

ICANN Transcription
EPDP on the Temporary Specification for gTLD Registration Data call
Thursday 11 October 2018 at 1300 UTC

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at:

<https://audio.icann.org/gnso/gnso-epdp-gtld-registration-data-specs-11oct18-en.mp3>

Adobe Connect Recording: <https://participate.icann.org/p8sijonwgj2/>

Attendance is on the wiki page: <https://community.icann.org/x/LQWrBQ>

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page:
<https://gnso.icann.org/en/group-activities/calendar>

Coordinator: Recordings have started.

Terri Agnew: Thank you. Good morning, good afternoon and good evening and welcome to the 19th GNSO EPDP Team meeting taking place on the 11th of October, 2018 at 1300 UTC for two hours.

In the interest of time, there will be no roll call. Attendance will be taken via the Adobe Connect room. If you're only on the telephone bridge would you please let yourself be known now? I do believe we have Kavouss on telephone-only at this time. Joining late will be Thomas Rickert and we have listed apologies from Matt Serlin of RrSG and Julf Helsingius of NCSG. They have formally assigned Lindsay Hamilton-Reid and Collin Kurre as their alternates for this call and any remaining days of absence.

During this period, the members will have only read-only rights and no access to conference calls. Their alternates will have posting rights and access to conference calls until the member's return date. As a reminder, the alternate assignment form must be formalized by the way a Google assignment form and the link is available in the agenda pod to the right and also the invite email.

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 need assistance updating your statement of interest please email the GNSO Secretariat.

All documents and information can be found on the EPDP wiki space and there is an audiocast and view-only Adobe Connect for nonmembers to follow the call so please remember to state your name before speaking. Recordings will be circulated on the mailing list and posted on the public wiki space shortly after the end of the call. Thank you and I'll turn it back over to our chair, Kurt Pritz. Please begin.

Kurt Pritz: Good morning everyone, or good afternoon. Thanks again for the timely start. Today's primary discussion will be on Purpose B which has to do with disclosure of data to third parties so that's pretty exciting. And if you haven't read your email yet, we have a data summary form workbook, worksheet that was delivered from Kristina Rosette as a collaboration, I think, Kristina will set me straight from the registries and registrars so while you're not listening to me in the introduction you might be reading that.

Just some housekeeping items, one for the all-day meeting in Barcelona on the Saturday before the meeting, we'll be sending out a proposed agenda for that meeting right after this one. And we want participants from this team up on the panel to present each of the sections in the agenda, so we're looking for people willing to participate.

We had penciled in names where we thought somebody was particularly knowledgeable in an area and where somebody was knowledgeable in a particular area but we don't want to volunteer people for them, so please do that and we'll send out – with the agenda we'll send out a request for volunteers.

Second, really quickly, there's assignments and homework that was meted out. I – Marika, do you have that at your fingertips and can go over that now or do you want to send reminders out after this?

Marika Konings: Yes, this is Marika. I can just briefly talk through that. So reminders actually have gone out to all the leads for the different data element workbooks; those were sent out yesterday together with the modified template, you know, where an additional section was added to include the lawful processing basis test. So again, ideally or we're calling up on you to have the updated sheets back by Monday at the latest so that would allow for everyone to review those prior to starting travel to Barcelona.

The objective is for the leads to go through the latest version of the worksheet, identify if those still are aligned with, you know, the discussions as they have occurred since Barcelona, if not, you know, flag any updates that may need to be made as well as flag any open issues or outstanding questions that the group should be focusing on. So that will help as well leadership to plan for the sessions in Barcelona to make sure that all aspects of the data element worksheets are covered.

So everyone should have received an email. I know that some of you have indicated that you may not be able to take it on so we're looking for additional volunteers there but in principle hopefully we'll get all those back by Monday. One other item that's outstanding as well specifically for Benedict and Farzaneh is this additional purpose in relation to research. I don't think we've seen anything on that yet and in order to give that due consideration it really

would need to be submitted as well as soon as possible. And I think those are the main items on our list.

Kurt Pritz: Okay great. Thanks very much, Marika. So unless there's comments -- and I don't think there need to be because controversial was discussed -- let's get into the substance of the meeting which has to do with Purpose B. And, you know, as you guys can imagine, the support staff and, you know, with CBI's help we meet often and for long periods of time discussing these. So we sit amongst ourselves and solve the problems of the world and then get on these calls and find out actually what the truth is. But rather than me introducing the material and David Plumb reintroducing it, I think I'll just turn that -- turn the introduction for this over to him. So David, could you take over please?

David Plumb: Great. Thanks, Kurt. It's David Plumb speaking. And hello everybody. So this is going to be a good conversation. You remember we spent most of our third day in Los Angeles on this. I thought it would be helpful to start the conversation reminding where we left off in Los Angeles and then we can transition into have someone from the registries and registrars, or a couple folks, walk us through the work that they've been doing in the evolution of that thinking that's happened over the last two weeks or so, okay.

So it's on the screen right now in the AC chat room, which is that box in the agenda which is that as far as we got in Los Angeles, right, which was there was a lot of conversation about whose purpose this really is and not full agreement on really about that. At that time there was agreement that this feels like a registry, registrar purpose and some felt strongly about whether this was or was not an ICANN purpose, so that's where we were a couple weeks ago. And we'll hear how that's evolved at least from the contracted parties' perspective.

But we did all agree that we want third parties with legitimate interests to be able to have lawful access and have some sort of system that makes sense

for that. And whatever you write as a policy, as an EPDP policy, should make that clear, right? And that is an important piece of this puzzle of how do you send signals as a group that say we want this to happen and we're trying to figure out how to do this in the GDPR compliant way. And the final thing was to take this back to your respective constituencies and talk about it.

So those who have worked the hardest, as I understand it, over the last two weeks, have been the contracted parties who've been actively testing this in their constituencies and putting some additional thinking into it. So without further ado I think it might be the most helpful thing is those who have been doing the most homework, which is the – our friends here, registry, registrars, to walk us through their logic and what's been happening with them over the last two weeks and how they got to this new set of ideas that have come across just this morning in the email.

I recommend everybody picks up that email. It went to the full list from Kristina just a little while ago, about 45 minutes ago, an hour ago, okay. So grab that and open it up and I'm – I understand from Kristina that Alan Woods and Emily Taylor probably are the folks who can best speak to the logic and analysis that's been done and is reflected in this workbook. So I'm going to turn it over to Alan Woods or to Emily and let the two of you walk us through what this analysis and what this process has meant for you all as you've tried to dig deeper into this purpose and how in this document you should be talking about this access to legitimate third party interests.

Okay, Alan or Emily, I leave it to the two of you to figure out how you want to talk about this.

Alan Woods: Well Emily, if you don't mind, I can take a stab at it first and you can fill in the gaps where I invariably will leave off. So Alan Woods for the record. Yes, so I think it's important to kind of say two things before I get into the substance of this. First things first, you know, listening back and reviewing and looking at what happened on Wednesday, because unfortunately I had to leave on the

Wednesday, I think one of the things which struck me was that there was a huge disconnect in people's understanding of what the word "purpose" meant.

So perhaps the reason I think people who (unintelligible). Okay. Let's try that again. (Unintelligible) I think we were referring to the legal term for purpose, purpose as expected under the GDPR. And every time we were saying, you know, is this a purpose of ICANN we were saying is this something that would be legally specifically under the GDPR considered to be a valid purpose? Whereas other parts of the room were thinking of is it an ICANN purpose?

And I think I just want to go on the record straight away and say unconditionally that it is obviously a purpose for ICANN because they can say that we have this – we have this purpose. They can state that they have this purpose but that does not mean in any way, shape or form, that that purpose if it goes to a legal process, would be considered to be something which is under the GDPR a valid purpose. There is a huge delineation there.

So when we were looking at this, I think what I want to point out as well is that I – when I went through this myself, I left my opinions at the door, shall we say. And I said, hey, let's see the way that, you know, Thomas and crew, they intended this particular review to be. Let's put the purpose down the way it is and then let's just answer the questions as truthfully as possible in isolation of each other. And that's what kind of happened here is that I took each one of the points and answered them as truthfully as possible limiting myself to what was being asked by that question.

And I mean, at the end of this we didn't come to a conclusion, per se, it wasn't to come to a conclusion but it was to follow through the legal analysis process of this. So okay, so the first thing then was – like so asking the question, I'm going to – the lawfulness of the processing element up there, let's just skip that a moment because to be perfectly honest I think we just

skipped over that part now that I look at it. We can come back to that. I think just go straight into the question.

So with the first one then, if the purpose is based on an ICANN contract, is this lawful as tested against the GDPR or other laws? So this was the first point where my brain began to melt in Question 1 and that was the question of is it a purpose in the ICANN contract? And 100%, if we were to look in isolation as to the – like if we're to look at just the ICANN contract so the RAA or the RA, then no, it is not something that is specifically passed on.

Where it has been passed on one may argue, and this is just argument's sake, this is for us to discuss, where it was passed on was within the text of the temp spec itself where it stated with a mixture of reading both Section 4 and then reading Appendix A, it basically said that ICANN's purposes are a protection of this and the disclosure of data for this – for these reasons and also this is now a duty of the registries and the registrars to do so. So it was created within the temp spec as being a purpose for that.

So this was – this caused a lot of the discussion I believe on the Wednesday, where if we were looking at the way that the data in the light of the temp spec, the way that the temp spec created the processing of data, the way it envisaged the processing of data, the temp spec itself made it a registry and a registrar purpose.

The reason it probably made it an ICANN purpose always as well, however, the problem is that functionally the way that the data is being used at the moment, is being held at the moment, ICANN doesn't hold that data. So functionally it was only a purpose of the registries and the registrars. And I know that that probably caused a lot of discussion and it was probably good discussion to have because again, it brought out of the woodwork what the difference between a legal a purpose and a functional purpose.

So in looking at the Number 1, then and that was, you know, was this asserted under section – sorry, was this asserted under the ICANN contract? It technically it is, but we have to be very careful in where it was asserted. Now I went – or should I say, we went into a discussion on the public policy role. And, I mean, this was – it was a discussion I think that we need to have in here when we're looking at it from a very much a legal kind of review point of view. And we're asking, we're saying that ICANN has this public policy and this public policy role.

And again, ICANN can assert, of course they can. And, you know, in fairness, they should assert this public policy role in a general sense because they are the people who are doing it. But that does not mean that under the GDPR when you apply the legal requirements of this, that it will be considered to have a public policy purpose for the purposes of GDPR.

So what springs to mind there would be Article 6.1(e) where it says that if you are to have a public policy purpose you must have a link specifically, it must be provided for within EU law, or member state law. And you can look at that – that's actually a tag-on in Article 6.3 if you want to look because it qualifies those – a few elements of Article 6.1.

So because it came up in what we were looking at, whether or not it was an ICANN contract lawful purpose or not, we went into asking the question, well does ICANN have a legal lawful purpose? And one must, unfortunately, conclude in that, that it possibly would have difficulty in asserting their public purpose, again, and I have to say this several times, under specifically the requirements of the GDPR because that's what we're measuring this against at the moment.

So you can read that yourself, I mean, it's literally going through things, is there a, you know, is there a specific public purpose for this? Perhaps not, but read it and please, I mean, is all about us having the conversation and

having comments on it and discussing this as well. But again, it was a step in is this a valid legal purpose under GDPR?

So the next one then, is the purpose in violation of the bylaws? And again, I can turn (unintelligible) kind of thought on this one. When I was reading the bylaws, again, and my answer was, well perhaps because – and specifically I pointed out the bylaws, Article 1(b).6, which says that while remaining rooted in the private sector including business stakeholders, civil society, technical community, academia and end users, recognizing that governments and public authorities are responsible for public policy, and duly taking into account the public policy (unintelligible) governments and public authorities.

So, you know, basically the ICANN Bylaws themselves say, look, we are a – we are helping businesses and this is – we are a business community, we're rooted in the private sector and the public policy is technically not in our remit. So I just think we need to reconcile that. I didn't say no, I didn't say yes, I said perhaps, but we need to consider that whether or not, you know, this particular purpose as stated would pass a test if we were saying – if we were a DPA, etcetera.

So moving on then to the description of the processing activities and then the responsible parties in that. So we took then just three specific, what are the reasons for this purpose in particular? And the reasons that we came up with were one, the collection of the registrant data for the purpose of disclosure under Article 6.1(f), to the storage of registrant data for the disclosure under 6.1(f), again, another processing, and three, the disclosure of data in contemplation of – excuse me – of Article 6.1(f). So they were – that's pretty straightforward, we just put them down just – there's no conclusion to be drawn on that just yet.

So moving on then to Question 4, and that is, is the processing necessary to achieve that purpose? And unfortunately, again, I keep saying, "unfortunately" but again, looking at this in isolation the answer was no,

because when you were saying is it necessary to process the data in this manner to achieve the purpose – and again, remember what the purpose was and that was to facilitate lawful access to legitimate third party interests to data identified herein, it's not because as we noted in 3(a) and 3(b), it's not necessary to collect, store or disclose data under Article 6.1(f), that's not the purpose. We're linking the purpose to Article 6.1(f) because that is the legal obligation already. It is not a purpose, it's a requirement of the GDPR.

So if we were to add is that strictly necessary to process data for that purpose, well the answer is no, it's not strictly necessary because it is up to the individual DPA contracted party to follow the law on that and that is to apply the reasoning of 6.1(f) when a request is made to them. So it is a purpose? No, but is it a legal purpose? No. It is a purpose of ICANN? Perhaps, but is it a legal purpose? No and that was kind of the conclusion that came out on that one.

So going to Number 5, sorry, Kavouss, apologies, it's the Irish in me, I speak exceptionally fast so I will try to speak slowly. Do data elements require transfers to meet the purpose? Yes, there needs to be a transfer to the registrar, to the registry to meet this particular purpose. So I think that's going fine. Six, publication of – sorry, pardon me, I just lost it. Okay, six, publication of data by registrar, registry required to meet the purpose. So again, in a noncommittal way we said, yes and no. The disclosure of the data is a publication and we have to be very clear for – clear straight away that it's the best of publication.

However, when we look at Article 6.1(f), it is probably more straightforward to – I'll just read it, it's easier to just say by reading it. It is more straightforward to achieve the required balance of data subject's fundamental right if that disclosure was on a one to one basis following the specific justified query and that wider publication is problematic with regards to 6.1(f) because it might be likely viewed as indiscriminate and that is again, not necessary to fulfill the purpose. So again, looking at this from a legal application of what is required

under the GDPR, it is very hard to see how that would pass specific muster on that.

And then going to Number 8, and again, (unintelligible) on this one but what are the data retention requirements required to meet this purpose? And simply the data retention requirements here – actually before I even say what is written here, let's just be clear that what we're doing here is we're doing a basic policy that ICANN can say, this is the policy that should be applied at a minimum. It is up to the individual contracted party to understand what are their local and national or maybe even super national requirements in this so that they can then add their own specific data retention requirements. I do it as a registry, I have my own data retention requirements because I know what laws are applicable to me in a particular situation.

So for this one, if we were to genuinely look at what should the basic ICANN policy for retention for this purpose specifically be, it is the life of the registration, however long that may be, 1-10 years plus, and then 35 days. And 35 days is literally – I'm making that to the RGP, the redemption grace period, which is after the life of the registration or technically some might believe that to be part of the life of the registration and then another five days for the pending delete.

But after that, I mean, the basic ICANN minimal policy to retain should be no longer than that. We can argue that there are reasonable ones on that, and I'm sure Thomas will be able to add to that as well, because he's been typing frantically perhaps, but I mean, that – from a basic point of view that's what we should be looking for. So, you know, that being said, you know, we're not necessarily drawing a conclusion but what we did there is we tried in isolation just to take this specific purpose as it is specifically written and to take it through those legal aspects.

And, I mean, this is what in my mind would be for – the concept of a data protection impact assessment. What are the relevant elements, I did miss

one there, didn't I, now that I look at it, about the picket fence one. Yes, I did. How strange that my brain actually went over that straight away?

This is probably another one that I know a lot of people will probably have issue with but are there picket fence considerations in this? We did come to the conclusion that there possibly are in this one because this is a new requirement for disclosure of the public policy purpose and in order to have that requirement be put into our contract because again it is necessarily in the temp spec, then it needs to be formalized specifically in whatever way it falls down whether it be a processor a joint controller arrangement in a joint controller agreement or data processing agreement.

And, yes, we can set the guidelines on what should be covered within that as the EPDP, then – but, you know, ultimately this is a matter that is for the private contract negotiations of the contracted parties and ICANN Org and that. And I know people don't agree with me on that one and that is going to always going to be a question and a discussion, but that was the – the CPH, that's what we thought on this particular one. So sorry for jumping over that, I didn't do it purposefully.

So, I mean, that's the whirlwind tour of this. As I said, it's up to you too to draw the conclusions. We just tried to do a legal analysis of it. You know, we are just one sector on this and we need to listen to everybody, we need to have the conversation. But I hope you can see, you know, where we're coming from on this. Happy to answer questions as best as I can and anybody of course in the CPE who can also answer the question. But before people jump in with lots and lots of questions which I see, I'm sure that Emily, do you have anything to add to that? Because obviously I'm giving you a very registry-centric so please, feel free to jump in there.

Emily Taylor: Thank you very much, Alan. (Unintelligible) got little substantive comments to add to your very comprehensive overview. There are just two very short points I'd like to make. One is to pick up a couple of points made on the chat

about the late delivery of this document. Apologies for that. I think I would just like to reassure everybody that the late delivery was a result of everybody working to the last minute and actually trying to resolve quite a complex and difficult mental puzzle that Alan was just taking you all through.

And secondly, just to highlight that sort of a quite high level point is that lawful access is of course the subject of a different process at the moment and so the, you know, the complexities around the universal access model are many and are being worked on by different groups and so I just wanted to highlight that. I can see that there are four people already in the queue and so rather than prolong my remarks, very happy to clarify any points or to answer questions from colleagues. Thanks a lot.

David Plumb: Okay. Thank you, Emily and Alan. This is David again. Okay, just quickly before we jump to the queue, two quick things. One is I want to clarify with Alan and Emily when you look at your answer to Question 4, are you essentially saying then by answering Question 4 in the way you did, are you essentially saying this purpose doesn't stand? Or are you trying to do something else? And then let's jump in the queue, but I just want to quickly check the – what you're trying to say with the answer to Question 4, for Alan and Emily.

Alan Woods: Thank you. Yes, thank you, David. So I think what needs to be clear on this is that, you know, at the end of the day all we can do – we can say is something yay or nay on this. I mean, all we can say is is it considering the data and the review that we have can we say with likelihood that this would be likely to pass to muster or not? So for me Question 4 doesn't say yes or no, it just says in my mind there is potential that a data protection authority, if they were to review any contracted party who is processing for this point or the ICANN for this point, might conclude that this is not valid because it is not necessary.

So we're not saying conclusively that this is a yes or no; I don't think we can – we're in a position to say that. What we are doing is we're actually doing it in

a way – a form of a balancing test on this and we're saying where would the likelihood fall down on that? And, you know, you draw your own conclusions on this but from my point of view, my own personal opinion is that would be definitely a black mark against the – it being considered to be a purpose that would be okay.

Now, and I will also say that this does not prevent us from reworking the wording of the purpose to make it work, you know, but again, we need to be realistic as to what we're asking here and I think that's the point.

David Plumb: Thanks, Alan. Very helpful. Okay, this is David. Folks, so let's jump into the queue. And I just want to encourage people to keep two big ideas in your minds as you're analyzing this, reacting to it and making statements or questions. One is the question of legality and how appropriately this fits into GDPR in how a regulator would look at it. I think what Alan is talking about sort of the legal view, or this as a legal purpose. So that's one set of issues and questions.

The other set of issues and questions is around what's really important to each of you as stakeholders in the ICANN community, right? And you're going to have needs and interests that are – that intersect with this issue. But let's try to tease apart what is a straight up legal analysis and what is – how do we satisfy what's critically important to each of us when we're writing this purpose? Okay? So try to pull apart those two things of what's just the straight up legal conversation and what's more I have some really important concerns or needs or desires here and I'm trying to figure out how to make sure we're satisfying those.

Okay, Hadia, you're first in the list. Please go ahead.

Hadia Elminiawi: Okay. So hello, everyone. So I have – I had only the chance to look at this right now. However, I am going to speak to some of the points that Alex raised. So we are debating here whether ICANN Bylaws require this purpose

or not and how the European Data Protection Board would respond to this. And this is – this is quite confusingly strange to me because the European Data Protection Board in its letter on the 5th of July does say not to list the purposes, however it does not say that the purposes should be ignored. That's one thing.

The European Data Protection Board in its letter, though, acknowledges that ICANN's mandates go beyond the technical functions of (unintelligible) and ensuring the security and stability only from a technical point of view. In the letter the Board acknowledges that ICANN Bylaws require ICANN to assess the effectiveness of the gTLD registry directory service and whether its implementation meets the legitimate needs (unintelligible) consumer trust and safeguarding registrant data and to (unintelligible) issues of competition, consumer protection, security and stability, resiliency, abuse issues and rights protection.

And with regard to the legal aspect, again, what has been raised is quite strange because under the (unintelligible) of 47 of the GDPR, preventing fraud constitutes a legitimate interest of the data controller concerned and – that's an important consideration here of course is that the data subject should reasonably expect at the time and in the context of the collection of the personal data that processing for the purpose of preventing fraud may take place.

Also under (unintelligible) of (49) we have DNS abuse mentioned as an example. So the issue here is really to make the data subject aware about the purposes for which the data could be used for. So DNS abuses, investigation and mitigation, that's certainly an ICANN purpose, it's mentioned in the mission. It protects registrants from abuse and hijacking their domain names, it protects the consumer, ensuring the security and stability for sure that's an ICANN mission; combating unlawful action in relation to the DNS, of course it's within ICANN's mission. So that's a quick

response to some of the points that were raised. And again, I have only the chance to look at this document now. Thank you.

David Plumb: Thank you, Hadia. So okay, let's just keep going. We're going to grab a couple comments and then we'll try to see if we can thread these ideas together. Margie, you're up next.

Margie Milam: Sure. I'm really struggling with the same things that Hadia mentioned. Honestly, it's simply unfair to ask us to respond to this by having such little amount of time to look at it. So, I mean, and I understand we want to probe and, you know, dig into some of the things that have been raised but I'd like to ask that we have this be the subject of the next call so that we have the ability to kind of understand and analyze the arguments and the bases that – the information that we just received earlier today. So that would be my encouragement because this is such a big topic for us and in particular the third parties access.

And kind of thinking through on the points that I could understand, I think I'm struggling with understanding how the registries and registrars came up with the notion that this is not part of the ICANN contract because the RAA and the Registry Agreement require the provision of Whois – public Whois access for legal lawful purposes. Now, it's true that we're working on making those purposes more specific because of GDPR, so I understand that the way the language read before the temporary spec might be too broad given what we know about how GDPR is applied. But that's – I think it's incorrect to say that it hasn't been part of the ICANN contract because it has been from the beginning of time.

And so that's one of the things that I really struggle with. And so I, you know, in thinking about it I feel as though that perhaps we're moving away from the contract basis too quickly. And the other point that Hadia raised, and I completely agree with, is that this also in the bylaws and so, you know, that's kind of a quasi-contract as well; it's not just in the temporary spec but it's

actually in the whole contractual framework that supports the ICANN role and mission in the policy processes.

So I think it's a little perhaps not complete to – when you think about that perspective. So those are some of the things that just came to mind. I'm sure I have a lot more but – comments but again, I do feel that we need to put this on the table for next call because it's unfair to the others to really absorb this.

And I think the last clarification I wanted to understand is, in this document is there any legal basis that the contracted parties feel would support this purpose? So I'm not understanding which basis they think would support registries, registrars and ICANN, although I understand that they probably disagree that ICANN has a purpose in this. But I'm trying to understand from their point, do they see any legal basis that allows them to do this?

David Plumb: Thanks, Margie. Okay, and I just want to make a note on the issue of time, and I think...

((Crosstalk))

David Plumb: Sorry, who's...

Alan Woods: Sorry, this is Alan here. Can I just actually respond to that last point of whether or not we think there is a purpose? Again, I think this is the core issue, it's not about whether we think there is a purpose or not because there is a legal requirement that the contracted parties do provide this access under 6.1(f). So again, we're trying to fit this square peg into a round hole. You know, we're not trying to say that there is no way of access, we're just saying that, you know, let's not try and contrive this purpose to make this access when the access is already taken care of.

But I really think people need time to review and digest this and I'm more than happy to do that. And again, it's our fault for not getting it sooner but

again, as you can tell there's a lot of thought that needs to go into these things so apologies for that.

David Plumb: Great. Okay, so let's do this, let's keep walking through some initial comments in the queue. Let's see if we can weave some thoughts together and absolutely this is not the last time you're going to talk about this. And while it's frustrating to not have a document ahead of time, let's have a conversation as much as we can now, and then pause, think about it and come back to it either next week on a call and certainly going into the Barcelona meeting. So, Amr, you're up next.

Amr Elsadr: Thanks, David. This is Amr. And thanks, Alan and Emily for walking us through this document. I had a very quick look at it before the call started and I think what I understood from it was pretty much in line with the – how Alan presented it, at least I hope (unintelligible). But I have a clarifying question because Alan, you skipped over the lawfulness of processing portion of the document, which is the very beginning.

So, you know, Question 1 and other questions you sort of indicate in the document that, you know, this is not a Contracted Party House purpose, so if that is the case, then how does 6.1(b) apply in the lawfulness of processing section at the top because 6.1(b) is, you know, would assume that this is a purpose for contracted parties because 6.1(b) also indicates that the contracted party has entered into a contract with a data subject and, you know, this purpose is necessary for the performance of this contract.

So I'm just wondering why 6.1(b) is in there? You skipped over this part of the document during your briefing, and how would you sort of associate this with any of – the rest of the content in the document? Thanks.

David Plumb: Alan. This is David. I'm happy to just very quickly say, Amr, that green box at the top of the sheets is identical in all the sheets and it doesn't indicate that each of those apply; those are just the three that you want to test against. So

the fact it's in the green box doesn't mean it applies, it's just a reference point so you could answer Question 1 and the other questions below. All right? So because it's in that box doesn't mean that Alan or anybody else has applied it; it's literally just a visual aid to remind us of three potential purposes – lawful – legal bases. Right, so nowhere on this sheet is it saying that, it's just a visual reminder of what the three could be.

Amr Elsadr: Okay, got it. Thanks, David. That does clarify it but I would add that it's also a little confusing. Thanks.

David Plumb: Yes, so maybe we can improve these sheets so we don't send those signals to anybody else, yes. Alan Greenberg, you're up next.

Alan Greenberg: Thank you very much. I'll limit my comments to a few of the points. I will say I'm glad we're having this discussion today. I won't be on the call on Tuesday, some of us are traveling already to the ICANN meeting so I'm glad we are having this opportunity even though we had virtually no time to look at it.

I'll comment on a few of the points. On Number 1, purpose, what we have here is a rather circular argument. Of course the ICANN contract prior to the temporary spec did not make reference to exact purposes regarding the GDPR. But as Margie said, there are implicitly parts of the ICANN contract which imply that we do have to make data available to third parties. You know, where the temporary spec is in fact part of a contract and our job is to create the instructions for rewriting that in a permanent form.

In Number 4, again, we're talking about what are the purposes and I agree that the current purpose at the top of this page is not really very helpful and maybe we need to rework it but I'll remind everyone that in Los Angeles we had a more detailed purpose and all the details were taken out of it. So, you know, an example of just one, and it's not my favorite one, but nevertheless, is IP violations, you know, ICANN – there are laws saying you cannot abuse intellectual property in certain ways and ICANN's contracts and the UDRP

process has a method of doing that. So how can we say this is not part of ICANN's purpose?

Next one is Number 5, let me scroll down to it, I'm sorry. And I fail to see why transfer to a registry is a necessary part of this unless we're saying only registries can give out the data and therefore we have to transfer it to a registry. Now I happen to support transfer to a registry for other purposes, but it's not clear that it's related to third parties.

And lastly, as other people have pointed out, Number 6 is addressing the question of who can get the data access, not whether there is – really here – the real issue here is can anybody get the data if no one can get the data then there is no purpose. If someone can get the data regardless of the details of the hoops they have to jump through to get it, then Number 6 says yes. So I won't belabor the point anymore, there's lots of other speakers and other people have said some of the same things, but I think this whole document is based on some presumptions that I believe are incorrect. Thank you.

David Plumb: Thanks, Alan. Mark S, you're up.

Mark Svancarek: I just wish we (unintelligible)...

David Plumb: Mark, we can't hear you. You're having your same microphone problems as usual. Is there something else you can do?

((Crosstalk))

Mark Svancarek: ...different microphone.

((Crosstalk))

David Plumb: Equally terrible. Bummer.

Mark Svancarek: I don't get it. But anyway, I just feel like I'm reacting right now because of the short amount of time frame so I'm going to take my hand down (unintelligible).

David Plumb: Great. Okay. Thanks, Mark. Happy to circle back with you. Ashley, you're up.

Ashley Heineman: Thanks. This is Ashley with the GAC. So first of all, you know, thanks to the folks who put this together. This is a brain-buster and it's not easy. And I think what's particularly hard is that you all are filling out a chart for a purpose that wasn't originated by you guys, it actually came from a different side of the house. And that makes it harder for you. And I won't speak for the BC and the IPC and the SSAC and ALAC, but at least from my perspective the primary purpose of the purpose, and I'm sorry, I'm sure I'm giving you a headache, Kristina, but was intended to really focus on the facilitating part or the enabling part, whatever adjective we use here because again, at least I recognize that, you know, the actual provision of the access and the lawful basis associated with that, that's for a different conversation.

So it's more the intention here, you know, recognizing that the European Data Protection Board said in their July letter to ICANN that they have an expectation that ICANN is going to develop a model that enables legitimate uses recognizing that to build a purpose in here that focuses purely on the facilitating part, which is, you know, the collection of the data, the, you know, whatever steps are to be had by the contracted parties and ICANN that, you know, puts in place this model that, you know, enables the access happens.

And so that was the primary intention and I don't know if this is how it was looked at by your group. I realize that it's kind of threading the needle and it's hard to keep that distinction in our minds. I know that I often find myself in that trap of, you know, kind of looking more at the access part and the interest of the third parties when reality the real pure intent of this purpose is the facilitation part.

And if there's any way that, you know, once we have our call next week that we could kind of look at it really kind of through that narrow lens perhaps it'll be more clear for us in filling out the worksheet. But perhaps I'm wrong and this is what people have been thinking all along. But anyway I'll stop there.

David Plumb: Thanks, Ashley. Georgios, you're up.

Terri Agnew: This is Terri. Georgios is on telephone. We'll go ahead and check his audio and come back.

David Plumb: Thanks. Great. Can we get that hold music out of here too? Okay, Kurt, you got your hand up. You want to jump in here?

Kurt Pritz: Yes, thanks very much. And thanks, everybody and thanks to Kristina and Alan and Emily for working on this. I think any document you get at 5:16 in the morning at the time of the sender indicates they worked on it pretty hard. So I want to touch on a couple things Alan Woods said and I hope I'm not mischaracterizing it that, you know, nothing here obviates the compromise and agreement we have to make data available to third parties, the data that's already collected and nothing more, you know, if the third parties can demonstrate, you know, a 6.1(f) legal basis.

And I also sort of latched onto what he said that this analysis might change if the wording in the purposes different and, you know, I think Alan Greenberg made that point too that we recognize the one point that the wording in the purpose needed to be more specific if it was going to pass GDPR muster but then we got away from that specific language. So I think, you know, to a certain extent the analysis was done on, you know, a flawed purpose, as Alan said.

So you know, reminding us that we have this compromise about making data available but only, you know, limited to the set that's already collected and

limited to those who demonstrate you know, a 6.1(f) sort of legal basis so I wonder if we should spend time rewording the purpose, you know, closer to what we had but in a way that fulfills the gist of our bargain that we made in Los Angeles, and then seeing if that changes this analysis at all but more, you know, more importantly if that rewording then, you know, permits us to go ahead with the answering of the charter questions and the publication of our agreement in the initial report. Thanks.

David Plumb: Thanks, Kurt. Yes, and I think that's a really interesting thing to do. Let's take the next four folks in the queue, I've got Diane, Kavouss, and then Emily and Alan are both in the queue. So let's do that and then let's do a quick pause and see where we're at and see if there's additional things we can do on this call or we just need to take a pause. So, Diane, you're up.

Diane Plaut: Hi, thank you, David. I think this is a great time to be able to speak because I very much am in line with what Ashley has said. I think that, you know, thank you, everyone, for the hard work that was done on this. I know that the thought that as put behind it was quite significant, but I do think perhaps it was taken in a very granular level that is not what was – the intention was with this purpose.

This purpose is really meant for the facilitation and the facilitation in line with what Margie said, is very much under 6(b) and a contractual obligation. And that in trying to focus on what David said evaluating this from a legal perspective under GDPR both parties are considered joint controllers. And in that context, each has very different bases which they need to identify. The contracted parties being 6(b), in relation to this purpose and then the ICANN purpose which is a combination of 6.1(f) and we could finalize on that any other purposes that can be identified with that.

So I think that what Kurt said is really important is that in fact maybe what we need to do is go back to what we got so far in LA and recognizing that those two purposes are really married and by looking at them in a vacuum, is not

helping us. We need to maybe bring some language back to what we had in LA which ties language into this purpose which ties it to the ICANN and third party legitimate interest purposes so that it has legs.

Because otherwise evaluating it in a silo is not – is not making it what it needs to be and it's making it very difficult for the contracted parties to get their heads around that for a reason, because ultimately we've all discussed it, in fact there is no public policy legs to stand on right now. If it doesn't exist with that ICANN getting some kind of accreditation or recognition which we all know is going to be very challenging. So I do think that we should try to put back some of the language that we had solidified in LA, marry these two purposes and then try to work on the language and that we could really be in a good place on solidifying all the different work that's been done.

David Plumb: Great. Thanks, Diane. Kavouss, you're up.

Kavouss Arasteh: Yes, first of all I have some point of procedures. Any document like this for discussion must be available 24 hours before the meeting, 24 hours before the meeting. This is something that we have to respect. If we receive something later than that one, okay, put it at subsequent meeting. So I cannot follow because I don't know what is that, I don't have – just ran from one meeting to the other meeting, arrived here in the business center to go to the computer five minutes log and then this is something that is Point A, Point B, C, I don't follow it at all.

Number 2, I appreciate very much those people who speak slowly and I have different difficulties for those people that speak very quickly. I cannot follow them at all. Number 3, I do not understand those people saying that according to DPA, the law enforcement is not a purpose. What is it? For government, it not for all, but for many, the law enforcement is one of the main purpose that they want to have access to the nonpublic data, so if it is not purpose that means you exclude that access. So I don't understand the situation.

I don't agree with this conclusions and we have to really be quite careful that we are not only dealing the problem of registry or registrar and so on so forth, we are dealing with problem of everybody. And for us at least for governments the law enforcement is one of the main purpose to have access to the data, in one way or other. So I do agree the DPA, I don't know what is the argument and so on so forth, so we have to really discuss that.

And this purpose, which has been invented in Los Angeles by some people getting together is not definitive, it just something guiding issues and we have to come back to see whether they are purpose of ICANN, purpose of registry, registrar, third party and so on so forth. Thank you.

David Plumb: Okay. Thank you, Kavouss. All right, Emily and Alan, why don't you guys weigh in for a second and then I'm going to pause and see where we're at, so Emily and then Alan.

Emily Taylor: Thank you very much. And really responding directly to Kavouss' point and also those by Margie and others earlier which is to agree that this document arrived very late before the meeting and, you know, from our perspective working on it we were working right up to the wire but that doesn't take away the inconvenience and you know, difficulties that places on others who are interrupting busy schedules and trying to prepare for this meeting so I definitely support the ideas of leaving substantive discussion until a later meeting with apologies on that.

I also just wanted to pick up on Ashley's very well made point about, you know, the sort of the difference between working out the mechanics of giving access and the sort of perhaps a higher level objective about facilitating the data sharing. And, you know, maybe one of the reasons why the drafters of this – this document have been struggling so much in going through what should be a fairly straightforward exercise is that the disclosure to third

parties of data that's really been collected to fulfill a contract of registration really basically this is about domain names being registered.

The lawful access part is something that would probably apply in other context to other contracts as well and so in particular we have really struggled with, you know, trying to fit it into the framework that is required by the template but also required by, you know, thinking about whose purpose, who's the controller, who's the processor.

This is sort of – this is almost like an exception to data protection laws and principles in that one, you know, where there is data held and there is an event that justifies people going inside if you like inside the protected data and getting a hold of it for some reason. I think that this is why we had struggled so much to produce this document and very much welcome others views on it. I'll leave it there. I hope I haven't confused any further with my comments.

David Plumb: Thanks, Emily. Alan, what would you like to add?

Alan Woods: Thank you. Like obviously I've taken notes of things that people have said so I'm not going to go through absolutely every one of them because we need to move on, I agree. People need time to digest this document. I think one of the themes that is still running through it, and I said it at the beginning that there still this confusion between the legal purpose and the purpose of ICANN. Not one person in the contracted parties will disagree with you when you say that it is a purpose for ICANN. But it is a legal purpose for them to process data is a completely different story. And that's what we're going through.

They can, of course they can, it's just we need to make sure that we're doing this right. We're not saying that this is a hard stop, no; we just need to make sure that what we're doing is thoughtful and in line with what the GDPR requires.

So one thing about it being on the contract already, my point was not that it wasn't in the contract, my point was that it wasn't in the contract that we were to give access to Whois for the reasons of public policy; it was that we were to give access to Whois. And again, that's already taken care of under 6.1(f). So again, let's be clear in the way we're looking at this.

Kavouss, just on your last point there about law enforcement, I just – let's be crystal, crystal clear on this, that there is no reason why law enforcement cannot get access to this data. It does not have to be a purpose in order for law enforcement to access this data. We do not need to create a purpose that we give data to law enforcement, because law enforcement has a legal right that they can establish to get that data. It does not need to then follow that we need to create a purpose for that. So we're duplicating effort on that one.

And we're not saying, of course, contracted parties are always going to listen to law enforcement requests from valid law enforcement of proper jurisdiction. They don't need to have a purpose. I don't have a purpose in my privacy policy that says, oh, and also it's my purpose to give access to law enforcement where they need it because that's a legal obligation on me; there's no point in doing – putting it down pedantically into a document. So we have to be very clear, nobody is saying that, Kavouss, at all.

David Plumb: Thanks, Alan. Margie, did you want to jump in quickly? I wanted to take a pause and see where we are. Margie, is it something quick you want to do?

Margie Milam: No, I mean, I guess what I wanted to raise was the issue that Kurt raised on the email earlier in the week about – I mean, really the question is do we need agree on the legal basis? I mean, I just think we all look at this differently and since we earlier were saying we don't necessarily need to agree to one, we could just list the ones that we think are, you know, are available as opposed to, you know, debating back and forth this issue because I don't, you know, I don't know how it's going to be resolved.

But the one thing I did want to ask and I don't know who knows the answers to this, maybe Kurt, maybe Dan or someone from staff, but at the conclusion of this process when we finish the policy, is the intent that it goes to the DPAs for approval? Because I think, you know, I think what the contracted parties want is legal certainty, right? And we, you know, I hear that loud and clear. But if through this process we come up with a, you know, a policy for Whois and is the intention that the Board is going to take it to the Data Protection Board for approval?

Because then that way, if that's the case then we don't necessarily have to reach agreement on the different things and some of the risks that the contracted parties do right now would be alleviated if at the end of the day when we come back with this complete package the Data Protection Board says, yes, you know, this works under GDPR. So that's a question is really to see, you know, do we need to agree to this right now and, you know, and also what is a plan for the policy once it gets, you know, adopted through the ICANN process?

David Plumb: Thanks, Margie. I wonder, Kurt, if you want to just weigh into that quickly, that question about how this group or the ICANN Board or GNSO or somebody wants to activate an opinion from the EU Data Protection Authority? Kurt, do you want to mention that, or somebody?

Kurt Pritz: Yes, I can mention that but my answer would be I don't know, so I don't want to take up anybody's time by speculating.

David Plumb: Okay. Great. So we're not quite sure but it could be an interesting thing about how you all activate the Data Protection Authority in different moments to try to test your own legal analysis as a group that you're doing. Okay, so let's take stock just for a second and then I'm going to jump Alan, but give me one second, Alan, if you don't mind?

Because I feel like one of the ways that we could actually, you know, just think aloud now for a moment knowing that we're not going to be able to make any decisions or do anything on this call but one of the things that's come up and has been loud and clear is, you know, when – how could we potentially reword or reframe this purpose so that it more accurately sits as an ICANN purpose? Right?

And if you think about the way that the EU regulator reacted to the earlier, you know, reacted in July with their letter, asking ICANN to be more discerning between what are their purposes and interests versus those of third parties, and to be more specific about its purposes, right? Is there a way when you look at this purpose which right now definitely reads more like a processing activity than a purpose, to add in language similar to what you did back in LA that situates it squarely on what actually ICANN's purpose, that actually – that answers the why you would want to facilitate lawful access, right?

Why does ICANN through its mission or its bylaws or whatever, have this purpose around facilitation of data to legitimate third party interests such as whatever, right? So I wonder if folks could think aloud about that for a moment, all of a sudden your legal analysis becomes different underneath because you've situated this purpose really underneath why is it important to ICANN. Like forget why it's important to law enforcement, forget why it's important to other people who care about IP whatever, but why is it important to ICANN? Right?

And if there's language that you could put in all of a sudden this starts to feel more like an ICANN purpose and not just some processing activity that has a complicated legal analysis to justify. Okay, so I'm just putting that out there as something we could play with right now on the phone. Alan, you've got the next word. I don't know if you're going there or going somewhere else but I want to put that out there as something to think about of how do you rework this purpose so that it actually feels like it – ICANN has a purpose here, is not

just thinking about the purpose of others or the legitimate interests of third parties. Alan, you've got the word, you've got the floor.

Kurt Pritz: Alan, this is Kurt. Before you speak I'm really – I apologize for interrupting but I noted that Marika had her hand up for quite some time and I just wanted to see if she had a point of order or, Marika, is this a good time to make your interjection before – I saw you hand up before the queue started.

Marika Konings: Yes, thanks – thanks, Kurt. This is Marika. I actually was responding to the previous questions on whether, you know, what if anything is going to be shared with the EDPB and I just wanted to point out that the charter does foresee that the initial report is to be shared with the EDPB. You know, of course that doesn't guarantee a response but I think as staff has indicated earlier, if there are any specific questions that you would like EDPB to respond to or have input on, it probably would be helpful to call those items specifically out because that would allow when we transmit the initial report to kind of call out in that letter what specific items you would like them to provide input on.

Of course as said, you know, that doesn't mean that they will respond but at least it is a step that's foreseen and, you know, maybe facilitate as well getting input on some of the questions that the group may have as it publishes its initial report.

Alan Woods: Thanks, Kurt. Thanks, Marika. Okay, Alan Greenberg.

Alan Greenberg: Thank you very much. I will address the issue you raised, David, I raised my hand to say that I can't help but have the feeling that we are on a steep inclined plane that's been greased, otherwise called a slippery slope. You know, we changed the purpose of this to be more vague and then we say because it's vague it's not a purpose. And as you correctly pointed out, it doesn't read like a purpose. You know, the ultimate end of that is, well, we don't need to collect anything if we don't have any purposes to use it. And I'm

sure that would please some people in this group greatly but I don't think that's what we're here to do.

I believe that there are purposes within ICANN. You said let's ignore the needs of intellectual property, and other groups like that. But ICANN is building a – trying to build an overall facility for the – or infrastructure for the Internet, for the domain name system, the gTLD domain name system in particular, which is usable in the real world where there are intellectual property violations, where there is malware, there is abuse, there's all sorts of things that happen and we are responsible for building a resilient and usable function and that does give us the purpose.

Now, the purpose is not worded in terms of GDPR in our current bylaws, that's why we're here. But that doesn't make the purpose disappear. Thank you.

David Plumb: Thanks, Alan. And, Alan, let me just circle back with you real quick before I go to Alex. So, Alan, given that you articulated quite a clear purpose right there, could you imagine inserting your language right now into a purpose statement?

Alan Greenberg: I certainly could. And we had such a purpose statement before it was eviscerated, I believe is the correct word, with all of the actual content taken out of it. Thank you.

David Plumb: Okay. Okay, Alex, you're up.

Alex Deacon: Thanks, David. It's Alex for the record. So earlier in the chat I suggested updated purpose text that's similar to what we discussed in LA. I tried to un-eviscerate it, if that's a word, add back some of the details. I'll just paste it right now in chat. You'll see that it covers the concept that Ashley mentioned earlier, at least I hope it does, and it's specific; it lists the third parties that will be given access.

So I think – I like the idea of kind of trying to go back to, you know, to what we discussed in LA, be specific with regard to third parties that will get access, try to craft it in a way in which it's clear it's an ICANN purpose, and while what's there is no perfect, hopefully it's closer to what we need for, again, Purpose B from an ICANN point of view. Thanks.

David Plumb: Thanks. Alex, before you go, just quickly, when I'm looking at this in the chat, with the piece that I'm feeling could be stronger would be why does ICANN care about these things, right? Cyber, you know, consumer protection, cybercrime, law enforcement, DNS abuse, right. Is it perhaps stronger in a purpose statement to say why ICANN cares about it, which I think were the words that Alan was putting out – Alan Greenberg was just saying, right, in order to have infrastructure, blah, blah, blah, right? I'm wondering if that kind of language really does strengthen it to say why ICANN cares about these particular issues.

Alex Deacon: Well, I mean...

David Plumb: Could you imagine, Alex, doing that?

Alex Deacon: Yes, I guess – this is Alex, I guess we could add it to this text but I'm envisioning a situation where this purpose or something close to it is at the top of a workbook and the details kind of justifying and analyzing it, especially those that you just requested to be placed, you know, in the body. Either way works but I think you know, I think that definitely can be done.

David Plumb: Okay. Great. Thanks, Alex. I see Emily, you're up next.

Emily Taylor: For this, and I'm just really responding, David, to your suggestion that we try to explore the sort of public policy aspect of ICANN's role, which is definitely there in its bylaws. And what – this is – it's still an area that we as drafting the document were really struggling with how to – how this changes things or

doesn't change things. The part of the reason why this is so difficult in my view is that, you know, a lot of public authorities have their basis in laws so if they say you will provide a public register of this or that, then you've got an equivalent – law of equivalent standing to GDPR and you say, well, I'm just following a legal obligation.

But as ICANN's public policy purpose is much more legally unclear to me, it's no doubt very sincerely held but it doesn't offer the same level of legal cover that I think a lot of the contracted parties would like to see. There's also another complexity which is as Alan very clearly put it, is that if you – if any contracted party is approached by law enforcement with a legitimate reason to access data, then you are following a legal obligation to disclose that data and so sort of the whole framework of processors and controllers is quite confusing in this context.

And I do think that perhaps one thing that can help us try to tease out the issue is sort of mentally thinking about well, you know, there is sharing one to one which is pursuant to sort of legal obligation, but then there's this other bit that's obviously lost with the temporary specification which is wide publication of a lot of personal data on a public register. Right? So those are two forms of sharing and providing access to third parties one of which obviously has gone.

To me the, you know, the publication bit which of course no longer exists, is something that could possibly be justified by a public purpose type of thing if ICANN could make the case for it that it quite clearly shows that ICANN's – in my personal opinion and please this is just not representing anybody else's opinion at all – that, you know, ICANN needs to really come out on that and say yes we require this public aspect of this data because that's part of our public purpose and run with that if that's – but, you know, a lot of people are worried about ICANN's ability to sustain those arguments legally or to handle those obligations if I can just put it as frankly as that. So that's just my personal views on the questions that you posed, David.

David Plumb: Thanks, Emily. And before you jump off and go on mute, I just want to test one thing with you which is you all have spoken a lot about the specific public policy related purpose here, and since, you know, that's a very weak space for ICANN to be in, to be named sort of public policy entity, but I wanted to test the difference between that of public policy, versus as a data controller having a legitimate interest in ensuring an infrastructure that is stable and etcetera and etcetera and all that language that's in the mission.

And that becomes a legal basis under 6.1(f) as a legitimate interest pursued by the controller that there is an ecosystem, right, that has certain characteristics and to do that we need to facilitate third party access to these kinds of entities, blah, blah, blah, law enforcement and you know, IP stuff. You see what I'm saying? You're not claiming you're public policy, you're just saying I want to make a stable system and to do that I need to facilitate third party access and therefore it becomes a 6.1(f) legitimate interest of the controller and nothing to do with public policy. Does that make sense to you, Emily, and the distinction there?

Emily Taylor: I'm not 100% sure I've understood it and hopefully others can help. I don't mean to pass it. But I think that, you know, I sort of go back to the data – the European Data Protection Board letter which advises or warns ICANN not to conflate its own purposes with those of third parties so that distinction would really need to be clear. And I think it would also need to be very clear what the consequences of such a declaration or assumption of responsibility would be, like would it mean that ICANN would then have to take direct control over all the data everywhere, that there would be some uber-system which is centralized and, you know, this would be problematic for many parties and also problematic legally with – in terms of data transfer and all of those purposes.

So I definitely think that, you know, the reason why this subject has been such a running sore within ICANN for 20 years is because it's very difficult to

pin a sort of public purpose on a private corporation that's in California, this isn't a structure that many people or laws recognize as holding a sort of global public policy authority. Now, for the last 20 years ICANN's just gone ahead and done it and it may well be that if it was tested at some point in the future it would be upheld but at this point it poses a lot of legal risks for the contracted parties. Thank you.

David Plumb: Okay thanks. I'm glad you mentioned the third rail issue which is underlying a lot of this debate which we're not seeing, right, transparently which is our fears and concerns amongst several of the folks on this call that if you go down this path somehow you're paving the way towards this direct control over all the data, centralized model which generates a lot of concerns around several stakeholder groups.

Okay, I see Hadia and I'm just – Benedict, if you're trying to talk can you just give me a quick heads up in the chat because I don't see your hand. Oh now I do. So, Hadia and then Benedict.

Hadia Elminiawi: Okay, so first off I would like to agree with Emily that I think ICANN should step in here in order to try to bring this that registries and registrars come under. And then speaking about the purposes, we could actually ignore all the needs of all stakeholders but one purpose remains, ICANN's purpose remains that we can't actually ignore which is DNS abuses, investigation and mitigation. How can we actually ignore this while ICANN Bylaws definitely requires it? So that's what I think when we talk about purposes. This is one purpose that we cannot ignore.

With regard to the public authorities I guess we don't need to talk about them here or now. We can just even split the purpose into two purposes, one that speaks about DNS abuses and IP and consumer protection, and another purpose that speaks about law enforcement for cybercrime. So, yes, so that's just a few comments that I wanted to say. Thanks.

David Plumb: Okay great. Thanks, Hadia. Benedict, you're up.

Benedict Addis: Thanks. So David, you asked us to propose some text to think of a way out of this. So I've just gone back to the GDPR and there are three things in this area where we kind of get a free pass on meeting this purpose test. So if we use either this language or language very close to it, we have met the purpose test that's built into GDPR. Okay? We still have to show that the processing is necessary so the stuff we do is necessary for the purpose, so that would be doing the worksheet stuff that we've all been working on. But this is sort of indisputable that if we use this language the purpose is met, so it might be one way out of this.

And it talks about – and it's different to what Alex has proposed because he's listed people and entities that want to access data, but instead talks about the kind of stuff that those people might – and those organizations might do. So here we go, I've also posted a link into the chat about this but I'm going to read it out as well.

So there are 1-3, Number 1 is for prevention. Number 2 is network and information security. And Number 3 is indicating possible criminal acts or threats to public security. So we could create – we could write that into this purpose and kind of be done with this, if we felt that that was – that met everyone's needs because there is no disputing that this is a valid purpose because that's written in. Thank you very much.

David Plumb: Okay, interesting. Okay great. Thanks, Benedict. And I think like it's trying – what I've been trying to push you all towards is really to name these things that are important to ICANN and that would meet GDPR smell test and that becomes your purpose. And that could be one way to do what Benedict just said. Alex, you're up and then Stephanie, Alex first please.

Alex Deacon: Yes thanks. It's Alex for the record. Just to quickly respond or to make a comment on Benedict's intervention there, I think it's interesting. I need to

read that text there. We also have to keep in mind though that at some point, right, the data subject will need to be made aware before they give their data of all the things we plan to do with it and who may get access to it and when. So again I think being specific is better in that case although the text of that document he linked to may do the trick so I appreciate that.

You know, I just had a second question. I know in LA we discussed that the registries and the registrars would go back and put this workbook together. And I appreciate the hard work and know that it's difficult especially in this group you know, to come to agreement on these things so I'm happy that, you know, while this doc was late it was made available for us to discuss and hopefully we'll have further chance to discuss it at a future meeting. But I'm just curious, is this the work product of both the registries and the registrars or at the moment is it just kind of a registrar view? I think it's important just for me to understand and wrap my head around, you know, what the context is here so just curious if this is a joint registry/registrar workbook or just registrar? Thanks.

David Plumb: Okay, I don't want to speak for people. This is David. You know, correct me if I'm wrong, this was a joint effort by registries and registrars and that doesn't mean that everybody is jumping over the moon happy with it, but it was a joint effort by them that they worked on until 45 minutes before this meeting. But please correct me, anybody who worked on this if that's not correct. Okay. Great thanks. So, Stephanie, you're up.

Stephanie Perrin: Thank you very much. Stephanie Perrin for the record. And I don't like to continue to march us in circles but I'd just like to note that we had a discussion last night about why we need legal counsel independent, neutral legal counsel who is familiar with data protection law to be on this call to stop this going in circles. In my view this is a good example. We continue to conflate the legitimate interests of third parties, that would be BC interests, to combat trademark abuse, law enforcement interests, cybercrime interests to combat, you know, malware and other kinds of DNS abuse.

We continue to conflate those interests with the purpose of the collection, use and disclosure of the information, which is a primary relationship between the individual or entity getting a domain name and the delegated party that provides the ability to the Internet with that domain name. Right? That's the primary purpose of registering a domain name. All these other interests are interests, they are not purposes. ICANN was instructed to pay attention to all of these other interests but that does not make them purposes in a relationship.

So really to suggest that we are not going to facilitate the legitimate interests is unfair. We are working on how to facilitate those legitimate interests. But that is an instrument. The purpose of ICANN is not to set up Whois; it is to permit the registration of domain names. And while the purpose of ICANN in the context of GDPR has been stated as being continuing the Whois to the maximum extent possible, that is not a shared belief; that is a position taken by ICANN Legal and the Board. Thank you.

David Plumb: Thanks, Stephanie. Yes, it's a tough knot to untangle here and certainly some independent advice could be helpful. I see Benedict's hand up, is that a new hand, Benedict? If it is, please go ahead.

Benedict Addis: It is. Thanks, David. Stephanie, again public policy argument that Emily made is really good here. ICANN has acknowledged to us in its responses about how it used registration data internally that it doesn't really use registration data internally. These – so ICANN's purposes in using – in securing the network in the three – those three sort of security, fraud prevention and criminal acts purposes, are very much ICANN's purposes. But they are delegated to others. So again, the way I see it is that some of the third party access argument is ICANN answering its own purposes, as David asked us to be very clear about, but outsourcing those requirements to those that are helping it and us clean up the network.

They may not answer everyone's needs because we do have to be tighter on this. But this is specifically what we are talking about is answer ICANN's purpose to secure the network by making access available under very restricted circumstances to third parties. And indeed those accesses that we're not going to talk about yet, can be governed by the sorts of standards that I know you're very keen on yourself and indeed we're hopefully going to attend your workshop next Sunday to discuss that. But I don't see these as separate – as entirely separate arguments. Thank you very much.

David Plumb: Thanks, Benedict. Alan Greenberg, you're up.

Alan Greenberg: Yes, just a quick comment that ICANN's mission is not just to register domain names but to do it in a way that generates a reliable, usable system that meets the needs of the public interest, so to speak, even though we don't have a legal mandate to do that in some jurisdictions. So if all we're doing is registering domain names and facilitating that, a lot of us could save an awful lot of our time because it could be a lot easier than what we're trying to do of actually build a DNS that's usable and trusted by people. Thank you.

David Plumb: Great. Okay so the crux of what's happening here, folks, is there are several of you who are saying, listen, I see an ICANN purpose related to ensuring the stable functioning, etcetera, etcetera, and domain name ecosystem, right? And that is an ICANN purpose and we can state it as such and that requires us to facilitate certain, you know, third parties get access, right? And others of you, Stephanie and I see in the chat, Lindsay, are saying, I'm not buying it. So Stephanie, jump back in. I want to ask Lindsay to jump into the queue too if you want to help explain better. I think we're getting at the nut of this and we're pretty close. Stephanie, you've got the mic open.

Stephanie Perrin: Thanks very much. Stephanie Perrin again. I keep – and apologies for being pedantic here. I keep pointing back to (Jacob Kunsta)'s correspondence. He's the head of the Article 29 Working Group back in, I don't know, 2012, 2011, 2010 I believe (Roshauer) before him, 26, 27, 28, 2006 to 2008 – that ICANN

is in a difficult position as a private sector entity registered as a corporation in the state of California listing law enforcement activities as one of its purposes. It has not been delegated that responsibility other than in an informal manner and no one can pretend that the GAC, with all due respect to my GAC colleagues, is a, you know, the treaty organization, it is a relatively informal group that provides advice to ICANN.

So we are not at all arguing with the need to facilitate law enforcement access to data that is required under law of each nation state. The problem is the instruments and the problem is the – as I see it at least, and I'm not a lawyer as I continue to say – the problem is ICANN setting itself up as an instrument to do this and to declare the lawful access its focus.

Let me draw a parallel, we never refer to other entities that are operating under data protection law, but in a regulatory environment, the banks are set up to manage money for people and they're fundamental to the economy and it's a bad thing when they fail, and we've seen it recently, but there are strict limits to how much they are allowed, under the banking regs, under the Financial Administration Act of various countries to get into the personal details of individual's lives and you know, unfortunately ICANN does not even have the remit that a bank would have, duly authorized.

But in my country at least and in most of the others I'm familiar with in the OECD context, making a move on bank's privacy requires – and in other words, getting more elements under your control, requires significant regulatory reform. You can't just with the stroke of a pen, say that ICANN should set up a common repository for data that can be accessed by third party actors and law enforcement when in particular for law enforcement, they already have the ability to do so under relevant law.

So I think this is an important distinction and we keep belaboring it but as Benedict said, I have no intention of making it hard for law enforcement to access data; and in fact I want to make it easier through a standards process

that will facilitate instant access to that data so that they can stop malware. You know, these are real problems. But what we're – what the problem here is the fundamental of how data protection law would apply in this case. Thank you.

David Plumb: Thanks, Stephanie. Okay, I see Margie has her hand up. Quick before Margie, I'm really trying to circle in here to understand you know, are we having a fundamental disagreement or are we just saying things in different ways, right? Because at the end of the day some of you are saying I can see an ICANN purpose related to the stability and the effectiveness of this ecosystem, and for that to happen I need to be able to facilitate third party interests to certain folks, right?

And some of you, for that, rings very true. For others you're feeling this like nervousness and like wait a minute, ICANN's purpose isn't law enforcement, right. So I'm just teasing, like can we say ICANN does have a purpose around ensuring the stability and ecosystem that works, that requires it to facilitate third party access? Or is that just not going to work for – at least for Stephanie and for Lindsay who have been super vocal folks cautioning us on this. Margie, you want to jump into this?

Margie Milam: And David, to answer your question, I think it is a disagreement on that issue because Stephanie's view, and why I tend to disagree with the way she looks at this, is she looks at ICANN as this private corporation that doesn't have any international mandate. And while it's not a government entity, and we all agree that it's not, the simple fact is that the EU has written letters to ICANN about this. The European Data Protection Board has written letters to ICANN about this so they recognize ICANN in this role. And so that's why I think we have this disagreement because obviously a private corporation, you know, wouldn't be doing law enforcement, right?

And then when you look at ICANN by giving ICANN the purpose it doesn't mean that ICANN is involved in law enforcement activity, it's just the

facilitation of access as we've been talking about. So I think it is a fundamental disagreement on how we look at this. And so, you know, it's one of those things where maybe we talk about it in terms of, you know, some groups, you know, on this team believe this and then others believe this because further discussion on this isn't going to change anyone's mind.

David Plumb: Marc Anderson, you want to jump in on this?

Marc Anderson: Thanks. Thanks, David. I think you know, I think – I agree with, you know, where Margie was going with that – with this and, you know, I was raising my hand to make sort of a similar point. You know, David, you seem to be – you seem to be trying to push us to get agreement that this is an ICANN purpose and that that, you know, if we agree that this is an ICANN purpose that solves the problem. And you know, I think what you've heard throughout the course of today's call is that, you know, that doesn't really, you know, solve this for many of the people on this call.

And, you know, the term “purpose” has, you know, has gotten to be a bit of a loaded term for us in this group here. You know, talking, you know, talking about it as an ICANN purpose, I think you know, we've heard from everybody here that, you know, ICANN, you know, ICANN has made it its purpose. You know, ICANN the Org, ICANN the community, you know, by virtue of all of us representing the community, talking about it, you know, we've made it a purpose. But that doesn't necessarily have standing under GDPR.

And so just saying it's an ICANN purpose does not sort of, you know, solve, you know, solve our problems as a group. It doesn't move us forward under GDPR. We still need to take that under, you know, I think defining it as an ICANN purpose here really is, you know, the most we can get out of that is agree that it's within scope of our discussion. But, you know, I think where, you know, where it doesn't get us any further in sort of justifying the processing activities under GDPR.

And so I think, you know, if I was trying to sum up what I've heard on today's call I think that's where I would say the challenge is, not whether this is an ICANN purpose it's how do we take that and justify it under GDPR.

David Plumb: Marc, that's excellent. And it's making me think that the next step is to do this exercise again, right, but to do it with the kind of language that I think was Benedict who suggested some language from – purpose language or getting back closer to the language that the small group – one of the small groups in LA got to and then do this exercise again, right, and see how does it feel to answer those questions when you do it this way knowing everything we know and hearing these voices in our heads while we answer – go through this – go through this sheet again, right? Hearing Stephanie's voice and others that are very skeptical of this.

And there's one other thing I think we can do in addition to going through this worksheet with some different purpose language pulling on language such as what Benedict put in the chat, and that is to imagine what you would want to accompany this as policy language from you as a group, right? Because I can imagine that you would want to put as a group that for instance as a group you are in no way trying to signal that everybody there's some consensus that ICANN wants to do or should do centralized data and centralized model, etcetera, etcetera. Like you as a group, you're not wanting to send that signal. Maybe some individually was very eager to send that signal but you as a consensus group aren't.

And so think about the kinds of language that could accompany this that would help send the signals that you as a group want to send and address these concerns that you have. Okay? I'm concerned we're sort of at the end of the road of this conversation right now and I want to test if folks are up for these next steps that I'm suggesting. One next step is to read what was sent this morning a little more carefully and think through the logic and try to, you know, understand that better.

Two is a handful of you try to put together a purpose statement that is more along the lines of, you know, using language that Benedict put in the chat or language that's similar to what you had before in LA from that small group, right. And then run the exercise and do another run of the data elements worksheet, right?

And then the final thing is to say are these pieces – is there policy items that you'd want to put in your initial report that help send the signals that you want to send so that people don't misinterpret things or run further with something than the group as a whole wants to run. Okay. So folks, just testing, does anybody have other suggestions about next steps to take this forward beyond the ones I just suggested or different from the ones I just suggested? Any other thoughts about next steps? Okay. All right.

So given that, I think we're going to wrap up the call now, give you all back 15 minutes of your lives. And I think for our wrap up we should do – I'm just trying to make sure there's not something going on in the chat that I need to deal with. I'm not able to follow the – track the chat. Kavouss, if there's something you want to say I'm not quite sure what the reference is there. So unless folks want to comment on how to do next steps and take this on one more level of analysis, let's wrap up this call and then get back and figure out whether next week we can talk about this or you're just going to have to take it up in person in Barcelona, which is the most likely scenario.

So Kurt or Marika or Caitlin, whoever wants to do some of the wrap up things we typically do in terms of action items, let's go ahead and do that. Oh, Kavouss, excellent, I was hoping you'd clarify your comment. Kavouss, you've got the floor, you wanted to say something?

Kavouss Arasteh: Yes. Yes, excuse me, do you have any idea how to go to the next steps? You're asking us, but what about you? Do you have any idea? I think it's about many meetings that we're turning around law enforcement, ICANN purpose, stability, security of DNS, it is connected to this third party interest,

third party purpose and we're turning around ourselves for many, many sessions. So do you have any way to get out of this, please? Thank you.

David Plumb: Yes, sure. My suggestion here is that we actually do need to go back and try this with different language – purpose language that gets at what many of you on the call were saying today felt very comfortable. Right. And look, get back or establish that new purpose language and run this through and see how that feels. Right? Do the analysis in the same way contracted parties did some analysis on this, you know, sort of bare bones purpose language, right, do that same thing and see where that gets us. And I have a feeling it may help clarify some of these issues that we've been wrestling with on the call.

And I'd encourage people who feel strongly about this to help us do this exercise, we can either set a quick time to do it early next week or whenever people have a moment and we can do it over email as well. But I think we need to test it out, not because – we need to keep it separate from this analysis that the contracted parties have done, and we're going to use them both and see how these two things inform us about where you stand as a group of folks and what you can say as a sort of temporary consensus and what you can't say and you just say these are the two views that are in the group right now.

And it could be that that – because we're pretty much out of time in terms of getting to an initial report that we're going to do one last chance to really clarify where people are at. And it's, you know, one possibility in your interim report that you simply just name these two differences of opinion and you solicit input from the broader community on it. Okay.

So we can work out from – I can work with the leadership team to make some very specific suggestions about how to do this other analysis. I would encourage people to volunteer who feel strongly about this and we can make a little subgroup that shares the document around and maybe gets on the

phone briefly, okay? So Caitlin, I think you're doing the wrap up here at the end of the meeting. Why don't you go ahead?

Caitlin Tubergen: Thanks, David. This is Caitlin Tubergen from staff for the transcript. So I have four action items flagged. The first is for volunteers to come forward to present during the high interest session in Barcelona and the leadership team will circulate an email to facilitate volunteers signing up. Second is for the leaders to please remember to complete the data elements workbook homework. These are due Monday, October 15.

And as a reminder, the objective in going through this exercise is for the appointed leads to review the workbook, flag any updates that need to be made to the workbook and also flag any outstanding issues that may need to be discussed in Barcelona with respect to those workbooks. And Marika had sent reminder emails to all of the appointed leads. If you need to ask someone else on your team to be the lead, please let us know so that we know that someone is working on the workbook.

Third action is for Benedict and Farzaneh to please submit the workbook for the research purpose so that the team can review it. And...

Benedict Addis: Sorry.

Caitlin Tubergen: Thanks, Benedict. And last, a quick recap of what David had just said is that we'd like everyone to please read the Purpose B workbook that was sent this morning more carefully and then some members could volunteer to come forward to put together a purpose statement perhaps using what Benedict put in the chat or the previous text from Los Angeles and run that purpose statement through the data elements workbook. And lastly for the group to be considering if there are any policy items that the team could put forward in its initial report with respect to the workbook. Back over to you, David. Thank you.

David Plumb: Excellent. Thanks, Caitlin. Great. Great summary. So I think we're at the end here. Kurt, is there any other things you would like to say to close us up? Happy to end a little early on this call and Kurt, any last words?

Kurt Pritz: Just to mention that in the chat Benedict's coalescing a group of people to work on the alternate language and that in accordance with what Caitlin said, we'll send an email with what we've garnered off the chat and the suggestions here, melding them into one or more options. So with that thanks very much for the constructive discussion today. Kavouss, is that a former hand or a new hand?

Kavouss Arasteh: Yes, yes, just what you said to propose an alternative language to cover the concerns of everybody, it should take into account consensus of everybody, this alternative language whether with the small group or whether one person group and so on, doesn't matter, but you take into account those comments has been made but not partially some comments. Thank you.

Kurt Pritz: Yes that's good. Thanks very much, Kavouss. And thank you, everybody. Have a great rest of the day. I'll be talking to a few of you in a couple hours. So long.

David Plumb: Take care, everybody. Bye-bye.

Terri Agnew: Thank you. Thank you, everyone. And once again the meeting has been adjourned. Operator, if you could please stop all recordings? To everyone else, please remember to...

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