

**ICANN
Transcription
EPDP Team F2F Meeting
Monday, 24 September 2018 at 20:00 UTC**

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David Plumb: Okay, Alan, you had a...

Alan Greenberg: Thank you very much. I have a slight hearing problem and normally I use earphones. The mics in this room were not connected properly to allow me to do that. They should be tomorrow, I'm hoping. If I could ask people just to speak a little bit closer to their microphone? People who speak right into the microphone I have no problem with; people who wander and talk around I do. So if I could ask your indulgence this afternoon?

David Plumb: I'll try to do the same. And this mic is probably the worst (unintelligible). All right, got no little exercise or anything (unintelligible), sorry about that. Are we okay, we just go right back into substance? Okay. We left off, before lunch, thinking about this mash up, right, between B1 and B2 and the other things down below. Right, thinking like why don't we take the word

“contacting” and “identifying,” putting them down below or vice versa, bringing those things up above. Other questions I want to put aside just for a second about whether should be talking about, interest in a purpose statement, I could put that off to the side just for a second, want to do about this – talk about B1 and B2 in the mash up.

Words in B1 and B2, which are contacting and identifying, and trying to put it below. Going to make a specific suggestion, what if we did just that? We got rid of B1 and B2, we took those keywords, excuse me, contacting and identifying, and we put it below for everything that’s relevant that comes below, which includes E and F, then would include, depending on how our conversation goes, H, I, J, K then this L thing, probably M.

What we’re doing is we’re taking away those words from B1 – well we are taking the keywords from B1 and B2 and we’re just going to push them into the language of the lower down thing. So an example of that (unintelligible) F somehow weave in the right word of contacting or identifying in order to safeguard data in the event if business (unintelligible). Okay, and then for H, I assuming how you want to talk about H, I, J and K, you would do the same thing, you'd use language like contact. Right? Great.

Thomas, on that, because that's a specific suggestion I’m saying, to get rid of it and then you drop the keywords down into stuff that comes below. Great. Lindsay and Benedict, you both seem to want to talk.

Benedict Addis: If anybody’s ever done any consensus-based decision making, that means I agree with you without having to speak stuff.

David Plumb: Great.

Benedict Addis: And that means technical point, so when I do weird stuff with my hands that's what I'm doing. But sorry, I'm not going mad. Just a quick bit of feedback, the B the contacting and identifying don't apply to E and F because E is about the data itself so – and F is about whether the data is right roughly speaking. So they're – those two are the only ones that aren't contacting and identifying. But I agree with you that...

David Plumb: For H.

Benedict Addis: ...etcetera of.

David Plumb: So let me rewind, right and say, let's just then keep it where we were right before lunch, which is we're talking about H, I, J, K, maybe L, say getting rid of B1 and B2 (unintelligible) dropping.

Gina Bartlett: And can I just amend what that means? And we take it down for right now and then we go to the data elements worksheet and work through those components to make sure that it's a fit. Yes.

Lindsay Hamilton-Reid: Lindsay Hamilton-Reid. Yes just I'm thinking about this over lunch and we've got sort of ICANN is processing registration data in order and I've been told that, yes, basically we decided it would be the ICANN community. Is that better? Oh yes, sounds it. I'm not really sure how we define ICANN community because there's lots of different stakeholders in that with lots of different purposes and interests and everything else. So just shoving it all in together to me doesn't work. It just doesn't work.

I also think that no, we don't need the Bs and all the stuff about cyber security, intellectual property, again, who's that referring to? Is that ICANN Org, is that the IPC, is that registrars? Who is that? Because to me this is all like

massively confusing and I think we need to separate it out. It's no good just saying ICANN community, without proper definition. And yes, I do think if we're going to talk about ICANN and what their purposes are then a lot of this can go.

David Plumb: I think that's an excellent point.

Lindsay Hamilton-Reid: Thanks.

David Plumb: And I think one of the reasons we're eager to do that very conversation is when you – when we get to this sheet, the very first question talks about ICANN's bylaws and how this fits in as a purpose stemming from ICANN's mission. So I think – if I'm understanding you correctly, you're saying let's front-end that a little bit and make sure we're saying things that are – make sense within ICANN's bylaws and mission.

Lindsay Hamilton-Reid: Yes, I am. However, is that what this sheet is actually about? Is it the ICANN community? Is it ICANN Org? Who does it mean? Because then that will depend what actually goes on here as a purpose.

David Plumb: Much better place than I to answer that. But I feel like this set of purposes, the purposes you all have been asked to produce by based on the temporary spec, are ones that has to be coherent with mission and bylaws. Therefore it doesn't make sense otherwise, but someone can correct me on that hopefully from (unintelligible).

Lindsay Hamilton-Reid: Hang on, just to be clear then, we're saying that this is ICANN Org, not ICANN community? Thanks.

David Plumb: So again, we've got – we talked about this this morning but I think the key thing here is, you know, others can help, what is the scope of the – what, you know, what's the right scope to understand purposes?

Chris Disspain: Thank you. This is Chris Disspain. Only to say that I think we might be drawing a sort of – an unnecessary distinction. If ICANN Org – if the – what we're talking about here is setting a policy. In the implementation of that policy there will be things that happen and of course it's going to be ICANN Org that – if there is data that's going to be collected, then obviously it's going to be ICANN Org that collects the data, it's not going to be the NCSG or the intellectual property group, it's going to be ICANN Org.

But ICANN Org is collecting that – would be, and again I'm assuming that things have happened, ICANN Org is going to be collecting that data as part of the policy. And it's the community that sets the policy and the community says it is an ICANN purpose. So if this policy development working group recommends that ICANN should collect a bunch of data and make it available just openly since obviously subject to GDPR compliance, just make it available openly, I know that that wouldn't work, I'm just using as an example, that is specifically what the policy is and ICANN Org will be charged with implementing that policy and making it happen.

So I don't think there needs to be a distinction drawn between them because it's about policy and if the policy says that's what you do, that's what you do.

Gina Bartlett: Benedict.

Benedict Addis: Hey. Chris, when you say "ICANN will collect" do you mean ICANN will mandate the collection processing kind of data?

Chris Disspain: Oh I'm sorry, yes, it could be both ways, it could be ICANN collecting it, there's all sorts of possibilities, right? But it could be ICANN collecting it, it could be ICANN saying contractually I hereby designate that you, the registrars, will collect it or whatever it may be. But it's still policy that comes from the ICANN community which in this case is the GNSO PDP with some additional people involved at the behest of the GNSO itself.

Gina Bartlett: James.

James Bladel: I'm sorry, I thought Benedict was...

Gina Bartlett: Oh were you done?

James Bladel: Well I think – so my – this is James speaking. So my question I think was very similar to Lindsay's is that if we consider this to be ICANN Org and we say something like, for example, to support a framework that identification of third parties domain name registrations related to intellectual property does that mean ICANN in pursuit of enforcement of its own marks or is that – that's not limited or that's just kind of intellectual property writ large and the same for abuse and cyber crime and other things because it seems to me that if we say that these are the purposes of ICANN Org then we do, Chris, it's a very necessary distinction between ICANN's interests and purposes versus the broader community.

Because I don't know that ICANN actually engages in a lot of these, I mean, they would function perhaps as an intellectual property owner, I mean, we do as well, not necessarily as a registrar. You're losing me here when we say that these are purposes of ICANN when I think we're saying really they're not.

Chris Disspain: So may I respond? Okay, so yes, or rather no, or possibly both. So to be very clear, I don't think any of this is about ICANN's own purposes in respect to its – as a corporation, if it's going to be looking after its own trademarks and intellectual property and doing what it does, that's fine. That's entirely separate from this discussion. This is a GNSO policy development process to set policy for making Whois or what's left of Whois or the new Whois GDPR compliant. So the fundamental question is whether you believe or whether this group can reach consensus on ICANN as part of its mission collecting or mandating the collection of data for the – for purposes of other parties.

Simply put, if you believe that it's part of the – and I may – I mean, I'm paraphrasing here, if you believe that it's part of the – ICANN's mission of security, stability, resilience, and all that stuff of the DNS, that data should be collected and be made available to law enforcement, then that is something that goes into the policy; and if you don't believe then it doesn't. So I'm not clear what's not clear because it seems to me that's the crux of what we're talking about, isn't it? Or have I missed something completely?

James Bladel: Just one final and then I'll let go, is that that starts to – to me that starts to sound a lot like the very limited guidance that we did receive from the Europeans about conflating the interests of ICANN Org with the interests of other parties. It seems like we're...

((Crosstalk))

Chris Disspain: But that's only if you – yes, that's – that would be a completely fair interpretation if your interpretation of ICANN's mission is that it doesn't allow it to do it under its own mission because they will be doing it for the purposes of a third party. But if you believe that as part of – and I'm making no comment which is right or which I wrong, I'm simply trying to make a

statement about what may – what you guys need to work on, if you believe that it is part of or could be part of ICANN's mission, then it falls outside of the statement that the data protection people made because it isn't for third parties, it's for ICANN on behalf of.

Gina Bartlett: So I'm going to read the queue but I want to encourage everyone to tackle this question around is it within ICANN's purpose to gather the information for the third party and try to continue to grapple with that if that should be part of the purposes. So I have Alan G, Alex, Thomas, Lindsay, Benedict and Hadia. Did I miss anybody else? Stephanie, Margie, Kavouss, Marc A, Georgios, Ashley – Ashley – I've got Stephanie, Milton. Okay.

((Crosstalk))

Gina Bartlett: Okay great. Alan G. Need to run a queue who doesn't want to speak.

Alan Greenberg: Thank you very much. This conversation is interesting because it's never on the subject that I put my hand up for by the time it gets to me.

Gina Bartlett: Sorry.

Alan Greenberg: I'll try to answer the current question. I believe if ICANN is responsible for the DNS, there are implications in that. We use the term "security and stability" in our – actually within our bylaws, within our mission. And there's an implication that what we are doing is not trying to build a DNS but trying to build a DNS that can be used and can be trusted to fulfill its purpose. The implication of that is that although we do not worry ourselves about intellectual property violations, we do not take a first level responsibility for cyber crime that involves the DNS, we have an obligation to facilitate

addressing those issues. And for that, we collect data and make it available as necessary or make it accessible as necessary.

If the data is not collected then it cannot be made available and if it is needed to address some of these issues then we have to collect it and it is our purpose to build a reliable, usable DNS and that I think is the link.

Gina Bartlett: So, Alan, that establishes the link, would you capture those third party interests like the IP property in the purpose of ICANN? Or would you capture it somewhere else in the policy?

Alan Greenberg: I think the purpose is to build a usable, reliable DNS, the other things fall out of it. You know, the UDRP was I believe the first consensus policy that ICANN built because it became obvious there was a need for such a thing.

Gina Bartlett: Alex.

Alex Deacon: Sorry about that.

Gina Bartlett: please go close to your mic and speak your name.

Alex Deacon: Yes, Alex Deacon. Yes, I just wanted to agree with what Chris said earlier but also Alan, I think it's important that we consider, you know, kind of ICANN as a community, let's not focus on the dotOrgs, and I think we can have a conversation about purposes without conflating third parties and what ICANN's purposes are.

I think – I won't read this but it's, you know, ICANN in a letter, I think it was Göran, a letter to the Working Party 29 kind of describes, you know, what ICANN's scope and mission is, you know, so I think it's important for us to go

back and read what Göran says is within the scope and mission of ICANN. I think it supports this view that the things that we're talking about or will talk about in J, K – H, I, J, K and even L are definitely an ICANN purpose.

Gina Bartlett: Thomas.

Thomas Rickert: Thanks. I guess the distinction between the community and ICANN Org is somewhat artificial in this context. We're doing this exercise ultimately in order to allocate responsibility. And the community does not have legal personalities apart from what we did in the accountability but that's an aside here. So I think ultimately ICANN to a certain extent allows for the community to define its organizational purposes and it enforces those contractually. Right?

So I think we need to discuss this with ICANN purposes in mind; those can be purposes that might be pursued to advance third party interests, and this is where we have to be clear on whose interests are actually pursued because that has legal implications. But it's always about ICANN Org's responsibility. And whenever we talk about the community or parts thereof, that would be third parties in this context.

Gina Bartlett: I'm going to go Lindsay next. I have Lindsay, Benedict, Hadia, someone, I'll read that name in a second, Mary, Kavouss and I'll keep going. And if you could please try to speak, I have you, Margie, could you please try to speak to the question of the third party interests, should they be part of the ICANN purposes or should they be captured in some other part of the policy?

Lindsay Hamilton-Reid: Lindsay Hamilton-Reid. Yes I was just trying to sort of establish earlier kind of what we were trying to do here. As one of the contracted parties it does concern me reading a lot of these purposes because we already

have processes in place to deal with things like law enforcement, IPC. What I don't want is to have that in some ICANN contract limiting me to what I can do and what we can't do.

So because laws change, each country has its own laws, there's different things, I just don't want us to be in a position where we're forced to try and comply with something that isn't going to work. So that's why all of this stuff, I'd rather that wasn't in this policy document at all, and would just say something like yes, I'm sorry, registries, registrars, contracted parties, whoever, should deal with this in accordance with applicable laws. And having to go through all of this I think is tricky and I think it will cause problems.

Gina Bartlett: So, Lindsay, to make sure I understand, you're suggesting that these particular uses, the consumer protection, the investigation of cyber crime, the intellectual property, that the registrars and the registries should have that as part of their purpose and then that way they can be responsive to each country's laws? So not part of ICANN, yes.

((Crosstalk))

Gina Bartlett: Yes.

Lindsay Hamilton-Reid: Absolutely.

Benedict Addis: Wow. I guess Lindsay's raised an interesting point. And we've got – as an ex law enforcement officer, I think to me the reason to have a homogenous – sorry, the reason to have a homogenous policy on this is not just to facilitate access, but also to allow registrars, particularly those operating in countries

without as good a rule of law as we're used to here, to push back on egregious requests, not just from law enforcement, from other bodies.

It gives to me this – what we're doing here and the purpose of us being here is giving contractual comfort to contracted parties not holding them to a particular standard, which would to my mind, result in a mess of bilateral agreements between loads of interested parties and loads of registries and registrars in loads of different jurisdictions. I don't think that's workable. I think we're here to make this policy; let's stand up to the task but make sure that we don't write anything that puts you in a difficult position. Thank you.

Hadia Elminiawi: Hadia Elminiawi. So responding to Lindsay, I think from a business point of view it's impossible to make the problems with DNS, consumer protection, investigation as a purpose of registries or registrars. So from a business point of view, it just doesn't work. And then...

Gina Bartlett: Hadia, can you say more why it wouldn't work? Could you just explain a little bit more?

Hadia Elminiawi: It's not within their business model. You're imposing new things to – for them to do, right, the registries – but I'm not to speak for them, okay. So I go back and answer the question about the – what's ICANN purposes. And I strictly think that enabling identification of third parties is not an ICANN purpose. So and then but – but I do believe that issues related to DNS abuse, consumer protection, investigation of cyber crime, and intellectual property rights do fall within ICANN's purposes.

And I would like to refer to the letter that was sent on the 5th of July to the ICANN Board from the European Data Protection Board, it says, "European Data Protection Board has taken note of ICANN's bylaws which require

ICANN in carrying out its mandate and in particular as part of its review process, to assess the effectiveness of the then current gTLD registry directory service and whether its implementation meets the legitimate needs of law enforcement promoting consumer trust and safeguarding registrant data.”

“And to adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues and rights protection prior to authorizing an increase in the number of gTLDs in the future.” So actually I understand this as a kind of a support from the European Data Protection Board.

Stephanie Perrin: Thanks very much. Stephanie Perrin for the record. As Alan said earlier, it's so hard by the time you get to the person you're in the long queue, there's four more things you want to respond to. So I'm going to roll back the tape to Chris's comments, and in fact Hadia's kind of brought us back to that by listing the things enumerated in the ICANN Bylaws.

A, all this needs to be subjected to a data protection impact assessment because the mere fact that ICANN has written itself these bylaws over the past 20 years doesn't mean that they comply with data protection laws and constitutional rights. You know, ICANN is not a law enforcement agency. The – I think there's a – that's sort of my point Number 1, if they're going to set itself up as a law enforcement – a collector of data for the purposes of cyber crime enforcement and law enforcement and consumer protection, and note I'm saying collector of data for those purposes, then they've got to own it as a data controller and they've got to be able to justify that purpose.

And it has to be proportional and there has to be a data limitation principle in there, and it has to be within their mission. Now, I will argue that ICANN's mission has to do only with the DNS and unfortunately there's this constant

deletion in the minds of just about everybody who comes to ICANN between protection and stability of the DNS, and consumer protection vis-à-vis, the DNS, and consumer protection as to whether or not I'm buying a fake handbag or not on the Internet.

And that really bedevils this language. So I mean, if you're going to drag in these public interest values that ICANN is collecting data for, then kindly marry it to the DNS in its role as the outsourced manager of the DNS, not the Internet writ large. So that was the main point I wanted to make. Thank you.

Gina Bartlett: Thank you. I'm going to go to Margie. And if – I want to challenge the charge here is to try to determine what to do with these third party interests and I'm hearing sort of under the usability and the reliability of the DNS to capture these elements within that. But if you say, no, they need to be their own purposes within ICANN, so I'm going to keep through the queue but if you can keep bringing us back to suggest how to resolve and address this issue it would be very helpful. Margie.

((Crosstalk))

Gina Bartlett: I have Margie, Kavouss, I keep – Marc A, Georgios, Ashley, Milton, Alan W, Farzi and Chris. I'm sorry, it's hard to read my (unintelligible).

Margie Milam: Thank you. I mean, sorry, got so many things to comment on. I do agree with what Chris and Hadia said. I think I disagree with how narrow Stephanie sees the mission of ICANN. And I think the reason that ICANN role has been so successful is because it provides a framework for resolving issues that skirt the DNS without actually having to go to court. And so the problem with the approach that Lindsay was saying is that it results in fragmentation and you have case by case resolution of these issues which ultimately means you end

up going to court and causing a lot of costs and introducing a lot of friction in something that can be resolved very quickly.

And so that's why, you know, that's where you're seeing the disagreement is if it's as narrow as Stephanie has suggested, then the things that the ICANN community has been working for years, I mean, we've been working on DNS abuse issues, we've been working on intellectual property issues as it relates to rights protections and things like that, that's all – that all would never be possible if the mission was as narrow as Stephanie suggests.

So I do feel that that's a purpose as it's written in the bylaws is – and addressed in the various articles that Hadia was mentioning it really makes a lot of sense to include that as part of what we're talking about. And then the other point that I think was lost in what Hadia mentioned, the European Data Protection Board, you know, recognized this in its letter so it wasn't contesting that ICANN's mission was that broad, it was just simply saying make a distinction between the ICANN mission and the other – ICANN purposes and the other purposes. But it actually did recognize that that was within ICANN's mission and scope, some of things that we're talking about with the cyber security and IP and all of that.

Gina Bartlett: Kavouss, we're to you. Okay I'll go to Mark S and then Kavouss, when you're ready I'll come back to you. Go ahead Mark S.

Mark Svancarek: Thank you. Mark S. I wanted to agree with Chris and Alan first of all and I liked what Margie said too about trying to avoid everything becoming a court case. And also I think I heard Stephanie say that we should be careful not to define the purpose as preventing all crime on the Internet but limiting to crime related to the DNS; that made sense to me. And I wanted to say to James, I think it's okay that ICANN has not directly pursued these activities in the

past. It's not because it wasn't part of their mission, it was because they had outsourced them to various other parties. So I don't see a conflict in that regard.

Gina Bartlett: Keep going. Okay, thanks, Mark. Marc A.

Marc Anderson: Thanks. Marc Anderson for the transcript. Yes, I also have Alan's problem where the conversation sort of passed me by a little bit. But as I listen to the conversation we're having, you know, I'm – it seems to me we're getting a little bit off course in that, you know, we're having a conversation about purposes, which has been useful, but I think you know, what we need to do is focus on purposes under GDPR, which subtly different. And I point that out because I, you know, I think under GDPR we have to look at the processing activity, the purpose for that processing activity, and the legal basis under which you perform that.

And so in sort of having this conversation about purposes, I think we're losing sight a little bit on what is the processing activity that we're trying to justify? So let's sort of, you know, tie it all together what's, you know, the processing activity, the purpose and under GDPR what's the legal basis for performing that processing activity. And I think that'll maybe help focus the conversation we're trying to have right now.

Gina Bartlett: Georgios.

Georgios Tselentis: Yes, thank you. Also want to make a point regarding the ICANN scope here. I think if we take again – and I will make a quote from the letter of the 5th of July for the – from the Data Protection Board. I think we should see also ICANN as an organization – is enabling the legitimate uses of the Whois data.

So if I quote what it says there is that the Working Party 29 was already acknowledging this, and then the letter of the 5th of July it says that “The European Data Protection Board confirms the expectation of the EPDP towards ICANN to develop a Whois model which will enable,” so we should see here the role of ICANN as an enabler by providing the Whois data, “legitimate uses by relevant stakeholders such as law enforcement of personal data concerning registrars in compliance with the GDPR.” So that’s what I wanted to say here that we should see from this angle the scope of ICANN.

Gina Bartlett: Thanks. I’m going to go back to Kavouss, he's back online and then I’ll go – come back to the thread. Kavouss, are you ready? Okay, to Ashley.

Ashley Heineman:Hi. This is Ashley representing the GAC. I’m going to follow up a little bit on what Georgios just said but also to answer very directly the question that was posed by Gina, which was whether or not third party interests should be covered here. And I want to say emphatically, no. They're not being dealt with here. That is for a separate exercise. I think we all agreed quite a few times that the articulation of specific third party interests is for a later date and time after the gating questions have been dealt with.

I think what we’re looking at here is ICANN's purposes. And we’re looking very specifically at their role, as Georgios said, as an enabler. We’re not looking at how to specifically articulate what the legitimate interests are at this time, we’re not looking to specifically articulate how this enabling is going to happen, it’s just a recognition that ICANN has as a purpose, this role of enabling. So I will stop there. Thanks.

Gina Bartlett: Milton.

Milton Mueller: That went fast. So I think that Ashley's comments are actually something very good to build upon because she's agreed that we're not dealing with third party interests here in this section. Now the debate then is about do B1 – and let's not forget, we're talking about B1 and B2, we're not having an abstract religious debate here, we're talking about B1 and B2, and number one question about throwing them out was do we even need them? Do they do anything? I haven't heard that answer – I haven't heard that question answered by anybody advocating retaining them. There is stuff in G and there is stuff in H, I, J, K and L, which seem to be doing almost exactly the same thing as B1 and B2.

Gina Bartlett: Excuse me, Milton...

((Crosstalk))

Gina Bartlett: ...you know, we've moved away from B1 and B2 and we're trying to focus in on how to manage the purposes around those third parties and whether they're part of the ICANN purposes and if that is part of the ICANN enabling in the bylaws. So if you could speak to that it would be – we'd love to hear what your thoughts are.

Milton Mueller: I'm sorry, we're talking about B1 and B2 because that starts with the word "enable" – B2 starts with the word "enable" and I don't know what we're talking about if we're not talking about B1 and B2 here. Okay, so that's what I thought we were structuring our discussion, we were on B1, B2 and G, right? Okay.

So I think the fundamental issue here, to put it as bluntly as possible is that the people who are emphasizing the enabling of third party interests via – as part of ICANN's purpose are afraid that if they don't define it as part of ICANN's

purpose, they won't get access to that data when they need it. Yes, well the problem with the collection part is when I talk to people who want to retain these things, they don't say they want to collect any additional data than what's already collected.

Which means that, you know, the purpose for ICANN for collecting the data that it now collects with Whois most of us – most of which we have no problem with, is going to be there. There's no debate about, you know, do you need their name and all of that stuff. Nobody is saying let's throw out the name, address, etcetera of the registrant. We all want it to be there although we may have debates about how much of it disclosed to the general public.

So I'm still – I think if, you know, in order to get beyond this snag we have to, you know, clearly distinguish between third party interests and ICANN purposes, and the reason that we are pushing back so hard against defining this as an ICANN purpose is precisely this collection issue. If you define it as a collection issue then God knows what kind of additional data could be justified, could be collected based on this enabling of third party interests function. So if we could just agree that we're not going to collect more data and that we're fundamentally talking about a third party interest in getting access to the data, I think we could move on.

Gina Bartlett: Thanks, Milton. I'm going to go back to Lindsay and then I'll come back to my queue. Go ahead.

Ashley Heineman: It's Ashley.

Gina Bartlett: I'm sorry, Ashley.

Ashley Heineman: I'm sorry, I didn't want to jump queue but I just wanted to build on what you just said, Milton, but to also include that we're not looking to reduce the amount of information that's collected. And I think that covers everybody's angst and I think we're at a good place right now; we're in a good place.

Gina Bartlett: So what – I think I see a lot of people's heads nodding so in other words, taking it out of – maybe not all of them, some of them nodding negatively but taking the – you're going to be collecting the data, so take the third party interests out of the purposes and still look at the data and then later you deal with how the access to the data occur, is that what – yes. Yes, okay. So I'm going to back to my queue, I have like three people in the queue, Farzi, Chris and James and take you off? And if you could speak to how you feel about that and then I'll add you, Stephanie, if you could speak to how you feel about that, that might be a way for us to move on. Farzi, thank you for waiting. I know a lot of you have been waiting a while.

Farzaneh Badii: Thank you. Farzaneh Badii, NCSG. So I'm really glad that the European Data Protection Board letter is being referred to here. On the second page it says that a clear definition of the specific purposes pursued by ICANN, registrars, registries at the moment of collection would not categorically exclude the subsequent disclosure of personal data to third parties for their own legitimate interests and purposes. I have read this and cited it several times but we – I thought that we should also – I thought I should read it again so that there won't be concerns that if we do not have the purposes now then access – you want to clarify?

((Crosstalk))

Stephanie Perrin: Next paragraph, that's exactly what I was going to say, just read the next paragraph and I can put my card down.

Farzaneh Badii: Okay. And then okay, so it says that “Provided that the requirements of GDPR are met. Article 6.1 of GDPR provides a legal basis for controllers to disclose personal data for the purposes of the legitimate interest third parties provided that those interests are not overridden by interest or fundamental rights and freedoms of the data subject.” And these are things that we are going to discuss.

But well, I guess not now, at a later stage, but we need to – we should not be concerned that if we do not put certain things in ICANN mission, and this is not why we are here, we’re not – we are not supposed to expand ICANN's mission. There was a definition of ICANN's mission (unintelligible) CCWG on Accountability also set that and we had a bylaws change. And it is quite a limited mission.

So I think we are not here to discuss or expand ICANN's mission. And also the Data Protection Board is not the mission setter for ICANN, so if they merely repeated what the CEO said in the letter. And I’m going on and on and I have a solution by the way, how...

((Crosstalk))

Farzaneh Badii: ...how about we just continue on this like table and then discuss the section by section and then we will have a better understanding of what is like the legitimate interest of third party for purposes and what's like in ICANN and then we can argue based on the topic that is here.

Gina Bartlett: So if I understand your proposal is to go by the – like the consumer protection, the cyber crime and talk about ICANN purpose and the other legitimate interests? Is that what you're suggesting? I’m just trying to understand.

Farzaneh Badii: Yes, I think we can do that. But then also consider that my preferred option would have been to start from the matrix that Thomas and I provided because that is where we also talk about collection of data and then why and then you can discuss the purposes there, why for whom, then you can discuss all the purposes and everything there.

Gina Bartlett: James.

James Bladel: Hi, thanks. James speaking. So I hate to be that guy, but I'm going to do it, yes. But Farzaneh, you mentioned the letter and I think Hadia, you read a section where – or the European Data Privacy Board, Data Protection Board enumerated the ICANN Bylaws but the very next sentence is, “Nevertheless, the EDPB considers it essential that a clear distinction be maintained,” and we talked about whether that was a necessary distinction or an unnecessary distinction, the clear distinction be maintained between process of activities for ICANN versus third parties. And I'm not going to belabor that because it says right there, it's teeing up the idea that don't mix the oil and the water.

But I also have an idea for a solution, see, because I don't want to be that guy. Is that we can probably take H, I, J, K and L and roll them into one ICANN specific purpose, okay. I'm looking over towards Dan and Trang for a minute. And then have a new – so that would be like H, the new giant mega-H, and then a new I that says, and, ICANN as part of its mission, can facilitate – whatever we call it, you know, a process, a system for other legitimate interests to access that data. So it's like here's your stuff, ICANN, and then oh by the way, you also have to set up this other thing for everybody else to use. It's like two separate you know, entrances to the barn.

So I don't know if I'm helping but I'm putting this out here because I just think that from – you're not hearing from registries, registrars, you're not hearing that you can't get into the data; what we're saying is let's have a very, very clear distinction between ICANN using the data and ICANN making the data available for others and it's okay to say that they can use a separate entrance to get into the same room.

Gina Bartlett: So, James, to help us understand can you say more what you mean? What does H look like?

James Bladel: Well H would essentially be folding up an enumerated list of H, I, J, K and L and saying ICANN – ICANN Org, not the community, ICANN Org is using a framework and you would strike third parties and you would say supporting a framework that enables ICANN to identify registered name holders for domain name registrations related to DNS abuse, consumer protection, you know, and all those things. And, you know, line them up with the bylaws, okay, they don't have to be what they're written here, they can be just a – we can just pair with the bylaws.

And then a new I, would say “and to support and enable a process or system for – legitimate third party interests to access the data.” So it's kind of like just here's one for ICANN and here's one for third parties. Because I think the problem everybody has, the heartburn is that they just keep getting thrown into the same bucket.

David Plumb: Okay so we've got something specific and different on the table right now that I think it's worth flooring for a second. Okay? James explained it better than I could. I'm wondering, James, if you literally want to go with Gina and write that up on the board for one second? Yes. Because I think we're – it's an interesting thing to play with just for a moment, right? We'd make a

consolidated thing that's in ICANN's name, about the – what are currently in H, I, J, K. Then we have another one that talks about legitimate third parties, they have an interest, blah, blah, blah and just getting access.

As James and Gina are writing that up, we have some quick reactions to that. That seems workable. Yes? Does anyone want to make a friendly amendment – oh, Stephanie. Friendly amendment. Stephanie, is that a friendly amendment?

Stephanie Perrin: No, not really. The reason – Stephanie Perrin. The reason I raised my hand some time ago was to point out that historically when ICANN started, there was a problem of who was going to provide access to the data. And we all know that's an expense. Now it's a liability under GDPR with considerable fines. So ICANN punted and said, okay, great, we'll make it a requirement that it all be published in Whois, publishing data, then it's public, right? Then you don't have to worry.

And we in the NCSG have been arguing, as have the data protection authorities for 20 years, that you can't do that, you're violating data protection law. This is not new. Right? So now we come along with the GDPR, and it's very clear that the way the configuration of non-policies and contracts are right now the registrars and the registries are on the hook for providing access to the data and if it's up to them they now have all these new responsibilities that were there before but nobody enforced it, right, to make sure that whoever they're releasing the data to is in fact that required entity and that they have the legitimate interest, as Farzi just read all that.

So now the question is, if this is no longer affordable for the contracted parties to take on this responsibility, is ICANN going to shoulder the responsibility and the liability for setting up the kind of scheme that James just suggested?

David Plumb: Can I put that in a parking lot for a second? Because that seems like a second issue to deal with later.

Stephanie Perrin: It's a very important issue because it's who's accountable.

David Plumb: Okay who's going to take responsibility and pay the price tag to do this, okay. But friendly amendment, let me keep going. I'm not sure where Stephanie, that takes you in terms of the suggestion, your view on the suggestion of rolling it up into a single thing and then having another one that says there may be other issues that come up other legitimate interests, third parties. (Unintelligible) that?

Stephanie Perrin: Let's put it this way, it was comforting to know that the registrars realize that they were responsible for protecting the data protection rights of their customers. I have less faith that ICANN is ready to pony up to the bar and accept its role as a data controller and that they are responsible for protecting the registrant's rights. And there hasn't been a whole lot of history to support any comfort in that regard. Thanks.

David Plumb: Okay. Okay, other friendly amendments on this? I'm sorry, I'm busting up the queue a little bit here, but friendly amendments on what James and Gina are putting on the board? I see two...

Milton Mueller: I don't understand what we are amending. You can't ask for friendly amendments when we don't know what we're talking about. So what are we talking about?

David Plumb: Okay, what we're talking about is what James just suggested which is to take what are currently the issues of H, I, J, K, take those issues, roll them up into a

single thing which they're writing up on the board, and make a new one but do that not talking about third parties, talking about ICANN, and then make another one that they're writing up right now, what James said, so there's a third party interest where ICANN can create a framework for other legitimate third party interests.

Milton Mueller: Now when you say that we are friendly amending that, you're saying that that is accepted by everybody and we're just talking about how to amend it.

David Plumb: No, no I'm saying it's a suggestion on the table. Would you have a change to it to make it more interesting or more amenable the way you're looking at the world? Yes. Absolutely. It's just – we're doing it in real time, guys, we're trying to do this in real time. This is why it's so hard to edit real time. We need to be patient with each other because there's an interesting suggestion on the table, we need to look at it and then we need to think about it. In the meantime, I was – while they were working on it, I was trying to give a second to see if people who heard James wanted to react to it. Yes?

Milton Mueller: I heard James as saying he wanted all this stuff out of ICANN purposes and only in the third party legitimate interest section.

((Crosstalk))

James Bladel: Can I jump in real quick?

Milton Mueller: In that case my friendly amendment is to take it out of the ICANN purposes section and just have it in the legitimate third party interests.

David Plumb: Okay.

James Bladel: We're kind of word-smithing with one ear on the table. Sorry, this is James speaking. We're trying to word-smith with one ear on the table and – but here's the general idea is to create one of these purposes for ICANN Org to pursue those purposes that are outlined in its bylaws and then there's another purpose for the ICANN community to develop a framework for access for third parties to pursue legitimate interests. So again, it's a separation of ICANN Org and their purposes, and ICANN community, whatever they develop in terms of – so that's what we're trying to do and I see all kinds of cards going up so I really made a mess of that.

David Plumb: I don't know, I think there are – what we've heard through James and now through Milton two specific ideas. James is rolling up things into – an ICANN purpose that's related to its mission and bylaws and separating out third party interests in an I, right? Milton is saying, I want all mention of this cyber crime and DNS abuse and that to be put out into third party interests, taken out of purpose. (Unintelligible) I'm understanding you, Milton. So sorry about this, guys, but Alan W, Benedict.

Alan Woods: Thank you. Alan Woods. Okay, so I'm going back just a tad, can we bring this back to a very, very basic principle and a very, very, very basic level and that is what purpose are we – what is the actual expectation of the purpose? Why are we going to be using the data? Why do law enforcement use the data? And at the end of the day, the only reason and the only way that they will use the data that they receive from any of the three parties is to either identify or contact the registrant. That ultimately distills down to every single use case is they want to identify or contact the registrant.

So again, we're getting into these conversations of well why don't we create this wonderful – the purpose based off of the bylaws, which by the way, we're also straying into the territory of if it's in the contract it must be legal. If it's

the bylaws it must be legal is equally as wrong. So we have to be careful on that. Why can't we let the bylaws stand to be a high level expectation of you know, what use the data may be put to without actually making it a purpose?

So what we need to do here is just say, so at the end of the day even – all we – we take the data, or we collect the data so that again, just to say on C/D, that we've come up with earlier, to contact or to identify the registrant. Now, full stop. There shouldn't be much more purposes, so get rid of H, I, J and K, get rid of B1 and B2 because it's still under C and D. You can give access to law enforcement as it is a legitimate – another legitimate – a legitimate interest, that is in line with that original purpose, because ultimately all they want to do is identify and contact the registrant or ultimately perhaps contact the registrant, identification is the key one probably for the law enforcement, or for the IPC purpose.

But again, that's straying into the other end of the stick, the blunt end of the stick and that is giving access to legitimate interests of third parties. But the purpose should be as basic and as minimal as possible and that is to identify and to contact the registrant. We don't need to go into this amount of depth and detail because we will be absolutely until the cows come home going to be repeating ourselves ad nauseum on this. That is the reason we get the data so that's the purpose.

David Plumb: Alan, let me just quickly clarify with you before I go to the next person.

Alan Woods: Yes, of course.

David Plumb: It feels like from an outside observer is what you authorities and others are asking for is more of a why. You're going to identify or contact – aren't they – it seems like they're asking for a why.

Alan Woods: But that's not a purpose. That's not what we're going into the purpose. The why is why would the contracted party actually divulge that information? And that is to the contracted party when the request was made to them. That is the why. They have to justify that disclosure on a per disclosure basis. We don't put that into the purposes we don't need to hard bake that into the purposes. It's a request comes to my desk and says, hey, I'm law enforcement A, I have an issue with this, we're investigating this particular domain, can you give me the registrant information from that? And I have to make my decision whether I can disclose that. And the liability is with me. I'm not going to go back and say well, you know, it is an ICANN purpose. I'm not.

David Plumb: I think it's an interesting moment what Gina said (unintelligible) in the mic, but, you know, we have like really it feels like different things on the table right now, and it'd be interesting to do a quick pulse check, do it with the keypad, just give me a second to work it up or we could just do it with our hands. But who feels more aligned, just basic with what Alan is trying to express which is honestly (unintelligible) B1 and B2 and that's enough, right? That's sort of my sense – no, no. Do away with H, I, J, K. Yes, so you're just saying keep C and D. Okay, okay. Sorry. Sorry. Yes, keep the new C and D and (unintelligible).

Right, so that's one idea that Alan is expressing. Another idea is that we do what James had up on the – was putting up on the board, right, some form of what James is saying, which could be improved or – which is saying, you know what, let's name in our purposes that ICANN has a purpose around processing or having others process data to create some sort of – supporting a framework for access.

Gina Bartlett: So H is supporting a framework to enable ICANN.org to access registration data necessary to address domain name issues related to its bylaws. And I is the one to facilitate the process for third parties to access information for legitimate interests. And that...

James Bladel: But clearly the first one is for ICANN Org, the second one is for ICANN community.

Gina Bartlett: So maybe for the purposes of a pulse check, we just want to kind of see because it seems like we're in different places, for the – we're going to use Alan, if you don't mind, Alan, for the Alan idea we say C, D, we want to see like who's in favor of quote, unquote, C, D and dropping H, I, J, K. And then who is more in line with let's try to massage this language over here to get to the H, I, J, K? So first who's a C, D? Who's in (unintelligible).

David Plumb: So maybe hang on just one second, Alan, can you say it one more time?

((Crosstalk))

David Plumb: This is only to clarify to this pulse check. We really understand what these two ideas are on the table. You don't have a microphone on?

Woman: We could actually agree on C and – C D plus what James suggested. And so actually it's not two choices, you can now have three choices, right? Or get – take C and D out of the choices because we already agreed on C and D before, and just make it – take away B1 B2 versus H, I, J, K and just take C and D out of the equation.

Gina Bartlett: I think we do the later for the pulse check, okay.

David Plumb: All we're trying to do, folks, I'm sorry it's a little confusing in real time, but there's these different sort of fundamental things that are being on the table and it's important to get a sense of where people are at. Right? And the key thing is we actually understand what's being put on the table and it's hard when we don't have written stuff. So I know people are very eager to speak, and I'm just curious, if we had to say you're more inclined to do what Alan is saying, versus do what's up here on the board in terms of James's, sorry to personalize like that, but for convenience sake, okay, right. So just real quick, if you're more inclined to do it Alan's approach, is let's just see where people are at, okay?

No, we're not using that just now but we can do it in a second. But if you're more inclined – okay and if you're more inclined, you can put your hands down, to do the sort of approach that James is saying where you just revise you know, consolidate (unintelligible) who's more inclined to go down that road?

And who is – James is like, I'm out. I'm out.

James Bladel: No good deed. I'm out.

David Plumb: Yes, okay. And who are feeling totally just like confused and you really don't want to be having this conversation right now? Great. Okay. Okay, all right. So I feel like, yes, Kurt.

Kurt Pritz: So I feel that these suggestions and Milton's were all made for the purpose of – and I don't want to say this incorrectly but sort of maintaining the status quo with the idea of saying, look, data is still going to be collected and in the right set of circumstances, it can be disclosed to third parties. And so each one of these suggestions was made in that spirit. So when I'm looking across the

room and seeing the votes for these, I'm getting the impression that some people think that James's, for a reason, James's method might be a more reliable way of preserving that status quo and ability than Alan's way.

And so I don't have a judgment one way or the other but I think if we talk about these two methods where we're split, we want to – we should each say, you know, how easily does this, you know, provide the necessary assurances and, two, what are the difficulties or costs associated with each one?

David Plumb: I got people in the queue that I haven't – I see all kinds of hands up. I know people want to talk about this. Let's do a quick round, a reaction to having just done that quick second exercise, and then we're going to take a break and we're going to come back and see how we're going to attack this and see how we solve it. So I don't have a particularly great order in this so just bear with me, folks, we're just going to do a quick round like this, start here with Hadia, Hadia, did you have something else or are you done?

Okay. Or do you want to say something? Sorry. Go ahead, with a mic, go for it.

Hadia Elminiawi: But again I'm not sure what are we doing right now because so anyway, my comment is I support what James put up there and this is in addition to C and D. And but I would rephrase what he wrote so I wouldn't speak only about – I like the distinction that he made between the putting third parties in a clause and ICANN in another clause. So I like this distinction. But I wouldn't speak only about access so he's saying he is supporting a framework to enable ICANN.org to access.

I wouldn't say that. I would actually – because I don't think we should be talking about access now. So I would say supporting a registration data

framework to enable ICANN.org to address domain name issues related to its bylaws. So this would include the collection of the data as well and wouldn't be speaking only about access.

David Plumb: Sorry so Gina gets that right, the word "address" is not before registration, it's to enable ICANN.org to have registration database, to...

Hadia Elminiawi: To address, to address, yes.

David Plumb: Okay. Okay thanks. Alan.

Alan Greenberg: First of all let me go on record as saying that I find it exceedingly frustrating to have the last person speaking rewriting each document and then the rest of us trying to address what we thought was perhaps a good thing and...

((Crosstalk))

Alan Greenberg: ...continually rewriting it because one person says something I think is really bad.

((Crosstalk))

Alan Greenberg: James was really careful in his wording of H, ICANN supports a framework and in I, someone else builds it. I noticed David, once or twice, you have said ICANN builds the framework and that changes the intent completely. So I think we have to be very precise on our words here. My understanding is collecting is processing and we need a reason to collect. And I'm not seeing this anywhere here and if we don't collect it, we don't have it to give out to anyone. So I think we need to include why is it we're asking for all this data when we register data. Why can't everyone just register domain names

anonymously? And unless we have a reason, unless we have the rationale we're not even going to collect it and I think we're ignoring that completely.

David Plumb: How does that...

((Crosstalk))

Alan Greenberg: Okay now Milton has said – no one's disagreeing with us collecting the data, but we need the words so it passes muster that we can continue to collect that data.

Milton Mueller: Read C.

David Plumb: Alan, where would you put it in? Where would you...?

Alan Greenberg: I'm not even going to try to put something into the words here.

David Plumb: Okay.

Alan Greenberg: Okay. But...

((Crosstalk))

Alan Greenberg: ...I think we need to be very careful as we're going along and make sure that we're not having – ending up with conflicting ideas because one person says something and...

David Plumb: Okay great. Going down the list, am I up to Stephanie? I don't see any other card up. (Unintelligible).

Stephanie Perrin: Stephanie Perrin for the record. And I know I'm being a broken record and people are going to groan and thump their heads on the table but I'm sorry, we should have hired a data protection expert so that I didn't have to keep doing this. Every single data controller or processor has to exceed to request for data for legitimate interests from third parties. So I would contest the concept that supporting a framework is one of ICANN's purposes as the Article 68 group's letter said very clearly, we reiterate, I won't read it verbatim but it's partway down that page, ICANN should be careful not to conflate its purposes with those of third parties. And what we're doing by building a framework to support third party access is we are conflating those purposes in my view.

Now, I understand, not to go back to my previous example, I understand why the contracted parties don't want this albatross around their necks, I understand why the third parties still want the data. But if this is going to be ICANN's responsibility then when we're talking about is ICANN as data controller accepting the mandate of all disclosure to third parties for legitimate interests.

That's going to be quite difficult given the difference in law globally and setting up a framework. Can be done under RDAP, but it's a difficult thing and ICANN needs to take that on then. And I think that's basically what James is suggesting by this sort of amalgamation of these very sections into hey, it's one of ICANN's purpose to build this new framework and that gets it out of everybody else's hands.

Second point on this is it won't get it out of everybody's hands because of the inherent dual controller nature of the contracted parties. They have financial data, they may have different address data, they have the kind of transactional data that's in their relations with their clients that is useful in a law enforcement investigation and it is also useful in a cyber crime investigation

so traffic data. So what do we gain by doing this? What we gain is a whole lot of obscurity in how this is going to be managed. Thanks.

David Plumb: I don't see others, I know that Chris wants to respond. Yes.

Chris Disspain: Thanks. Stephanie, I agree with you I think but I don't understand the distinction. Of course the registrars have data that is currently not in Whois and not public, and of course that data is dealt with and has been for – since – forever dealt with by whatever legislation is in place in the jurisdiction of that registrar, so that hasn't changed. All that's changing or what we're discussing is not that data, but what data, if any, should be collected and what data should be published publicly or available on an access mechanism.

I'm not clear what the – what the relevance is of what the other data the registrars have got because it has nothing to do with what we're talking about as far as I can tell, but I'm happy to accept that I may be wrong. It just sounds like it's confused the issue – it just confuses it – I mean, my mind, confuses the issue.

David Plumb: Yes (unintelligible) got in a better way right, dive in after a break, see if we can puzzle them out, see if there's some way that we can make sense of these competing ideas that you put on the table in which (unintelligible) kind of a split. But what we need to do is pause for a second and make sure we've articulated those well, make sure we know where we are. And if there's some specific points here like Stephanie raises and Chris is trying to out, I encourage you over the break to talk between the two of you and see if you can sort that out and make some clarity for everybody else as well.

Let's take a pause for 20 minutes, and those of us – I particularly would like to talk with Alan, Milton and James over the break to see if we are correctly,

you know, articulating what you're putting out there. Then we're going to come back to (unintelligible) those different ideas. Okay? Make sense? All right, so let's take a 20 minute break. I'd love to check in with people who have been putting those specific ideas on the table see if we can pull that together well. Right?

END