ICANN Compliance. So this seems to be a little bit of a one-way street, and I think there needs to be more meat on the bones here to figure out a way to assess whether the concern is indeed justified here. I'm not comfortable with the balance that's struck here. it seems unbalanced, in fact, to me.

JANIS KARKLINS: Thank you. Do you have any specific proposal how that could be fixed?

LAUREEN KAPIN: I need to think further about how we would do that. Generally speaking, I think then there needs to be a time for ICANN Compliance and perhaps also the affected stakeholders that are involved—right now, there are only two categories of automated processing, so I would think it might be the law enforcement and IP communities. But I think you would need to then have some sort of procedure where the impacted stakeholder groups and the contracted parties can confer and weigh in to discuss whether they are in agreement that in fact, what has been designated as appropriate for automated processing no longer is in light of the recent guidance. There needs to be some—I'm going to put it in jargon terms—notice and comment process, albeit it likely should be something that's quick. That would be my suggestion, subject to more pithy and specific language. But that's the gist of it, that's my suggestion.

JANIS KARKLINS: Thank you. We have hopefully automation, one of the issued that would be in scope of the mechanism. So that's where we could add also a review of notified exemptions. That would be one way. Another would be to provide some kind of implementation guidance. But let me listen others. Stephanie, please.

STEPHANIE PERRIN: Thank you very much. I'm not—unsurprisingly—comfortable with the use of the word "must." I think "should" is better in the circumstances. Let me explain why.

JANIS KARKLINS: Please be precise. There are a few musts.

STEPHANIE PERRIN: Contracted parties must automatically process disclosure decision. And the reason is that at the end of the sentence, you've got "pursuant to the implementation guidance below and the processes," and then at the end, you've got "where technically and commercially feasible and legally permissible."

So there's a whole lot of ambit in data protection law. Essentially, it is interpreted in a way that is a risk management area. Not in some cases. Some cases are black and white, but very rarely are they black and white. It's not like running a red light and you can measure where your car was when the light changed from yellow to red. It's a risk management decision in many cases. So there

will inevitably be interpretations of something being—here we have air quotes—legally permissible when according to he party that wants the data, you could try to get away with it. And we all know that—and I won't mention any large company names, but this has gone on for the last 40 years of data protection law.

So that's one gray area. And then the other gray area that we talk less about is there's local law, and unfortunately, the words "automatic processing" are hangovers from something that was very clear in the previous directive, 9546 from the European Union, and some of the data protection laws that have not been changed still have something pretty firm in it about automatic processing. So any contracted party operating in a jurisdiction that has local law that hasn't changed that wording to the more complex decision making involved now is stuck there.

And I foresee plenty of situations where one party would have one interpretation of whether something was legally permissible and other parties might not. I cannot imagine ICANN in its present configuration mediating those disputes. Therefore, that's why I object to the word "must". "Should," I'm okay with. I think "should," we all understand—and don't misinterpret what I'm saying: we all promote the concept of making this simple and inexpensive, therefore automated, where feasible. But let's not pretend something is possible when it's going to be quite difficult. Thanks.

JANIS KARKLINS: Thank you, Stephanie. Actually, we had initially "should," but it was not acceptable for many, also because of the scaling up of the system and contracted parties were reluctant to use "must."

But the deal was put “must” in the initial statement and the policy statement and then add those exemptions that is displayed in the footnote 43. So that was the deal which we made some weeks ago, I think, when we discussed the public comments on this. Again, we’re trying to find the balance point which would allow everyone go away from this conversation with a feeling that they can live with this, and specifically those who will be the biggest users of the system but also biggest operators of the system. So everyone should feel comfortable that they have sufficient safeguards from one side, but automation will be made when it is technically feasible and legally permissible. Milton, please.

MILTON MUELLER: Yes. I think Stephanie explained our concerns about the word “should” versus “must,” and we thought when we made that “cannot live with” recommendation, that we were actually proposing a fairly wimpy and easy to accommodate compromise, because of course, we’re not thrilled about the whole process of automatic disclosure at all and probably would prefer not to have it. So we've been moved very far out of our comfort zone and viewed that as not a very big deal. So pretty much, what would be the operational difference between having “must” and “should?”

But I understand also that the deal that Janis described in which footnote 43 is meant to respond to some of the problems that might happen with automation, and we like that. But we would like to see footnote 43 in the main text just so that it’s actually considered really a critical part of the policy and not an afterthought or an amendation.

And now our concern is the determination of what is technically commercially feasible and legally permissible. I think that's going to be the big sticking point here.

So number one, we're kind of kicking the football to implementation guidance, which is a fun process that probably could take another two years, and the mechanism outlined in recommendation 19. So right off the bat, we want to know, before we accept this language, what is happening in recommendation 19. And as you know, that has been a sticking point.

So if there is an acceptable process for recommendation 19, we could accept that language. If recommendation 19 strays outside the boundaries and turns into an alternative policymaking process, then we're obviously not going to accept this language. So I'm not sure, Janis, how to handle this. I do know that there is a small group proposal floating around for recommendation 19 that we would accept, but we don't know whether anybody else will accept it. So that kind of has to be cleared up before we can know whether we could accept this.

JANIS KARKLINS: Yeah. Of course, there are points that are sort of dependent on each other. So I'm still hopeful that we will find a solution for recommendation 19. But from other side, this conversation about the automated disclosure decisions is also important because that kind of informs the discussion on the recommendation 19 because if we in a policy conversation allow the review of cases after receiving new information that is not available today based on physical operations of the system, court rulings, board rulings, not

ICANN board rulings but European data protection authority board rulings. So that we can take those, discuss, and agree with it consensually and further automate the system.

Just one thing struck me. In the first line, contracted parties must automatically process disclosure decisions. I think that we need to stick to not automatically which has probably different meaning, but in automated way, we have further down the text automated disclosure decisions that should be—we're talking about automation not automatic disclosure.

What I can tell Milton, I think we need to trust each other and if we can provisionally agree on something here, dependent on reaching agreement on recommendation 19, and if there is no agreement on recommendation 19, we would revisit this recommendation in light of disagreement on 19. So I would suggest to proceed that way.

For the moment, think that 19 is agreed, and where we can find this balance point on this particular text. Margie, please.

MARGIE MILAM: Hi. Thank you. I do agree with Milton that that footnote is a very important part of the recommendation and should be pulled up. I think that s fair for everyone and that footnotes shouldn't have such important text.

But I think my point is a little different in that I think the language "automatically process disclosure decisions" isn't quite right. What I think it should say is automatically disclose data for any categories. And the reason I say that is if you're only talking about

processing a decision, the processing could result in an automated no. And I think that's not what we intend in this scenario. What we intend in the scenario is that if it happens to be a category of requests where it's legally and technically permissible and it's been agreed that that can result in an automated disclosure, then the answer automatically needs to be yes, not no. So that's why I think it needs to say "Must automatically disclose data for any categories" subject to the caveat which is in that footnote so that everyone understands that that decision is subject to the concerns of the contracted parties, that for some reason there might be some local reason they can't do that. So that's what I would propose.

JANIS KARKLINS: Okay. Thank you. Let's see whether others can agree with that. Marc Anderson, please.

MARC ANDERSON: Thanks Janis. Thank you, everyone, for the constructive feedback and suggestions so far. I want to note, from the registry perspective, when we looked at this language, we had concerns with the proposal to change this from the original "should" to a "must" and did not feel like the additional language in the footnote was sufficient to address our concerns going from a "should" to "must."

We had sort of our own feedback, but registrars beat us to it as far as submitting comments, so we decided to just add our comments or add our names next to what the registrars suggested.

And the reason for that is I think the registrar suggestion is good here in that they leave in the “must,” but as a balance, they leave it to the contracted parties to make the determination as to what is technically commercially feasible and reasonably permissible. And I think this is a good balance, because we know—we've talked about this before, contracted parties reside in different jurisdictions, have different measuring sticks by which they determine what is technically and commercially feasible, and certainly what is legally permissible is going to vary from contracted party to contracted party.

[So where the contracted party makes this determination that must automatically process disclosure decision is pulled in.] So this seems to strike a good balance. It also allows for evolution as what is technically and commercially feasible and what is legally permissible will evolve over time, it allows, with contracted parties making that determination, they're able to evolve over time as well. So that really allows flexibility for contracted parties to comply with law and also allows for flexibility for that determination to evolve as laws and guidance and additional information related to what is legally permissible changes over time.

So I think this is a good compromise and that’s why registries added their initials next to the registrar suggestion.

JANIS KARKLINS: Okay. But would you be comfortable to lift the text of the footnote 43 to the next sentence for the avoidance of doubt? To lift that like it is now displayed on the screen. Would you be comfortable with that?

MARC ANDERSON: If you're asking if I'm okay with that being part of the text and not being a footnote, then yes, I see no problem with that. But I think that sort of misses the point of the proposed updated text from registrars that registries are also supporting.

JANIS KARKLINS: Please say again, it misses the ... I didn't understand.

MARC ANDERSON: The registrar suggestion leaves the determination as to what is technically commercially feasible and legally permissible to the contracted party. The contracted party makes their own determination. Therefore, I'm not sure the text in the footnote is necessary.

JANIS KARKLINS: Okay.

MARC ANDERSON: On the surface, no issue with moving it from a footnote to the body of the text.

JANIS KARKLINS: Okay. Thank you. Brian, please.

BRIAN KING: Thanks Janis. I thought I was agreeing with quite a bit of what Marc Anderson said until the text changed on the screen. We're not going to be able to live with the contracted party determining kind of at its sole discretion as that language Berry's just highlighted. I think we do strike the right balance and we have a policy that's actually a policy that requires the contracted parties to do something that ICANN Compliance can enforce. That's what we do with policies.

So we need the "Must" language upfront, and I think we could live with the "must" language that was there. Margie made a helpful suggestion that we would prefer as well. And we are all ears and we're really interested in working on this exception process and how this works. Or in early days of data protection law in the grand scheme of things, and we have a lot of legal uncertainty.

So we will need to have smart reasonable exceptions that cannot be abused by contracted parties. So that's what we're thinking about. I think we've had a lot of good conversation in the chat there about if the law changes in a certain jurisdiction or if a contracted party has reason to want an exception, we should build some language and some concepts around how that would work, and there needs to be some oversight by ICANN Compliance that would at least look like it's going to prevent abuse of the exception process by contracted parties with that in mind. I don't know that we would prefer one way or the other for footnote 43 to be above or below the fold, but we would strongly prefer the language, and it's probably "cannot live with" for us as a general policy level that the contracted parties are not unilaterally making that decision, because with that, the whole policy is worthless, frankly, and can't

be enforced if the contracted party can just say they don't agree. Thanks.

JANIS KARKLINS: Thank you. So maybe then my proposal would be to, if everyone would agree as a part of the sort of package deal, to maintain this text which is now on the screen where the contracted parties must automatically process disclosure—and I understand that staff put it verbatim from the Bird & Bird legal memo in this respect. Then elevate footnote 43 and put it in as here suggested before for the avoidance of doubt. And that would be kind of package that we could look at, provided that there is also acceptable agreement on recommendation 19 where automation is one of the elements of that scope of activities of the mechanism. So that is proposal that I would like to seek your acceptance. And then we'll see whether Laureen can produce any further suggestions to meet her concerns. Stephanie, Matt, and Mark SV in that order, please.

STEPHANIE PERRIN: Thank you very much. Gratified as I am to see the words "data protection impact assessment" in the footnote, I am absolutely stunned that the contracted parties are accepting this caveat that we see in the footnote, elevated or not. Because basically, folks, we have not done a data protection impact assessment, despite certain parties screaming for it for the last five years, on the entire process.

Now what you're saying is that in order for a contracted party to stop automated processing where they believe it is legally

impermissible or technically infeasible or not affordable, in order to stop this, they will have to do a data protection impact assessment. And folks, I make my living doing these things, so this is not cost-free, and we don't actually have a scope on what a DPIA would look like, because of course, ICANN's never done one. But that could be a massive hurdle, similar to the hurdle that was presented to contracted parties if they wish to comply with data protection law in the former policy. Whatever the heck it was called.

I had the great pleasure of sitting on that committee back in 2014 to 2015, and all the contracted parties know that it took them years to get an exemption from WHOIS requirements in order to comply with data protection law.

So I'm not astounded at the way ICANN repeats the same mechanisms over and over again, but that footnote is reading remarkably like the WHOIS conflicts with law, and for that reason, I cannot accept it. Please bear in mind that there are other parties involved in this multi-stakeholder organization. Some of us represent the individuals here. And some kind of a recurrence of the WHOIS conflicts with law where individuals have no rights and no way to get into the system short of us taking cases to the data protection authorities to intervene, is not acceptable. Thank you.

JANIS KARKLINS: Thank you. So you suggest to delete that impact? Or what's your point, what's your suggestion?

STEPHANIE PERRIN: Well, I liked “should” instead of “must.” The authority has to rest with the contracted party. They should not have to come through a massive hurdle to get out of an automated processing if they determine that it is not either legally permissible or technical and economically feasible. Period.

So you could use “such as,” but you talked about trust a few moments ago. My trust is at a low level at this point, because I perceive a bunch of last-minute efforts to bring back structures that were boldly in noncompliance with law. Thanks.

JANIS KARKLINS: Thank you. Matt, please.

MATT SERLIN: Thanks Janis. Of course, I'm going to make a comment and then have to drop and tag Sarah to replace me. But yeah, I just want to echo what Stephanie said. The change from “should” to “must,” we understood the motivation behind that, but what we tried to do was put some guardrails in place so that if it’s a must, the contracted party makes the determination as to what is legally allowable based on their jurisdiction.

So I just sort of have to take exception to what Brian said, that you just willy nilly have contracted parties deciding not to comply with the policy. That's not what we are saying. We’re saying that you cannot have a policy that requires contracted parties to break the law. So we find ourselves—I’d heard a lot of “We can't live with this and we can't live with this” repeatedly, and I think this really is the crux of what we need to resolve to move forward. And I dare

say that we're not going to come to a resolution on this call and we're going to have to take it offline and put some more thought behind it, because just the notion that we would create a policy that forced contracted parties to break laws is just, I think, a recipe for disaster. Thank you.

JANIS KARKLINS: So, thank you. Look, Matt, we sort of negotiated this should/must thing in the first sentence, and put the guard rails or trying to put the insurance in the second one. So first of all, I would argue that no one is forcing anyone break the law, because the automation may take place only when it is legally permissible.

MATT SERLIN: Right, but the question then is who makes that determination.

JANIS KARKLINS: That is the common sense sort of generic policy determination or description what should happen. And I always use the example of a universal declaration of human rights where everyone agrees because these are general policy statements. And then implementation of course, then we see the differences. Here will be probably the same.

What we're trying to achieve here is to accommodate concern of many groups that contracted parties may not want to automate disclosure decisions even if it is legally permissible. This is all what we're trying to achieve. And that's why we're trying to convince you to accept that there will be level of automation when

it is legally permissible, and then if European data protection authority says that case A is legally permissible and the court ruling is going that direction, you cannot say no. you have to go on those specific cases and then provide automated disclosure.

So at least, this is how I understand this conversation. Nothing more, nothing less. And of course, I understand that this 4% fee is like a sword above your head and then you do not want the sword to fall. But here we are. We need to find the solution. Mark SV, please.

MARK SVANCAREK: Thank you. I think I agree with what Janis is saying. When I see this language, I don't read it as contracted parties are being forced to break the law. But moving aside from that, most or all of the feedback that I'm seeing in the chat is based on the concern about breaking the law, but there's really more than that in this language. There's the technically and commercially feasible aspect of it, and I think that may need to be treated separately rather than lumping it together. Maybe have two separate sentences.

The reason I say that is that if this were a bilateral agreement between two parties, technically and commercially feasible can make sense. It can be understood between the parties and when there's dispute, you can discuss it. But here, we're talking about thousands of contracted parties of all different inclinations, and I think that this is going to wind up with really the line being ineffective if it's not written right, because one contracted party can just simply say, you know, under my circumstances, I really just can't afford to do that. And then they don't have to, and

because there's so many of them, there's really no way for us to scrutinize whether or not their claim was reasonable. So for the avoidance of doubt, I'd like to make sure that the language in the technically and commercially feasible aspect is more subject to a standardization. So I would actually separate that section out away from the lawful, legally permissible, language just so that we can at least move on without the argument that we have about legally permissible language. Thank you.

JANIS KARKLINS: Thank you. Volker.

VOLKER GREIMANN: Yes. I would like to hit on something that Stephanie said which matches something that I've been saying for a couple of meetings ago at least, is that we cannot have a process where the onus of proving that something is not legally permissible is on us. The impact assessment has to come from ICANN, and that should come out with a clear determination that yes, for all contracted parties, this is now legally permissible.

That also hits on the second part. Just because it's legally permissible in one jurisdiction does not mean it needs to be immediately pushed through for all registrars in that jurisdiction. We are still part of the ICANN community, part of an industry that is trying to have the same policies and practices apply across the board no matter where you are. Obviously, there are differences in law that change how certain contracted parties have to apply those policies or can apply those policies based on the law that

they're situated in, but the policies themselves should be applicable for all contracted parties no matter where they're at.

So having something in there that says just because you're in country A you are now held to a different standard, that just means that suddenly all registrars in one country or a group of countries are at an economic disadvantage to all other registrars out there in the world. That cannot be the case, that is absolutely against the core ICANN intent of promoting competition in this marketplace. Therefore, it would also lead to [forum] shopping, registrars just registering their main address wherever it is legally most permissible.

This is not something that ICANN should want, therefore this should be universally applicable. And I think this language needs a lot more work before we can agree to it. Thank you.

JANIS KARKLINS: Okay. Who will be doing this work? Brian.

BRIAN KING: Thanks Janis. I hope you weren't answering your question when you said my name. I'd be happy to help, and in fact I have put a couple of suggestions in the chat. Just to address a concern that was made, I do not expect that ICANN Compliance will be performing a legal analysis to see whether the contracted party's exemption request has sufficient legal merit and then potentially forcing a contracted party to break the law in order to follow ICANN Compliance rules. In fact, as I clarified in the chat a couple times, the role of ICANN Compliance here should be to serve as a

check just that this exemption request—which is a good and necessary thing—is not being abused and that the contracted party has actually shown that there is a reason why they need an exemption. And I'm sure those will happen and contracted parties need to be able to follow the law and not be in a pickle.

And in a different context, I would strongly object to the contracted party being able to cease automation and cease processing while they get around to sending the request to ICANN Compliance and through dependency of that investigation. But I think in the spirit of reasonableness, we have not objected to the contracted parties being able to follow the law during the pendency of this evaluation by ICANN Compliance.

And I would expect—it sounds like my experience is different from some other folks—that this is closer to a rubber stamp process by Compliance that just is intended to avoid fraud or abuse of this exemption process and not anything designed to compel contracted parties to break the law in order to follow the policy. So I hope that's clear. And there are several guardrails that we can put around this. I noted a few in the chat, terms that are often used in the law and contracts, like reasonable—I put it in the chat. Sorry, I'm drawing a blank now and trying to follow the chat. But let's leave it there. I think we're closer to agreement here than it might sound. Thanks.

JANIS KARKLINS: Thank you, Brian. Marc Anderson.

MARC ANDERSON: Thanks, Janis. This is a tough topic, and I want to thank everybody, I think we've been very constructive and trying to work towards a solution. So I think that's worth noting. I think Brian and Volker both made some good points. Volker made some of the points I wanted to make. And noting what Brian said, I do want to note that line 39 from ICANN Org does touch on footnote 43 and get to some of the points Brian was making. So it might make sense if we read ahead a little bit on that one.

I do want to note though, again, on the decision to what is technically and commercially feasible and legally permissible, what we have right now is Bird & Bird advice on the level of the likely amount of risk based on their analysis of GDPR.

And that's interesting, because going into the initial report for example, we had a category of same jurisdiction law enforcement request which we had considered to be likely to be something that could be automated. And the Bird & Bird advice suggested that there was a level of risk with that.

And what I heard from many of my colleagues is that while some agreed with the Bird & Bird analysis and were uncomfortable automating, I heard from many colleagues that they were still okay with automating that based on their analysis and their decision, their analysis on what is legally permissible, they were still willing to automate that particular use case.

And I think that's important, because the language that registrars suggested allows for that. It allows contracted parties who are on the hook for these decisions to make their own determination and in some cases this may result in some automation, and in some

cases, this will result in less automation. But I do think that it's very difficult to come up with a one-size-fits-all solution here when we're dealing with varying privacy laws against varying jurisdictions. And we've been very GDPR-centric so far, but there are a number of other privacy laws which are also impactful and may differ.

So new guidance on GDPR, that something is permissible under GDPR, does not necessarily translate into an opinion that something could be automated for all contracted parties in all jurisdictions. So it's important that we keep that in mind and make sure contracted parties have the flexibility to comply with all laws that are applicable to them.

And there, I think the registrars' suggested approach makes a lot of sense.

JANIS KARKLINS: Yes, but ... And this "but" is that the current experience does not suggest that contracted parties will go to automate the disclosure decisions. And again, maybe this is an irrational feeling, but this is how I understand why we were talking about changing "should" to "must" and putting some additional safeguards in the text which comfort contracted parties where they can make their own determination and provide exemptions.

And of course, the whole process is because of the GDPR and we're trying to be more general and not to repeat policy process when any other privacy law will be adopted and ICANN will need to comply with that from one side, but from other side, GDPR is a

damn high standard and it is unlikely that we will have privacy laws which may be even stricter than GDPR. And if they will be, then of course, we will need to do new PDP because that probably will be necessary.

Time is ticking and we're a little bit spinning wheels. Though exchange is useful, and one way would be to look whether we can ask staff to attempt to rewrite what is not any longer footnote but the text in the recommendation in light of this conversation, or even better, if somebody from the registrar group or registry group could help out with the formation, and first one who comes to mind is Volker who said that he would automate it anyway but on its own terms. Stephanie, please.

STEPHANIE PERRIN: I just want to reiterate that no amount of guardrails, caveats, conditions can turn a "should" situation into a "must" situation in terms of drafting a policy or a legal drafting. If there's so many unknowns that you have to have all these caveats, then it ought to be a "should," not a "must." We can't have a "must" with all of these preconditions. It just doesn't make legal sense. And I'm not a lawyer and I know that. [Having] at least supervised drafting. Thank you.

JANIS KARKLINS: Thank you, Stephanie. Look, can I suggest that we will come back to this part after staff analysis of all proposals, especially those who were made during the conversation, and in the chat room? I must admit I'm trying to multitask but these are rather complex

issues for me. And then following the oral debate and not necessarily processing everything that comes in the chat room. So after that analysis, staff would attempt to propose alternative language which hopefully will bring us to one page. Would that be possible? And we would try to move to the next topic which most likely is more or less about the same. Brian is suggesting his service, I understand. Is anyone from contracted parties who'd join and try to work out with Brian a possible alternative?

I see only Marika volunteering. And Matt. Good. So Matt and Brian assisted by staff will try to work out a possible compromise based on this conversation, including those who were suggesting change of "must" to "should" as we heard from Stephanie and Milton. So with this, I would suggest that we go to the next point, which is Marika.

MARIKA KONINGS: Yes. Thanks, Janis. I think we basically covered all the items, including 39. And ICANN Org liaisons can speak up if they disagree. I think many of the points that they flagged there have already come up in the conversation as well in relation to the footnote, how it would work in practice, how it would be implement. I think we did hear some suggestions or ideas on how that could maybe be further elaborated on. So I think that's something we take as well as part of the homework. But of course, if there's anything else that needs to be called out there, someone will raise their hand, I'm sure.

So the next comment relates to—

JANIS KARKLINS: Daniel's hand is up. Let me see if that's on the previous one before you go to the next one.

DANIEL HALLORAN: Thank you, Janis and Marika. I agree, most of the points we raised in our comment there were discussed. We're not taking sides on this, just [want to be clear on what exactly the role] for ICANN should be. I think one issue we have that did come up is this refers repeatedly to ICANN Compliance, which is one team within ICANN Org, and not necessarily the team that would handle things like exemption requests. We have other teams, we have GDD, legal, etc.

So I think most of these cases, policy should just be talking about what ICANN Org does or ICANN, not ICANN Compliance specifically. It's not a foregone conclusion that they would handle this. Thank you.

JANIS KARKLINS: Okay. Thank you. Please, Marika, now point 40.

MARIKA KONINGS: Thanks, Janis. I think now we get to a section that Alan previously alluded to, that we've incorporated to indeed address this, the notion that even for decisions where the central gateway may direct automated disclosure to the contracted party, there may be manual processing that needs to happen at the central gateway to

either verify information or kind of double check, maybe especially in the beginning of this process. And there was also some language added there that read similarly, the central gateway may request a contracted party for further information that may help the central gateway manager in determining whether or not the criteria for an automated processing of disclosure decision have been met.

Contracted party [inaudible] no requirement, it's just to make clear that this is an option that is available to the central gateway to reach out to the contracted party and on the other side, the contracted party may say, no, I'm not providing that information.

So in response to this specific section, the Registries Stakeholder Group has suggested that this should be deleted in their view. If the central gateway manager needs to request additional information from the contracted party about the registrant in order to determine whether request is automatable, then either the requestor has not provided sufificent information and it should be sent back to the requestor, or the request isn't automatable and should be forwarded to the contracted party. We should avoid adding additional processing of registrant data in order to respond to requests from third parties.

So again, I think the question here is whether this language should be deleted from the section.

JANIS KARKLINS: Okay. Thank you. is anyone objecting, Based on feedback and arguments received from contracted parties, whether that is something we could accept or not? Mark SV, please.

MARK SVANCAREK: Thank you. There seems to be an assumption in the opposition to the language that additional information always is personal information. And that may not be the case. There may be other information that's requested, and I think we should leave that as an option. Thank you.

JANIS KARKLINS: For instance, what you mean? What type of information?

MARK SVANCAREK: Well, I guess I should think about it before I speculate.

JANIS KARKLINS: Because the argument is if the central gateway cannot determine whether case is automatable or not, then there is no sufficient information provided by the requestor, and the request should be sent back to requestor with a request of additional information. But if you can come up with example, please let me know.

MARK SVANCAREK: Okay. Thank you.

JANIS KARKLINS: Alan Greenberg, please.

ALAN GREENBERG: Thank you very much. If this goes through and stays, any contracted party can completely automate the rejection of these requests. So these are requests coming in over some sort of electronic mechanism. If a request comes in saying we'd like the following additional information to allow us to try to make a determination, any contracted party can say no. They can automate that if they don't want to handle that. I don't see the harm in allowing this, and it may give flexibility going forward.

JANIS KARKLINS: Okay. So, how badly contracted parties want the text to be deleted? Maybe now hearing other side arguments that there is no harm to keep it, would you accept that? Milton.

MILTON MUELLER: I just have a clarification question. So, the text you're talking about deleting is the green text that is already deleted? Or is it the blue text that has been added?

JANIS KARKLINS: No, that is now marked.

MILTON MUELLER: So that's what you're talking about deleting also?

JANIS KARKLINS: [This is what] Marika said.

MARIKA KONINGS: Just for clarity, it's the second Berry is highlighting now, the sentence that starts with "similarly."

JANIS KARKLINS: Second sentence. Yeah. This one.

MILTON MUELLER: I'm sorry, I'm still trying to make sense of this. So the contracted parties want to delete that part that is now shaded.

JANIS KARKLINS: Yes.

MILTON MUELLER: Okay. Thank you.

JANIS KARKLINS: So my question is—

ALAN GREENBERG: The crossed out green stuff is going to be replaced later by another paragraph that's below it. That's a separate discussion.

JANIS KARKLINS: That is moved to implementation guidance. Okay. My question is to contracted parties now, hearing the argument of Alan that it does not make harm, would you accept to keep it in, leave it as is? Alan, please.

ALAN WOODS: Thank you. I'm just going to go back to what you said originally, Janis, on this. This is not a question about [what harm to] leave it in, this is a question of why do we have it in if we can't come up with a concrete example? So let's come up with a concrete example. I'm racking my brain, can't think of any reason why the CGM would actually take data from the contracted party in order to see whether or not something is automatable or not, and that's why we said, if it's not clear to the CGM at the beginning, then it just means that the requestor's not provided sufficient information or it should be sent back to the requestor, not to the CGM, an the request isn't automatable and should be forwarded to the CP because it's not falling under what has been decided.

So again, concrete examples, perhaps, but again, based on the information available to us and based on the reasoning and the discussions we've had on this, it does seem to be window dressing that's not necessary and could cause an issue in this instance. So in line with many other things, if we can't have concrete examples, we should not be keeping it.

JANIS KARKLINS: Yeah, I think Mark's hand is up, and there may be a specific example.

MARK SVANCAREK: Yeah, I think about my favorite use case, which is the data has already been disclosed to a previous person and it contains no personal data, and we discussed that this could be lagged either in the central gateway or it could be flagged at the individual contracted party who's the controller of that record. It seemed more likely that the latter would be the case. So this could be an example where we say, "Has this ever been disclosed before? Does this contain any personal data?" And then at that point, the answer could be yes or no. So that would be an example.

I suspect that there's another one, but I think that's a concrete example. Thanks.

JANIS KARKLINS: Okay. Thank you. Maybe Brian has example.

BRIAN KING: No, that was my example. Thanks.

JANIS KARKLINS: Okay. Can we think for instance that CGM may ask contracted party whether specific law enforcement agency has jurisdiction over the contracted party as additional question? Milton.

MILTON MUELLER: Yeah, I'm still trying to make sense of this. So the first statement, determination by the central gateway manager of whether a disclosure decision has met the criteria for automated processing. I thought we had established in earlier sections that it was the contracted party who made the determination or that it was our policy that made the determination. Am I completely missing the thread of discussion here? Where did we suddenly get the idea that the central gateway manager is deciding what gets automated and what doesn't?

JANIS KARKLINS: The central gateway manager receiving request determines whether criteria for automated decision making are met or not, based on policy, of course. And that is what determination makes central gateway manager and then sends the request together with information that the criteria for automated decision making are met to the contracted party for automated decision making by contracted party.

MILTON MUELLER: I still find this very, either poorly phrased or just wrong. So whether a disclosure decision has met the criteria—it sounds like a disclosure decision has been made, and now the central gateway manager is saying—and again, the question is, who's made that decision? I thought it was the contracted party. And now the central gateway manager is saying we have a disclosure decision but it meets the criteria for automated processing, so I'm going to review it at the central gateway. Grammatically and logically, that's troublesome. And from a policy standpoint, I don't

want the central gateway manager deciding what to automate or what not to automate. Just under any circumstances don't want that.

JANIS KARKLINS: No, Milton, you misunderstand that. So the policy today determines that we have two use cases that could be automated, which are described in Bird & Bird memo. So if the request that is received by central gateway manager meets one of those two use cases' conditions, then central gateway tells contracted party—

MILTON MUELLER: So the central gateway applies the policy criteria. Then we really need to reword this in a way that reflects that so that the criteria are established by policy, the CGM decides that a request meets those criteria.

JANIS KARKLINS: But this is what is—for clarity, the determination by the central gateway manager of whether a disclosure decision has met the criteria for automated processing of disclosure decisions may involve [not automatic review] at the central gateway. That's all what central gateway does, determines whether criteria of automated processing of disclosure is met.

MILTON MUELLER: Can we say the application of the criteria for automated processing by the central gateway manager may involve a nonautomated review?

JANIS KARKLINS: That goes beyond my competence. I'm not a native English speaker, so that is [inaudible] English grammar. Sorry.

MILTON MUELLER: Well, I think your English is fine, I'm just wanting to make sure that there's no grant of authority here for the CGM to decide whether to automate things or not.

JANIS KARKLINS: No, that is only [whether criteria met.] Let me take Alan Greenberg.

ALAN GREENBERG: Thank you very much. To be clear, the current document we have allows for a very limited number of central decisions at the SSAD. None of them fit this model. What this is allowing is that sometime in the future, the evolution model mechanism, should we ever come up with one, might come up with new scenarios where the SSAD could disclose information if it gets specific information back from the registrar.

As the contracted parties have pointed out repeatedly, registrars and registries live in many jurisdictions. Some may be in a position to release some information to the SSAD. We also have an issue

of geographic jurisdiction where we are allowing redaction in far more cases than the law requires, but a given registrar may choose to release some of that information to the SSAD. If it relives its workload, it doesn't violate any laws. So we're looking at future decisions based on—via the evolution mechanism and whatever approval path that goes with—that may allow the registrar, or registry, should they choose, to release some information to the SSAD. All we're doing is adding more flexibility to future decisions to have better response time and decrease load on contracted parties, and the contracted parties have no obligation to facilitate that, but they may, should they choose. That's all it's allowing. And it's only for cases that we haven't looked at yet that would still have to go through a formal approval process that is yet to be determined. Thank you.

JANIS KARKLINS: Thank you, Alan. I agree with you. Hopefully others too. Alan Woods, please.

ALAN WOODS: Thank you, Janis. So we had kind of a little caucus there in the background [and they said this.] Absolutely, I think one of the issues that we have here is specifically we're fencing and limiting it to the concept that personal data will not be specifically transferred. So I think from a compromise point of view, there's a lot of the qualms and the issues can be fixed by just limiting that, there won't be a transfer of personal data. And again, we will look into the case of "may," that a contracted party may provide or the central gateway may require. So again, that's taking into account

this concept of the preordained evolution that, yeah, there may be an expectation that that might have to change at some time in the future, but again, that would be part of what this evolution mechanism will discuss, one assumes.

So if we can come to that compromise and just say let's ringfence it to personal data, let's put it that way. Or to not personal data, as the case may be.

JANIS KARKLINS: You're suggesting that in the last sentence, a contracted party may provide such further information if requested with the condition that it does not contain personal data?

ALAN WOODS: Yeah, the expectation can't be that we must provide personal data. Again, if it comes to the individual concept of the controller, whether the controller wishes to take that risk, I think we need to be careful that we're not setting some weird expectation that it'll eventually be realized that we must transfer personal data as a result of this. We need to be very careful not to create a future expectation that is just certainly not envisaged at this particular point in time. So keeping the "may," the permissive and ensuring that it's not personal data probably would easily get us past the point, I think, of this, and we can move on.

JANIS KARKLINS: Okay. Can we get something on the screen while Alan G is reacting?

ALAN GREENBERG: The problem with that is we've talked about innumerable times that in an automated way, we don't know what is personal data, and there may be personal data embedded in other fields. So limiting it to no personal data, I think, puts a restriction on registrars and registries to perhaps say no just to be sure. And again, any registrar, registry can say no to everything. There's no obligation. But because we have so many jurisdictions and they may be subject to completely different rules, and some registrars may be willing to take the country of the registrant at its face value and say "I can release data because it's not subject to GDPR," that's a decision the registrar can take based on their own liabilities and legal opinions, and I don't see what the harm is of allowing them to make that decision, because personal data is not always protected. We are allowing it to be protected, for instance without geographic distinction, but it's not clear that a law requires that. So all we're doing is giving flexibility to future innovation.

JANIS KARKLINS: Okay. Thank you. In the meantime, there is suggestion coming from Georgios in relation to the first sentence. Probably, that's reaction to conversation that we had with Milton. So we're trying to display that on the screen. And Georgios, your hand is up, please go ahead.

GEORGIOS TSELENDIS: Just if I understand well what Milton wants to say there is that we give power of determination at the central gateway manager,

where actually what they do is they check whether the disclosure criteria are met and then go to the contracted party for the decision. So I suggested this language, and I don't know if it covers what Milton concerns.

JANIS KARKLINS: Okay. Thank you. Now let me pause just a second and to see whether that is something all of us could live with, with the suggested change. And still, there is unresolved kind of divergence of opinion, so contracted parties would go with this formulation with understanding that no personal data would be disclosed upon request of the central gateway and the reason why central gateway is not determining itself the disclosure decision but only indicates that it meets criteria is because unwillingness of central gateway to process any personal data. That's one of the principles that is placed in the current model, that the personal data always stays with the contracted parties and the central gateway only indicates that contracted party may release results in automated way if criteria are met. And whatever decision is made, that personal data goes straight to the requestor and not through the central gateway.

So that all indicates that central gateway does not want to deal with the personal data in any circumstances. Alan Greenberg. Now we have some edits on the screen. Please.

ALAN GREENBERG: Okay. Thank you. I don't think anyone is discussing the central gateway forwarding information back to the requestor regardless

of whether there's personal data involved or not. Our process calls for the contracted party to release that data. So I don't think anyone has suggested that just because the central gateway might suddenly have personal data, that it's going to release it to the requestor.

So I think we need to dismiss that part. I have no problem with the phrase [inaudible] but there's no expectation the contracted party would provide personal data as part of this information request. It's not part of the information request, it's part of the information request response. However, we've already said there's no expectation they'll provide anything. So I have no problem with adding this. I'm not sure it adds a lot, but if it gives some people a level of comfort, fine.

JANIS KARKLINS: Okay. Any other reaction or opposition? Okay, so maybe we have found at least one agreement on something today. Okay, in absence of reaction, we can try to go further, or we have reached the limit. No, we still have some 20 minutes to go.

MARIKA KONINGS: This is the last one in the automation section and it's a request for clarification from the Registries Stakeholder Group. There was an edit made to one of the use cases, the requests from law enforcement, local or otherwise applicable jurisdictions with a confirmed 6.1(e) lawful basis. The GAC team had requested that that would be updated by adding "all processing is to be carried out under article 2 exemption" and the Registries Stakeholder

Group had requested further explanation from the GAC on the applicability of article 2 exemptions in this context as they don't recall this being discussed as part of one of our meetings.

JANIS KARKLINS: Okay. Thank you. Chris, please.

CHRIS LEWIS-EVANS: Thank you, Janis. Hello everyone. Yes, so it Work Stream a long time ago we discussed this. As part of the use cases that we did very early on, under one of them was processing that was carried out from a law enforcement agency that was local to the contracted party. Under that, we said that the processing would be done utilizing whatever lawful mechanism was, and I think I gave the example of within the UK, I would process it under the Crime and Courts Act for the investigation of a criminal offence.

So in GDPR article 2.2(d), there is an exemption to the use of or the processing of personal data for competent authorities for the purposes of prevention, investigation or detection of criminal offences. So that exemption would fit and we wouldn't be allowed to use 6.1(e) in that case. And then obviously under this case, the processing that we would be doing has to be complaint with other data protection processing relating to law enforcement, which has more safeguards than GDPR, certainly in our case. So that was just the reason for adding this language, is that it fits with our use case that we described many months ago, and just ties it up nicely, I think.

JANIS KARKLINS: Okay. Thank you. So, any problems, after listening to Chris' explanation, to accept the proposed changes? So I see no objections. Marc Anderson, please.

MARC ANDERSON: Thanks, Janis. First, thanks, Chris, for the explanation. That's very helpful. I think this sort of underscores the difficulty in the GDPR-centric approach we've taken so far. So I think your explanation makes sense and accounts for one particular use case, and that's helpful. So based on that explanation, I don't have particular concern with this particular edit. I think it's worth noting that this isn't—the Bird & Bird analysis didn't take this into account. This wasn't considered as part of a legal analysis. But neither were a lot of other law enforcement requests which might also be applicable in this scenario. So that's, I guess, a long way of saying I don't think I'm bothered by this edit. I think the explanation helps, but it bothers me that we may have other problems. I don't know that that was helpful feedback, but I do appreciate the explanation, Chris.

JANIS KARKLINS: Okay. Thank you. Anyone else? Since no objections received, we can accept that. Daniel.

DANIEL HALLORAN: Thank you, Janis. I'm sorry I missed this earlier, but it looks like that "or" could be potentially a little bit confusing, the "or" processes to be carried out. And I think the intent is that that "or" refers to 6.1(e) or article 2, but in either case, it would still have to

be local or otherwise applicable jurisdiction. I don't think the intent is that it's from law enforcement in the local jurisdiction or it's from law enforcement and they're going to be doing processing under article 2 exemption but not in the local jurisdiction. So I think that "or" could be ambiguous. It's probably just a grammar sentence change. Thanks.

JANIS KARKLINS: Okay. Thank you. Chris, if you could think of what Dan just said. In the meantime, Volker.

VOLKER GREIMANN: Okay. Yeah, I don't have any overarching objections against that, just wanted to state that applicable doesn't always necessarily mean that it's limited to local. As you stated, Chris, there might be nonlocal law enforcement agencies that have jurisdictional rights to request certain data under contract or treaty, or you have registrar entities that are based in more than one country. In that case, that would also be expansion of what is local or what is applicable to that registrar. So I think we're already set up with a very broad scope, but I don't have any objections to the expansion here.

JANIS KARKLINS: Okay. Thank you. Chris, please.

CHRIS LEWIS-EVANS: Thank you. I think the “or” with the “with” after jurisdiction is fine. However, maybe “or where process needs to be carried out.” I don't know. I feel it’s okay. But really, I think it’s back to Dan for that one.

JANIS KARKLINS: Dan, please.

DAN HALLORAN: You could maybe say “otherwise applicable jurisdictions with either, one, confirmed 6.1(e) lawful basis, or two, processing to be carried out [inaudible] article 2 exemption.” Thanks.

CHRIS LEWIS-EVANS: Certainly happy with that on a first thought process.

JANIS KARKLINS: Okay. It’s good that two lawyers talk to each other. It’s always a good result. [Trying to joke.]

CHRIS LEWIS-EVANS: I'm not a lawyer.

JANIS KARKLINS: Aren't you? I thought you are. Okay. So, we have now then solution that everyone can live with, and so we can move to the next issue. Marika.

MARIKA KONINGS: Thanks, Janis. The next one takes us to the SLA recommendation. There are quite a couple of clarification questions here starting off with item 42. It's a suggestion from the IPC, BC that the priority matrix should not be entirely implementation guidance, because currently, as you can see from the recommendation, there's a bit of text that's part of the policy recommendation, and then a part that's implementation guidance. So I think the question here is, does EPDP team agree with that? And if so, we would need some further guidance as to which part you expect to be in the policy language and which parts do you expect to be in the implementation guidance. And of course, this is also relevant in the context of the recommendation 19 conversation, because any aspects that are in the policy recommendation cannot be changed without a PDP, the scope of the mechanism is very specific to implementation guidance. So that's something the group would need to factor in as well if you want to move things around here.

JANIS KARKLINS: Okay. Thank you, Marika. Volker, please.

VOLKER GREIMANN: Yeah, I absolutely agree with Marika. I think if we were to move it from implementation guidance to the policy recommendation, we better have a damn good reason for that, otherwise you're locked in place. And as I've said before, I like flexibility. Thank you.

JANIS KARKLINS: Thank you. With this explanation, can IPC, BC withdraw that request to move? Margie.

HADIA ELMINIAWI: Let me understand. So if it's in implementation guidance though it's not enforceable, I think that's the concern. So I think the policy recommendation could be such that the recommendation actually says the initial recommendation is ... whatever's in this chart, and then the policy recommendation further says, but this can be adjusted per the evolutionary model. So it gives the flexibility that we intended to give because remember, the SLAs were intended to evolve. But I think the understanding across the board was that if the thresholds aren't met, that it does create a compliance obligation. So that's the reason why we were objecting to having it be part of the implementation guidance.

JANIS KARKLINS: Okay. Thank you. Alan G, please.

ALAN GREENBERG: Thank you. My understanding—and I guess it's not rigorously enforcing what is policy and what is implementation—was at the very least, the numbers in the third column were initial ones which could be changed in implementation. Maybe it should be wider than that, there should be four categories next time, not three. but at the very least, my understanding was that the numbers in the third column were the things that we were proposing now but certainly could evolve and change without policy changing. Thank you.

JANIS KARKLINS: No, policy is not changing, Alan. It's changing our knowledge about the SSAD operations and—

ALAN GREENBERG: Yeah, I understand, but my understanding was having these numbers in the policy section did not lock them in for the future, that they were something that could evolve. Perhaps I don't understand what the IPC-BC want to be have more flexibility by moving the whole table into the implementation guidance. Maybe we need an explanation of what it is they want to be able to change as things evolve, if it's not just the numbers.

JANIS KARKLINS: Okay. Thank you. Volker, please.

VOLKER GREIMANN: Yes, just one thing, I notice on the table that the response times for priority one were still at 24 hours. I thought we had moved that to one business day. Was that an oversight in the editing or is it something that I just thought we had settled and we didn't?

JANIS KARKLINS: Cannot answer. Marika, can you answer that?

MARIKA KONINGS: Yes, Janis. That's something that the registrar team pointed out, and it's indeed an oversight. We updated it in some places, not here. So the next iteration will see this corrected. And I think there was also another footnote or another section where similarly we had forgotten to update it.

JANIS KARKLINS: Okay. Thank you. So, we see what is in the policy now on the screen, we see what is now in the policy part of the recommendation.

MARIKA KONINGS: Janis, if I may, this probably also ties in with the next question or comment from ICANN Org which asks about, can the team please clarify who they intend to have the final say on the specifics of the SLAs? Are they being determined as a matter of policy here in recommendation 9, or would it be an implementation matter to be determined by the IRT and ICANN Org? Or will this be determined in contractual negotiation between ICANN Org and the contracted parties?

So I think this is also something that came up in the recommendation 19 conversation where I think at least there, the assumption was made that it would be the result of negotiations between Org and contracted parties that would be informed by the recommendation 19 mechanism, at least I think that was where the last conversation ended up. But of course, that's not something that the full team has discussed yet or reviewed. So it seems to be tied to that conversation as to what goes into the

policy section and indeed, if it goes into the policy section, it's a matter of policy. There's no implementation as such or a bilateral negotiation. And again, we then need to see as well how to make sure that the policy language allows for updating by the mechanism to make sure that we don't overstep that boundary of going into policy changes.

JANIS KARKLINS: Thank you, Marika, for this explanation. So there is a reference in the text that we see now on the screen, how that will be reviewed and then changed. I need to see whether that is something we could live with. Mark SV, please.

MARK SVANCAREK: Marika, could you confirm for me—because I really do not remember it—when did we decide that one business day would be the standard as opposed to one calendar day? The concerns that ICANN Org had put in their feedback about the variety of definitions for business days had always been a concern of mine, and I don't remember us actually ever getting that resolved. So could you remind me when we resolved that? If we did and I don't remember, then I apologize. But I do not remember ever agreeing to that. Thank you.

MARIKA KONINGS: Yeah, thanks, Mark. I think it's actually one of the questions we'll get to later as well. But as I recall, I think it has always been business days in the draft, but I know the question has been flagged before.

MARK SVANCAREK: So it's still open, is what you're saying?

MARIKA KONINGS: I think there's some further questions about what is meant with business days and how that's to be implemented. So I don't know if the group still wants to—and I think there's a notion as well—[I don't know if it's this comment, Berry,] and the ICANN Org—yeah, I think in the green part where they note as well that the RAA and RA reference calendar days and not business days. So obviously, it is something that group can reconsider based on that input. But as noted, I think so far, it has always been business days in the draft.

MARK SVANCAREK: Yeah, my recollection was that we were still discussing the complexities that are mentioned in comment 47. So thank you for acknowledging that.

JANIS KARKLINS: Okay. So we seem to have reached the time to end this call. We made some progress, but not as fast as I wanted to. It would be good if the team could look at next questions and then provide input prior to our next meeting. But I see Marika's hand is up. Maybe Marika, you can guide us on our plan.

MARIKA KONINGS: Yeah, thanks, Janis. Maybe to amplify that request, it would be really helpful—I know that the Registrar Stakeholder Group for example already has done that through the Google docs which are on the Wiki page and we can of course circulate it again after this call. If any group wants to already provide any input on some of the clarifying questions that have been flagged or is able to come forward with a potential solution for some of the concerns expressed, feel free to already add that to the relevant Google docs and then we can incorporate in the master document that we've been working from. So at least we already have some input and that might kind of show a path forward, especially if for example the understanding on certain items is aligned over a number of groups, there may not be a need to discuss it again because we have clear guidance from what is provided in the Google docs.

JANIS KARKLINS: Thank you, Marika. So wee will meet in the plenary next Tuesday at 2:00. The small group on mechanism recommendation 19 will meet on Monday, 22nd June, also at 2:00 PM UTC. Hopefully to finalize the work and be able to present the recommendation to the team for consideration.

After that, we will not have any further meetings next week except those two, Monday, Tuesday, but since our progress is not overly fast, I would like to propose that we meet the week after and have three consecutive meetings on June 30, July 1, and July 2, aiming at finalizing review of all recommendations. So hopefully putting the final report for a quiet week and subsequent adoption.

So that week, those three meetings, 31st and 2nd July, would be last meetings that I would moderate, and my wish would be that we could finalize the review of all recommendations by then.

So with this, I would like to thank all of you for constructive participation, and for those who volunteered for homework, please do so. Staff will help. And I wish all of you good rest of the day and declare this meeting adjourned.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. Please remember to disconnect all remaining lines and stay well.

[END OF TRANSCRIPTION]