

**ICANN
Transcription
GNSO Temp Spec gTLD RD EPDP Small Roles & Responsibilities team
Monday, 12 November 2018 at 18:30 UTC**

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Coordinator: Recording are started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening and welcome to the EPDP Small Roles and Responsibilities Team call taking place on the 12th of November, 2018 at 1830 UTC.

On the call today we have Theo Geurts, Marc Anderson, Stephanie Perrin, Diane Plaut, Kurt Pritz, Alan Woods, Thomas Rickert, Marika Konings, Caitlin Tubergen, Berry Cobb and John Jeffery as well as myself, Terri Agnew.

I would like to remind all to please state your name before speaking for recording and transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this I'll turn it back over to Thomas Rickert. Please begin.

Thomas Rickert: Thanks very much and hello, everyone. It's great that you guys made it to this small team Responsibilities – or Roles and Responsibilities call. Ninety minutes have been allocated to this call but we don't have it exhaust it if we don't have to. So I have accepted the task to chair this call but I hope that this discussion can be very interactive so please do raise your hand or just speak

in case there's something you want to say. This group is small enough so that we can have this more like a dialogue.

Staff asked me to provide them with a couple of bullet points in terms of agenda so I would suggest that we go through that briefly and see whether there's anything missing or whether you want to go about this discussion differently than I suggested.

So the first point would be administrative matters. I think we can take that off the list already. We will take the roll call from the Adobe room so if you're just on the audio bridge please do speak up and we will add you to the list of attendees. Also if you have updates to statements of interest please do speak up now or type something into the chat and if you need assistance with updating your SOIs, staff will gladly help you with that. So let me just pause for a second whether anyone in this group wants to speak? That does not seem to be the case.

So in terms of substantive discussion or agenda points, I had suggested that we briefly go through the roles as described in the GDPR so that we're all on the same page in terms of what the options are. We would then go into a discussion of the rationale or the potential joint controller agreement versus other scenarios that could be considered.

And I would really like those of you – and I know that there are some in our group who had hesitations to make friends with the concept of joint controllers to speak up there and share the concerns with us but not only limit their interventions to concerns they might have but ideally they would also speak to the alternatives that they think are applicable in this gTLD scenario.

The fourth agenda point would then be the options and limitations of policy work/charter limitations. And I guess that's important for us to discuss because when we had our EPDP plenary call the other day there was quite a bit of discussion around whether our group should go as far as coming up

with a draft joint controller agreement or any other type of written agreement that might be required to be compliant or what our group could actually suggest doing. I remember vividly that Marc Anderson said that, you know, the execution of any written agreements could not be prescribed by a policy group such as this. So that's where this type of discussion should be taking place.

And then, number 5 would be a strategy to implementation. I think we are all aligned or at least I do hope that we are that GDPR is about documentation almost all the way through and that something needs to be done in order to write down what's required in order to make everything become compliant. And then the question rises, what can our group do? What should our group do and what should be left to staff to operationalize and what should be left to potential contract negotiations so that we actually can put into our report so that the community that will read our draft initial report will understand our roadmap to compliance.

So let me pause here. That was my take on how we could conduct this discussion so please raise your hand or just speak up if you think that we should be doing things differently and if so please do suggest how we bet's conduct this conversation. All right so I don't see any hands raised nor do I see any interventions in the chat which makes me believe, and that's basically the way we go about with these things, at least in the GNSO, that absent objection everyone silently agrees with this approach and that's great.

So let's dive into the second agenda item and that's the overview of roles as defined by GDPR. I will not read to you nor give a detailed outline of the document that I've been working on that Diane made amendments to which has been shared with the list but the idea of this document is also to give a brief overview of what the options in terms of responsibility are in the GDPR. And I think that the concepts that we really need to focus on are the concept of controllers, the concept of processors, the concept of joint controllers,

which is not explicitly mentioned in the GDPR, and the concept of joint controllers.

And I do hope that everyone has read this document that has been shared on the list so I think I should just mention that the document continues a couple of definitions of what a processor is; it contains a definition of what a controller is. These are basically taken from the GDPR. And while co-controllers reside next to each other doing things on their own, the concept of joint controllers is the one that we are going to discuss today.

And I think I should take a second and that will probably allow us to segue into even the next agenda item. The concept of joint controllers is enshrined in Article 26 of the GDPR and it basically says that those parties are joint controllers that jointly determine the purposes and the means of processing. So I would really like to keep it at this superficial level because I know that you've been in this for a couple of months now; some of you have been dealing with GDPR for much longer and I don't want to be repetitive and tell you things that you already know. So please indicate if you would like to take a deeper dive into the options that GDPR is offering.

So again, we have controllers, processors, we briefly spoke to the concept of co-controllers and to the concept of joint controllers. And if you think that we need to do a better job in describing the roles, if you think that we should be discussing more concepts than this in our paper, then please do speak up now and we can then discuss how to amend the document that has been shared on the list.

Theo – Theo, please go ahead.

Theo Geurts: Thanks, Thomas. And just to – maybe I'm jumping the gun here a little but, you know, as some of you may know, as a registrar we have gone through the process with several – well with a lot of ccTLDs in contract dealings prior to the 25th of May. And what always struck me within this process is that the

regular contracts, the regular approach has been insufficient. That being said, the joint controller setup seems to be the correct way in dealing with this very complex situation that we have in with ICANN – putting it very diplomatically.

I was not such a fan of the joint controller setup because I was sort of taken back by the immense work that lays in front of us. And I am very skeptical that we should engage in any work there as an EPDP team there. I think we cannot go there to do any work there, I mean, there is too much to do there. And that is sort of my fear about the joint controller part.

I think we can recommend it that we should be going there, I think that will do justice to the registrants and all the other parties involved into this process, but I think creating any work there that is going to be very problematic; we don't have the time for that. So those are my initial observations. And let's see how this progresses because I've got a couple of other pointers that worry me also but let's see if they get addressed later on. Thank you.

Thomas Rickert: Thanks very much, Theo. I guess that's very helpful and actually that's a good starting point for a substantive discussion already. Let me just pause for another second to see whether there are others who want to speak to the overview of roles and whether there's that we're missing from the current draft document. So I don't see any hands raised or interventions in the chat so...

John Jeffrey: So, Thomas, this is John Jeffrey and I apologize for the question because I'm not familiar with your processes as well as I should. I'm stepping in for Dan today because it's his 50th birthday.

Thomas Rickert: All right.

((Crosstalk))

Thomas Rickert: Let's put our congratulations to his birthday on the record then.

John Jeffrey: Very good. So the – I understand that you have this working document and I understand that we have some concerns with it still and have some issues to raise. And we've prepared or are in the process of finalizing a memo that goes into some of those but it really does start with the basic question I think you're asking of whether and how to structure a joint controller agreement versus a data processing agreement and where these definitions fit in because certainly some of the advice we're taking is different from the paper and I think is therefore I don't want to give the impression that by being silent we're in agreement that this is fully the right approach; I think there's still some things to work on.

Thomas Rickert: Thanks, John. Can you offer some information as to what the concerns are so that we can put that into the equation when we discuss today?

John Jeffrey: Yes, definitely can. And I'm not sure that I can summarize what is currently about a 10-page memo into some small points but I think just to give you sort of the general concepts, we think there are some challenges to the approach and by that just in terms of how joint controller is defined versus processor, what the details of the activity of processing the information is and the liability that's associated with that processing of that data.

As you well know, in a joint controller agreement we could have all sorts of things that lay out the details of what it is that's being processed for purposes and how. We could also do that in a data processing agreement. But the difference of calling it a joint controller agreement versus a data processing agreement and the associated liability that attaches to that could be different for the registries, the registrars and ICANN. And so that creates some amount of complexity depending upon how you draft those agreements or that approach.

I'll just pause there and then we can go on if you'd like.

Thomas Rickert: Okay great. I think we need to exchange more thoughts on that. But let me just take stock of where we are with this sort of at the end of the agenda Item Number 2 and I understand that ICANN is going to share the legal memo with the EPDP team shortly and that that memo will likely also speak to the roles as defined in GDPR so let's take note of that as sort of the last point to be a minute for agenda Item Number 2.

I guess that, you know, part of what you were saying as well as what Theo said, already, you know, would have fitted to agenda Item Number 3 and that's the discussion of the rationale or joint controller agreement versus other scenarios. And I guess that we should probably try to summarize some of the pros and cons in the meeting minutes for the rest of the EPDP team to read, digest and then make part of their thinking when it comes to finalizing the report.

And I think that JJ, your remarks are most welcome. In fact we've been asking on a couple of occasions that ICANN should, if at all possible, share any legal memos or expert opinions that it has commissioned in order to inform our debate. And I think that there are different scenarios imaginable for the gTLD world. I think that Theo is spot on when he's describing his experience as a registrar, so I think in the industry at the moment all sorts of scenarios are being put in writing but that doesn't mean that all of them are – would hold water when they're tested in supervisory authorities' proceedings.

So maybe in order to get the discussion going, I can take one or two minute to outline what our thinking was when we suggested that a joint controller scenario could be applicable. So Article 26...

John Jeffrey: Thomas, just a point...

((Crosstalk))

Thomas Rickert: Sure.

John Jeffrey: There's a couple of things in particular that I think would be really valuable to focus on. Would it be helpful for me to point to those as opposed to going through it generally? Because I assume this group is – has a pretty sophisticated understanding of the issues in your memorandum but I could be wrong and it might be useful to go higher level.

Thomas Rickert: I'm perfectly okay with you bringing up the topics but maybe by way of introduction and, you know, we had a bit of a discussion during the last EPDP call and there has been some questions that I've been asked subsequently by some members of the EPDP team. So let me just take the opportunity to very briefly summarize those points and then I will hand over to you to come up with the individual points that you would like to share.

So joint controller scenarios are primarily there in order to protect the data subject. So the data subject should be spared the effort of trying to identify who the responsible party for individual processing activities is in a matter of – in an unlined world. So basically that's been designed for the information society where you have different parties doing different things – very complicated service offerings are being made to consumers and these consumers should not be forced to do research before they can exercise their rights under GDPR.

So this is why the joint controllers are meant to be jointly and (unintelligible) liable so that you basically have a single window strategy as a data subject when it comes to exercising rights. So in legal literature, in many – in, you know, I only have German legal literature but we can have part of that translated if need be, looks at this through the lens of the data subject.

How does this play out to the data subject in, in our case the registrant? And I think that the registrar – the registrant provides data to a registrar and then there is the expectation that magically the domain name will ultimately work and resolve. The data subject does not understand the nuances of what's

happening between registries, registrars, escrow agents, EBERO and ICANN. And probably they even shouldn't. And this is why the joint controller scenario could be a solution that would jump to mind when it comes to looking at this from the end user perspective.

Also, the – some registrars have mentioned that they think they're just the processor because they just collect the data on behalf of registry as prescribed by ICANN contractual requirements and policies. And if you look at that then I guess the test question that you need to answer is would the – would the registry or ICANN for that matter, be able to be everything on their own, because typically you are using data processing scenarios where a party wants to outsource certain processing activities.

In the gTLD world, it's not possible for a registry to do what a registrar does nor is it possible for ICANN to do what a registrar does. Right? And therefore, you know, you have shared responsibilities in the gTLD world, that's part of the contractual setup and the accreditation model that ICANN has and therefore I guess, you know, the joint controller scenario could evenly be applicable.

So, you know, that's I guess the primary two points and I would like to pause here. We can talk about sanctions and how the sanctions need to be divided between end user or data subject, rights they might claims versus what a supervisory authority can do and to what extent that can be reflected in a JCA so that there's a fair outcome in terms of liabilities, but let's just pause here, go to JJ first to raise some concerns and then we go to Theo who has his hand raised. JJ, please, over to you.

John Jeffrey: Go ahead and go to Theo, I'll just wait and come in because my point isn't directly on what you were just speaking about.

Thomas Rickert: Okay, Theo, go ahead.

Theo Geurts: Thanks, Thomas. And to add a little bit more color here, I mean, we already have signed with several registries – ccTLD registries the standard controller processor agreement and what we find and what is actually happening and what is going to happen is a reality that in those agreements which have been set up from the registry point of view which there is zero engagement with the registrars, the other contractual parties is that those standards agreements – those standard data processing agreements lack the detail, lack the responsibility and that is just shocking. I mean, I'm not going to put any of these registries on the spot but there are sometimes – there are cases where there's, for example, a breach on the registry level and we go and the registry is the controller and they are going like, we are going to inform the data subjects.

And I as a wholesale registrar having resellers, I'm going like, you guys are – that is not a great idea because you're already dealing with a data breach, you're going to tell the data subjects that that data has been breached and that there's a high risk for them and you're going to tell them in a capacity as a data controller, as a registry, these data subjects have no idea who you are. And they go like, but we are the data controller and this is what is in the contract.

And that is exactly such situations which you're going to avoid going through the joint controller agreement because you're actually going to sit down and sort out all these issues, all these purposes, all these operational aspects that need to be taken care of, who is doing what, where is somebody doing, why is that. And it can be different on even on the business level, it could be different on a wholesale registrar versus a retail registrar.

I mean, so if you want to have – deal with the complexity here which is enormous, let me stress that, which is enormous within the ICANN world, then I don't see – and maybe you have an idea JJ, you might want to elaborate on it how you would think that a standard data processing agreement would suffice there because I haven't seen it yet. I've seen

contracts so far and all the contracts that I've seen and signed, there's none of them that's perfect; they are like 70% there and the other 30% is missing and it's going to be sorted out I think through the courts at some point but I don't think we as ICANN and as a community here we want to go there. We want to have a contract, an agreement that does justice to the registrants and all the actors involved including ICANN Org. So with that I'm going to hand it over to Thomas again. Thanks.

Thomas Rickert: Thanks very much, Theo. JJ, do you want to come in at this point?

John Jeffrey: Well I think the one thing that – and tell me if I'm going off the path of what you were intending to discuss on this, but one path really goes to the way that the memorandum is interpreting registrars and registrars or joint controllers for quote, the set of operations of domain registration. And it looks like you're favoring the interpretation that jointly must be interpreted as meaning together with or not alone, as different forms and combinations. And so you're looking at it like it's a single point of control and my – one of my concerns is that even how the registries and registrars would think about it, that they are a single point of control, let alone adding in the ICANN piece too.

And so if you're entering it from the approach that as joint controllers, all of the parties engaged with that are all fundamentally responsible for all the good and bad actions of each other party, then I think there's some issues there. And that's one of the concerns that we have. We don't want to shy away from our responsibility for requiring Whois, the collection of it, the display of the information, at the same time if there are actions in the processing of that data or that use of that data that are different than those requirements, is it really that the registries, the registrars and ICANN should all be jointly responsible for the use of that data in that way?

Thomas Rickert: Okay, JJ, I guess probably it's helpful for us to try to get aligned on the concept at least, the way it's currently being envisaged in the memo. Now if

you have concerns about liability, then we need to make a distinction between two different layers...

((Crosstalk))

John Jeffrey: I think those are directly related in that if you are selection the term and approach of joint controller, and you are saying that all of the parties are therefore fully responsible for the actions relating to that, then they're not separable; those concepts are not separable from whether or not there's liability. I'm – if I'm responsible for the actions of every registrar and registry, however they use that data, because they're collecting it under the purposes in Whois, then that may be a bridge too far and that's what we're concerned about.

Thomas Rickert: Okay, so I'm not sure whether Alan wants to respond to that so let's go to Alan. Alan.

Alan Woods: Can you – you can hear me okay?

Thomas Rickert: Yes, you can be heard.

Alan Woods: (Unintelligible). So I suppose several questions have jumped to mind but the first thing I'll say is well when it comes to the apportioning of the liability, I mean, I think you're looking, JJ, at the – at a very – I don't know, kind of on the faith of it level in the sense of Article 26 is very specific in the sense of that it is – the joint controller allows an arrangement whereby the parties can sit down at a table and say this is the responsibility that we have in this particular aspect and this is the liability that we want from it. It comes down the contractual agreement between the parties as to who would be liable in an instance.

And I think this is the whole point of where we're getting to at this, that the concept of doing an entire swath of – in this instance we need a DPA, in this

instance we need a JPA, is even harder than stating let's just from a 10,000-foot level accept that, you know, in the odyssey and the weirdness that is (unintelligible) and that does not fit necessarily cleanly within the realm of what is expected under GDPR and nor should it because in fairness we have a very strange system in that.

But we're saying that if we take it at a 10,000-foot level that we are technically joint controllers as we proceed on, however, the detail and so the devil in the details, that if we break it down specifically as an agreement between the parties, and an actual appreciation of what the contract and the data flows within the terms of the joint controller agreement itself, then those issues that are specifically there within what you were saying there should be taken into account.

The whole point of the GDPR is to modernize the data protection regime to allow for situations that are not within the norm, not within the specific boxes of a controller or a processor. And I think this is probably one of the first tests, and I mean, what I will say is there's been a good few questions already in the chat and I don't know if you can see the chat, but I think at this point of second guessing what's in your memo is probably not very helpful for us.

I think we really need to consider what's in the memo and personally I'm surprised because I know every time – had we gotten everything that's on the table with ICANN we've never been told about a memo such as this and I would like to see that memo so that we can specifically and legally and academically look at this memo so we can respond adequately.

I think people are holding onto ideals that are not necessarily going to apply to the domain name system going forward and I think we ought to draw a line in the sand and say this is not fitting into the normal boxes and this is the first step towards us creating a proper industry code of conduct, an actual code of conduct, because we will have to explain to the DPAs specifically, you can't ask them to figure it out for us. We will have to draw a line in the sand that

says this is what works for us, does it work for you and can we make this into a specific code of conduct for our industry that the data protection authorities can help with.

So as I said, I think a starting point here, and I don't want to cut across the entire conversation of today but until we know the contents of that memo and what is being sought here, I really think that we need to consider this. Thank you.

Thomas Rickert: Thanks, Alan. I guess that's an important point that you make because our group has asked on a couple of occasions whether ICANN Org would be willing to enter into written agreements with the contracted parties – a joint controller agreement or in the case of the EBERO and the escrow, into a data processing agreement. And when we asked this question in Los Angeles I guess it was Chris Disspain who said that he doesn't have any reason to doubt that ICANN would if the EPDP team recommends that.

So we are supposed to wrap up our report and publicize it by the end of this week and I think we should take note of this coming memo, if it's 10 pages long I think that the publication of the document by the end of the week will likely not be possible. I think everybody will want to read that.

Back to the substantive discussion, I think that it's worthwhile noting that we are dealing with quite a complex setup with quite a number of players. And it will be difficult to be transparent about who does what. And Article 26 is pretty specific in its rationale to be there to be – to provide for transparency with the data subjects. So I think what we need to divorce in our thought process is what registries and registrars might be doing with data outside what we're discussing here.

And, you know, for example, using PII for invoicing purposes or for market research or what have you, for advertising purposes, is something that the registrar or the registry as the case may be, need to inform about separately.

So I think that we need to have different parts of privacy policies with the data subject where the data subjects are informed that, you know, registrars are doing additional things with the data, that they are solely responsible for. And based on the discussion that we had in the EPDP team I think that our group is aligned that what we're discussing here and what should go into an ICANN policy is only what's being in our report in terms of processes and in terms of (unintelligible) for processing.

So we're just discussing that so I think that JJ, maybe some of your concerns can be put at rest because the idea is not to include other purposes or other processing activities into the joint controller agreement. But...

((Crosstalk))

John Jeffrey: So the question – with a question on that, if I may?

Thomas Rickert: Sure, go ahead.

John Jeffrey: So what's not fully clear to us though is we've been talking about the fact that we should all carefully assess each party's role with respect to the domain name registration and we think that that's important. But that isn't completed yet, right? Or am I just not aware of it?

Thomas Rickert: So basically – the discussion on roles and responsibilities is not fully conformed, that is correct. So we have a couple of purposes...

((Crosstalk))

John Jeffrey: Right.

Thomas Rickert: ...and we have allocated responsibilities to the various processing activities. So for the collection of data, for making – for allowing for the registrants to exercise their rights, that's what we call Purpose A. Our group established

that ICANN registries and registrars would be jointly responsible. And I have asked that our group have a discussion on each and every of the purposes/processing activities to confirm whether the allocation of responsibilities as currently our report is in line with everyone's thinking. Right?

And I guess that's probably the second step. I guess the first step that we need to take is to get aligned on whether we think a joint controller scenario is applicable and whether the contracted parties and ICANN are actually willing to enter into negotiations on this very document which will need to include not only the roles and responsibilities, you know, who is responsible for informing the users, who is taking care of rectification requests, who's taking of...

((Crosstalk))

Thomas Rickert: ...requests.

John Jeffrey: So just to finish my question, right, so the – so not having that be done yet creates – it seems to me that different people speak about this in different ways. Your dialogue about this is not the same as those that we have from time to time with other registries, and from time to time with other registrars. And therefore it strikes me that there are assumptions that are built into what people believe those parties' roles with respect to domain name registrations are, and that in turn may cause consequences from a liability perspective as we move forward.

And so we're – it feels as if it's a little bit cart before the horse if we don't understand what everyone's roles are and there's not a fundamental agreement on that. It's very hard to predetermine the controller and processing relationships. And this is what we've been saying all along going back to early in the year when we were first looking at the calzone model and even before that, that we don't have a problem with the concept of joint controller, but there's yet to be a clear determination of what the roles of the

parties are in processing that data and there's different assumptions that go into that as is present in the EPEG case and other things.

Thomas Rickert: So, JJ, before we go to Theo, I think that you need to have agreement on the basic approach and then you can sit down and allocate responsibilities at whatever level of granularity the parties to the contract might require or deem helpful. So I think that this is actually a point that we need to discuss first. I think the – at least legal literature is quite clear that you can't just pick what liability setup you think you want to have, not you personally, but any party in the industry and then say, okay, let's make this a joint controller agreement, let's make this a co-controller scenario or a controller-processor agreement.

I think this – looking at this from the outside, I think a lot of folks in the EPDP gradually come to the conclusion that it is what it is, namely a joint controller agreement scenario. And we need to fill it with life; we need to come up with allocation of responsibilities, we need to make sure that there are proper indemnifications so that ICANN is not taken hostage for other parties' wrongdoing. But I guess the basic principle needs to stand and it can't stand before we go to the next step.

Theo, go ahead.

Theo Geurts: Thanks, Thomas. And just to circle back on the answers to the questions from the registrars or the contracted parties that they are different, I mean, if you ask me on the right for objection, how that should be done, you will get a different answer from me than from example Go Daddy, for example, just to put somebody in the spot there. I mean, because we have two completely different business models. I mean, for the right for objection, I think that a registrant should go to as a resell registrar, go to Go Daddy and sort it out there with all their services. In my case it should go – it should be at the reseller level.

So if you're going to ask contracted parties a certain question on how should this and this and this be dealt with, you're going to get different answers because that could be in a mix somewhere that it's maybe handier to deal with a certain right of the data subject to do at a registry level. I can't foresee that completely, but there could be different situations and that is why the joint controller agreement setup addresses that all. And I think if you want to properly do that, and we haven't done that, I think nobody has done it yet, is setting up a data protection impact assessment and go through all these processes, where do we deal – where does the registrant go for rectification? How do we deal about deletion, etcetera, etcetera.

And these are very operational base questions; where does it go? How should it be done? And if you start arguing about it and you go through multiple scenarios, which is the likely going to happen until you get the right answer, which is in the spirit of the GDPR, which is what the legislature intended to do so that a data subject can easily exercise their rights before we get to the right answers there, there's going to be a heavy discussion there in my opinion and it's going to be a long discussion.

But the first basis here should be a data protection impact assessment on a very detailed level. What we've done in the EPDP is in my opinion, not detailed enough. So that all still needs to happen. And that's going to happen when you start actually working on Article 26 as it is intended and then you will get the questions to the answers and answers to the questions. Thanks.

Thomas Rickert: Thanks, Theo. I think you are making reference to the so-called micro level versus the macro level. And I think that you're spot-on that when it comes to actually allocating who does what and who shall be responsible for what and who shall indemnify in what shape or form, the other parties for what, that actually needs a lot of discussion. And I guess that Number 4, the options and limitations of policy work are exactly the place to discuss this. So I have no illusion that the EPDP team will be able to sort out all that detail. But I think that looking at the macro level, the way that the user perceives this, that

is they see a black box of different actors providing them with a domain name and hope that this is going to work.

And I guess that, you know, looking at the different purposes, you can come up with quite broad brush allocations of responsibilities in policy recommendations and leave all the niceties, particularly with respect to the reseller scenarios that you mentioned, to the implementation work. But I think there is no way for us to entirely shy away from this discussion because one of the chartering questions that we need to respond to is the question of responsibility.

And so I think that – and let's try to take this to a 10-foot perspective again, we need, as a group, to decide what it is. We must not be driven by a desired outcome in terms of liability because I guess nobody will gladly raise their hands and say I'm going to be responsible for something. But we need to shape what the scenario is. And again, Article 26, and I will go to you in a moment, says if the parties jointly determine the purposes and means of processing. Right?

And so some might say I didn't even have a real say in how things are going to be done and let me try to translate for you a little excerpt from legal literature, and that is, you know, what is the threshold of relevance of your co-authorship, if you wish, in determining processes and means of processing. And that's basically you know, one commenter said it's if the processing would be different if one party hadn't been at the table. And now go ask yourself, would this whole setup in the consensus policies, ICANN Contractual Compliance, the way registrars are dealing, the way registries are dealing, be different if we didn't have registrars? I think yes.

Would it be different if we didn't have registries? I guess the question is also yes. Would it be different if there were no ICANN? And I guess again the answer would need to be yes. So I would really like to hear from those who think that we can do something else than a joint controller scenario to speak

up and share with us how they think that can work. Again, nothing is carved in stone at the moment but we're under extreme time pressure, we need to put out temporary recommendations to the community to respond to and therefore I think we just need to be specific own that we might likely recommend.

Diane, please go ahead.

Diane Plaut: Sure. Hi, Thomas. How are you? I want to follow up on a number of points that were made today and really listening very carefully to everybody's perspective. We've come into this EPDP with – EPDP with a lot of different expectations that really have taken on a very thorough analysis of the different purposes and assigning the different roles of ICANN, the registry, the registrars. And much to JJ's question, I feel that we've come very far in being able to do that macro analysis of the assignment of the roles and the synthesis of the data elements in each purpose.

And therefore we are at the juncture where we're able to identify the roles and responsibilities and that within the definitional meaning of the GDPR that this is a joint controller setup and we're able to, within joint controller agreement, proportionately separate out the roles and responsibilities and add specificity and thereafter be able to separately assign different liability measures. And this to me seems to be the benefit to all parties involved. And much to Alan's comments, I very much support the fact that we would need to look at the legal memo to have insight into what you're seeing, JJ, but ultimately I do think that we are at the place where we need to identify these roles and that will enable the policy recommendations to really be functional.

Because the assignment of the roles and the ability to set forth even a draft joint controller agreement taking our roles that we've assigned with the purposes and taking all the data inputs that we've worked so hard to collect will then take everyone to the next step forward with the proportionate assignment of liabilities. And it seems to me from observing that that's really

what's necessary for the Contracted Party House to be able to move forward in their business model comfortably, for ICANN to take on the proportionate liabilities where appropriate, and to be lining this up to be able to have this policy successfully implemented.

So we're at the macro level and then we're setting ourselves up to be able to provide for the micro details. And then to Theo's point, the next step down would be the inclusion of recommendations of data processing agreements on the registry – registrar level where they're dealing with different third party processors. So I think that these are all necessary steps and to have this assignment of the roles and responsibilities is an imperative step right now for us to take on to make the policy recommendations even feasible.

Thomas Rickert: Thanks very much, Diane. So let me try to read the chat.

John Jeffrey: Yes, I'd be happy to read out my comment that I made.

Thomas Rickert: Please do.

John Jeffrey: "As you mentioned in your memo," -- I'm referring to the memo that we're all looking at -- "a joint controller arrangement is necessary where parties jointly determine the purposes and the means of the processing, for example, where the parties not only cooperate to decide jointly about the purposes but also the means of the processing. Where a party, for example, plays no role in the actual data collection process for registrants, passing registrant data onto the registries, invoicing and other activities it's much more different for form a joint controllership."

So my question is why are we deciding on joint controllership agreement as the form instead of going to an agreement? It isn't as if there's a joint controller agreement form that's predetermined and all we have to do is go figure out what the roles are within that. We should be figuring out what the appropriate agreement is and what the appropriate assignment of

responsibilities are for those various roles as opposed to predetermining the joint controllership arrangement.

So, John, I think the memo in its entirety really describes that – or how this can't be anything else than a joint controller agreement. And the excerpt from the legal commentary that I should probably add to the memo basically says that, you know, you do have a joint controller scenario whenever one of the parties absent would change the way data is processed.

And I think that if you look at ICANN's role, the registry's role and the registrar's role, we would have different processings all the way through that have different policies if one of these three parties were absent because they made themselves heard when it comes to negotiations of the RA, the RRA, and the shaping of consensus policies or as far as ICANN, or its concern the contractual enforcement and compliance work in particular.

So I don't see how it can be anything else than a joint controller scenario and I'd really be interested in learning what it might be in your view so maybe, John, you already read the memo that hopefully you will share with us in the next couple of days. But what is the recommendation coming out of this memo? Should it be controller/processor scenario?

John Jeffrey: No, and that's really what I've been going to all along. The concern that we have is that we're not at the stage where there's a complete understanding of where those responsibilities lie and an agreement about the responsibility of the various parties relating to where that data is maintained and controlled. So I think there's still a lot of open questions but we seem to be, in this group, jumping to a conclusion about joint controllership and that's why I'm concerned. Why are we doing that? And I understand your interpretation of that and the reason why and that's what we're digging in and looking at more closely.

Thomas Rickert: Okay, so, you know, just quickly, I think that, you know, this is nothing that our group has jumped to; I think that our group has been discussing this for quite a while...

John Jeffrey: I apologize if I used the wrong term.

((Crosstalk))

Thomas Rickert: So it's not really new but I do agree that this is a discussion that only really became visible more broadly when we wanted to put the right words into our initial report. John, in terms of next steps, when do you think you'll be able to share the memo with our group?

John Jeffrey: Unfortunately I'm not the person that's been having that generated, and I apologize but I am stepping in for Dan today so I'd have to have a communication with him.

Thomas Rickert: Okay but there is a plan to share it with the EPDP group, right?

John Jeffrey: We are in the process of preparing a response specifically to this group outlining our concerns. And the exact form that that would take, we're trying to make it simpler rather than more complex. And so we're relatively close to doing that but I don't have a guaranteed timeline today.

Thomas Rickert: Okay. I guess that's important for our next steps so I think that our – the publication of our initial report can't be sooner than receiving and having analyzed and discussed your memo with us so I think that time is of the essence, so if there's any way for you to expedite things I guess that would be helpful. Kurt is on this call so basically it's going to be Kurt's project management that's going to be impacted by this.

((Crosstalk))

Thomas Rickert: So, Kurt, I'm on sure whether you want to speak to this? But maybe just one...

((Crosstalk))

John Jeffrey: ...just for the record I think Kurt dropped off, Thomas.

Thomas Rickert: Oh did he?

Kurt Pritz: No, Kurt's back on but I've only been on for 15 or 20 minutes so I'm loathe to like jump in where you guys have been discussing that.

Thomas Rickert: So, Kurt, did you follow the last couple of minutes of our discussion?

Kurt Pritz: Yes, I think that one of the questions for our group is whether the – or whether the determination of whether we should enter into a joint controller agreement is, you know, how much of that is a policy determination and how much of it is legal determination? I think Thomas's explanation that, you know, that registries and registrars would collect data in a certain way but for – they have the agreement with ICANN which causes them to take on a different sort of obligation, you know, and the relationship between registries and registrars and the whole processing of data is affected by that.

In fact, all the purposes that we've outlined in the initial report as it is today, are ICANN purposes and in fact they're joint, as Alan instructed me, they're joint purposes; they're ICANN purposes but by and large they're also purposes of contracted parties. So that's what caused us to think that, you know, this is all governed by agreements between contracted parties and ICANN, so at what point do they agreements between ICANN and contracted parties become joint controller agreements, I'm not sure.

And I'm also not, you know, in this PDP work we've been asked to, you know, often to make legal determinations, which probably isn't appropriate for the –

for a policy making group. And that's why we're going to be seeking outside advice from DPAs and the Data Protection Board and the like. So that's kind of where my question lies, is this where we take a set of facts and turn it over to the Data Protection Board and say, "Is this a joint controller relationship?" Or is this policy discussion where policy makers say, you know, because of this set of agreements there should be a joint controller agreement? So that's where I think the – our group is right now, which I know isn't really helpful.

Thomas Rickert: Thanks, Kurt. I guess you're making an important reference to the limitations or the issues that we're facing, namely, we have a policy group working on partially policy work and partially compliance work. So we can certainly go to the European Data Protection Board and ask them for their advice. The question is whether we're going to get something and whether we're going to get something in the timely fashion to inform our discussion. So...

((Crosstalk))

John Jeffrey: And whether some of that's even really the question, right? So I like a lot what Kurt said, I think there's some important elements to it. The critical element of that is what of this that we're discussing is actually the policy and which of it is an interpretation of the law? And where do those two meet? And where is it a requirement to have that interpretation of the law before the policy is developed? And do you really require for example, European Data Protection Board to answer the question of whether it's a joint controller relationship or not in order to formulate the policy on what should happen and how it could happen under this potential policy?

So I think those are some really critical interacting problems. I don't expect that we would get that advice even if we perfectly framed it, it would become relatively complex to the European Data Protection Board to answer and it would be probably not the most important thing that they would see on their workload.

Thomas Rickert: So yes, I guess you make a good point saying that you don't know whether we're going to get that advice as we move on...

((Crosstalk))

John Jeffrey: I think my first point...

Thomas Rickert: We can – yes well you've mentioned two points or Kurt mentioned two points. Let me try to respond to those briefly. We already got advice from the European Data Protection Board. It actually made an innuendo that a joint controller agreement might be present. I would need to dig out which of their letters it was but they mentioned joint controller scenarios explicitly. Also I guess the Hamilton memo explicitly stated that a joint controller scenario would be applicable, so basically we're not taking this from nothing. But there has been previous innuendos and advice that a joint controller scenario might be applicable.

You are right that – both of you are right that, you know, some of the work that is of legal nature and many in the community has criticized that, you know, a policy body as the EPDP group is now landed with doing compliance work that should have been done elsewhere, but now we are where we are; we are chartered with speaking to responsibilities. And if we think that this is a controller/processor relationship we need to have the appropriate agreements in place; if you don't have written agreements that's something that's punishable by the authorities.

But I guess that looking from the outside, looking at the rationale for joint controller situations, it is probably the least risky option to go with a joint controller scenario and try to fill that with life. The alternative would actually be a controller/processor arrangement. As I mentioned, that would be outsourcing scenario for most cases and what we find in the gTLD work is nothing where one party outsources certain activities to another party.

But if liability is the root concern, let's maybe discuss that a little more before we adjourn. We have two layers of liability, one would be liability towards potentially aggrieved data subjects. And as some of you mentioned during this call, in fact there is joint and several liability of the joint controllers for that. That would be, you know, aggrieved data subject going to one of the joint controllers and trying to get their way potentially sanctions.

In order to cover for that, you allocate the responsibilities internally in the joint controller agreement, you publicize who's responsible for what to a certain degree which is also a legal requirement and then you back that up by indemnification clauses. So if a registrar does something wrong that he or she is responsible for somebody goes to another joint controller then the registrar needs to indemnify the other two parties if they're suffering damages.

Maybe we – when this is being operationalized even think about a security bond into which all parties pay some funds in order to cover for potential insolvency scenarios or other jeopardizes. So that's the one level. But I guess the probably more risky level is being sanctioned by the authorities with their severe fines. And actually Article 26 subsection 3 clarifies that. So for the authorities, this joint and several liability is not applicable. So if a registry is doing something wrong, then the authorities would go after the wrongdoer and sanction the wrongdoer and not the other. So the joint and several liability concept is not applicable there.

So I think that, you know, we might not be able to discuss this or come to conclusions without knowing more about ICANN's thinking because recommending something to only find out subsequently that ICANN has other concepts in mind is probably not the appropriate way to go. So...

John Jeffrey: Can I add something to that? Because I think what...

Thomas Rickert: Sure.

John Jeffrey: ...we're trying to do is not jump in front and create a solution; what we're trying to do is respond to the paper that you created. And I think that's important. So if you just take, for example, your last point where you said on joint and several liability that that's separable in some instances and you went through – I'm not sure I understand that. For example, the memorandum says that, quote, "Even with a clean distribution of responsibility between the controllers, all controllers are liable vis-à-vis external parties for the overall processing operation." End quote.

So if – how would that work in practice? So if there's a personal data breach in Toronto, say, would all the parties worldwide incur liability with respect to those data subjects? And what are the consequences if all of the parties don't provide sufficient notice or provide adequate consent? So there's a – there's a disconnect to me in terms of the difference between the policy and the legal issues relating to liability which in some ways, the approach that this is taking draws into issue now when in fact maybe it doesn't need to be an issue now. And so that's the concern that I have and the reason I'm expressing it.

Thomas Rickert: Okay, so I think we really need to wait for the document to come in in order to discuss it. Are there any further...

((Crosstalk))

John Jeffrey: That wasn't the document, though, that was me so...

((Crosstalk))

Thomas Rickert: Kurt.

Kurt Pritz: Yes, so this is really a two-step discussion though, right? One is a determination of whether there's – whether there's a joint controller relationship here and whether there should be a joint controller agreement.

And I think many on the team, especially the contracted parties, find that persuasive. But then the second step in that is then how to address liability or indemnification or these things, which might be – which is a different problem that shouldn't be addressed until we establish an answer to the first one.

John Jeffrey: Yes, so that was the first part we talked about before I think you were on, Kurt. And the question we were raising if there's an assumption of jumping to joint controller, and maybe that's the right answer. But if there's that assumption built in, there are – there's an interpretation of that that takes you down a path and there's an interpretation of that that takes you down a different path. The interpretation of being a joint controller on a registry, for example, could mean that they're responsible for actions of the registrar beyond what they would want to assume liability for.

So then you're defining those things inside of a joint controller agreement but the joint controller agreement in fact there is no form for that and what we'd be basing it on is subject to some interpretations, which we might not get right. And so then for example, a registrar processing data in a certain way or causing data breach, for example, in my example, then creates liability for ICANN for the registries, for others, that may not be necessary in order for us to be implementing the policy.

Thomas Rickert: Okay, I think, JJ, we really need to see the memo. It looks like there might be conceptual or different paths to implementing or understanding Article 26 and what many of us have read in legal literature. So I think we're – we can't go any further than this. I'm not sure whether we actually have any conclusions that help drive the initial report forward. I have to confess that I wouldn't be able to report anything else to the plenary than stating that there are concerns from ICANN Org, that a memo is in the making, that we will hopefully get the memo soon and that we need to pause the publication of the report until such time when we have the opportunity to read the memo and discuss it. Is there – let me just check with the group whether that's a fair description?

Kurt Pritz: So this is Kurt. So I think time marches on and you know, we – I think we should take the input we received from John and have a further discussion. And I think it's – and decide to put in the initial report and cite John's comments. And, John, you can tell us whether you want us to attribute them to you or to ICANN. I think it's really good that we're having this discussion and, you know, we see this PDP as sort of a problem to be figured out that needs ICANN sitting at the table because we're the contracted parties and the other constituency groups and stakeholder groups in ICANN are closely tied at the hip on this, so we look forward to and appreciate participation in any of the meetings in this way so we think that's really good.

So I would, you know, continue this discussion and not let it get in the way of the initial report, which we want to get out to generate public comment so we can sort of hit, you know, still look to hit our dates.

Thomas Rickert: Kurt, I don't know how we can possibly publish the initial report if there's no alignment on this point. This is one of the fundamental things for our group to recommend. You know, I think we need to come up with a proposal on whether – to present to the community for the community to comment whether we got it right or not. I think if we're silent on that in our report or if we make a recommendation to which the community says yes, you should go the joint controller route, and then find out that ICANN has hesitations that are insurmountable for ICANN to actually sit at the table and discuss with the contracted parties, that would be a disaster...

((Crosstalk))

John Jeffrey: Thomas, if I can interrupt? There's a lot of assumption that you put into that that I think aren't exactly accurate, so let me see if I could help too. And isn't the goal of the discussion – or maybe I'm not understanding this. So let me rephrase the question. What is the goal of this group? Is it to come to a certain determination or is it to highlight where there may still be an issue as

well? Because you're not in a final phase of the policy, right, you're in a reporting phase of the policy.

So if there was still an open question that for example, we may posit needs to be decided after there are additional indications, because this is very deeply into the legal interpretation phase, then why would that stop a final report or a report from coming out that indicates that there are implementation issues and other aspects to work through still as opposed to stopping the report because there are still hard legal questions that exist? If you stop the report because of hard legal questions that exist there will never be a report; there's going to be hard legal questions all the way through the creation of a policy.

Thomas Rickert: So, you know, I've just taken on the role of chairing this meeting so I think others should chime in as well. But I would have difficulty even putting out something for public comment if we don't know ICANN's position on this.

((Crosstalk))

John Jeffrey: But ICANN doesn't determine your consensus, we only determine whether it's capable of being implemented at the end so we're trying to help guide this to an implementable point but we're not part of determining your consensus.

Thomas Rickert: That's correct, but if we – if our group came to consensus and it looks like there's emerging consensus that there is a joint controller situation, and if ICANN then says, no, we're seeing this entirely differently, then what? ICANN would need to sign a joint controller agreement or ICANN would need to negotiate a joint controller agreement with the contracted parties. So our recommendation would be potentially consensus recommendation coming out of this group and then ICANN refuses.

I'm not saying it would, but I'm just saying that at the moment the different stakeholder groups and constituencies have put their positions into the triage report as well as into the initial report, but not having our position on the joint

controller or the responsibility chartering question informed by ICANN views would be a dangerous thing to do. You're right that you're helping with the implementation that you just mentioned, that you have a 10-page memo in the making where ICANN raises concerns, and I think that these concerns need to be known to the stakeholder groups and constituencies for them to form their views.

((Crosstalk))

John Jeffrey: Sorry to interrupt. To go back to what Kurt was saying though, this is an important point, so what we hear from you is you want ICANN to be a participant at the table and that's what we're trying to do. What that can't become is ICANN becomes a barrier to your creating consensus because we have a view that might be different than yours. So like – so this is the problem that we face in trying...

((Crosstalk))

Thomas Rickert: JJ, are you still there? I can't hear you anymore. So JJ's network dropped he just wrote. So I think we should wait for him to come back. In fact I think that the points we're just discussing are nothing that should be an exchange between JJ and myself, first of all, you know, I was the unlucky chap accepting the action item to put something on paper to go into our initial report so it's not about me or a position that I might have, but I was trying to outline the difficulties that our group might have in putting out a report that is not informed by ICANN's views.

But a determination on whether these difficulties actually exist need to be made by the representatives of the various SGs and Cs. And a determination on whether we can go forward and under what parameters we can go forward needs to be made by our leadership and not by me. I just want to make this perfectly clear that this is not about me or, you know, I just put some ink on

paper to help drafting the report. Can we hear more views on that while we're waiting for JJ to come back in?

Kurt Pritz: Yes, so Thomas, this is Kurt. First of all thank you very much for chairing this and, you know, I get your role completely so I appreciate all the work and thought that went in so you see yourself as a facilitator but also as a thought leader. The other thoughts I have really – I think I want to wait for John because I'm understanding your points better.

And I think that what we want to do – and your points really have to do with not just looking out for the members of our group but also looking for ICANN too so ICANN organization too so I would like to help you or maybe others put the thoughts you have at this point of the meeting into a thoughtful much less than 10 page memo for ICANN saying here's our reticence in going ahead with our deliberations on this work because we don't want to wind up in a position where we're, you know, we've created a consensus policy to which ICANN says cannot be implemented or does not agree.

So I think it's – but I think you put it very eloquently but I think we should try to put that in writing for ICANN so they can consider the ramifications of what you brought up.

((Crosstalk))

Diane Plaut: Kurt, this is Diane. And I feel the same way. Oh.

Kurt Pritz: Hey, John, so while you were gone I was just complementing Thomas on his thought leadership on this issue and stating that every time I disagree with Thomas in even a tiny way I find myself regretting it. So I think what Thomas's points are, is that he's looking out for the welfare of the policy making team and working on policies that will ultimately be accepted but also looking out for, you know, the multistakeholder model and ICANN Org too,

and not putting ICANN in a position where we have a policy that ICANN Org deems un-implementable or unacceptable.

So I thought those thoughts were really well put but I think they'd be better put in a brief memo so I was saying something much less than 10 pages. But you can see here that there's considerable support for Thomas in the thoughts he's making on the team. So John can't talk but he can hear.

Thomas Rickert: Okay so...

((Crosstalk))

Diane Plaut: Thomas, I'm happy to add some thoughts. I think we have to start out with the appreciation that as a policy group and as Thomas has expressed, we're on this cusp of policy and compliance together and in making that recommendation it's inherent that Legal is a component to that because within the charter question are in fact legal questions. And so it's not – it's something that hopefully we could overcome that hurdle to think that this outside the scope of this – of the charter questions to not inherently also answer these legal questions. And in fact I know that Göran had asked us to make legal recommendations.

And no matter what the complexities of the roles and responsibilities of the parties here very much beg for the identification of labels. And so the joint controllership label is something that the Board has pushed as a concept that was implementable here. And as Theo has described, you know, to – we have to go through this impasse of the joint controller should be able to identify these complexities.

And the liability issues are most adequately addressed in that context so even though Thomas laid out in his memo that there would be joint and several liability, that's just a legal concept that he included in the memo, but in fact in application in the joint controller agreement the liabilities are

proportionately tagged with the roles and responsibilities. And this helps ICANN just as well as it helps the contracted parties.

So I think that we have to really see this as the most important positive step forward to be able to make our policy recommendations mean something. So as Thomas has said, it's really difficult for us to go forward in all the work that we've done and not make these labels and properly assign them because that's what's necessary to answer the charter questions fully.

Thomas Rickert: Thanks very much, Diane.

Diane Plaut: I'm very happy to help in any kind of memo to take this forward.

Thomas Rickert: That's much appreciated. Thanks so much, Diane. We have five minutes left on the call so I think that, you know, it's particularly unfortunate that JJ can't respond other than in writing. And I think that we should probably not continue a substantive discussion without him being able to be heard. What I would suggest doing now is let's try to adjourn now. We have a marching order on how to report to the EPDP plenary tomorrow. I think that our leadership will need to make a determination on the next steps. JJ, if you could, I think that our group would appreciate a lot if you could push for the memo to be shared with our group at your earliest convenience.

And as I hopefully made sufficiently clear, I think it will be very valuable for our group to understand what ICANN's concerns are so that all the groups can put that into their own thinking and as we move on I think it would be even more appreciated if we got earlier notice of those concerns if any so that we can enter into a true dialogue on the things. And ICANN is – ICANN Org is at the table for a reason, we do appreciate your comment and insight and expertise and, JJ, thanks so much to you and Erika for joining our call today. And maybe we can schedule another follow up call as soon as we get your memo and then potentially invite more EPDP participants to the table or even have this part of the plenary discussion.

So I'm not sure, Kurt, whether you want to make any closing remarks but I think I've said that I wanted to convey for the time being. Kurt, do you want to speak or shall we just adjourn?

Kurt Pritz: Well I think I just want to say thank you very much, Thomas, and thanks to the other members of the EPDP team for attending this and giving up your time for this. You know, it's a – it's obviously an important question and I just appreciate the depth and the depth of the discussion and the intellect behind it, so thanks very much and thanks again, Thomas.

Thomas Rickert: Thanks, everyone. The meeting is adjourned. We can stop the recording. Bye-bye.

END