
ICANN Transcription
GNSO Temp Spec gTLD RD EPDP – Phase 2
Thursday, 12 December 2019 at 14:00 UTC

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TERRI AGNEW:

Good morning, good afternoon, and good evening. Welcome to the GNSO EPDP Phase 2 Team meeting taking place on the 12th of December, 2019, at 14:00 UTC.

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

I do believe Becky Burr may be on telephone only at then moment. We have listed apologies from James Bladel of RrSG, Julf Helsingius of NCSG, and Chris Lewis-Evans of GAC. As a reminder, Janis Karklins, our Chair, will be on then first hour and then may need to drop off. At that time, Rafik will be taking over chair duties. They have formally assigned Sarah Wyld, David Cake, and Rahul Gosain as their alternates for this call and any remaining days of absence. Alternates not replacing a member are required to rename their line by adding three Z's to the beginning of their name, and, at the end, in parentheses, their affiliation-alternate, which means you're automatically pushed to the end of the queue. To rename in Zoom, hover of your name

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and click Rename. Alternates are not allowed to engage in the chat, apart from private chat, or use any other Zoom room functionalities, such as raising hands, agreeing, or disagreeing. As a reminder, the alternate assignment form must be formalized by way of the Google assignment link. The link is available in all meeting invites towards the bottom.

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

Seeing or hearing no one, if you do need assistance with your statement of interest, please e-mail the GNSO Secretariat. All documentation and information can be found on the EPDP wiki space. Please remember to state your name before speaking. Recordings will be circulated on the mailing list and posted on the public wiki space shortly after the end of the call.

Since Janis is having slight difficulties with the Internet, we'll go ahead and turn it over to Rafik Dammak, the Chair of today's meeting. Rafik, please continue.

RAFIK DAMMAK:

Thanks, Terri. Thanks, all, for joining today's call for the EPDP team. As you can see on the agenda, we will continue working on several of the building blocks. Janis has problems in joining us, so I'm helping for today.

If there is no objection to the agenda, I guess we can move to the next item, and that's the housekeeping issues and the status of building blocks. Here I think I can turn to Caitlin, if I'm not

mistaken, if she can give us a quick update of the status with regard to the building blocks.

CAITLIN TUBERGEN: Hi, Rafik. As you can see, there hasn't been a big change since our last meeting on the building blocks, but we're working, as Janis would say, on getting more of these to turn green.

RAFIK DAMMAK: Thanks, Caitlin. So that remains our objective – to get all these to green – which means finishing those building blocks. Are there any comments or questions?

Okay. That's it for this agenda item. I guess we can move to the next agenda item, #4. That's the terms of use. First is a review, I think, of what we did last time.

Yes, Caitlin? Please go ahead. Sorry.

CAITLIN TUBERGEN: Thanks, Rafik. I just wanted to remind everyone what has changed on this building block since our last meeting. At the end of the last meeting, Janis would ask support staff to add some language to the building block or a note to the EPDP Team explaining the difference between the privacy policy, the terms of use, and the disclosure agreement. So we added a note at the top explaining the general difference between the three things. That doesn't have to be included into then building block. That was just

more for reference. Of course, EPDP team members can feel free to disagree with this. This is just some generic information.

Additionally, I wanted to point out that the general recommendation at the top [or] the initial report text, as we noted on Tuesday's call, is a broad recommendation. Then there's some implementation guidance below, where there are more details about the three types of agreements.

EPDP team members had added some details to this weeks ago, but, on Tuesday's call, some of the EPDP team members noted there might be too much detail, so we proposed to delete some of this. Of course, again, the team can feel free to disagree, just to pare it down a bit. The items that are not highlighted in green were items that EPDP team members made comments on that we can specifically go through today and see if we can get agreement on.

I'm hopeful that's helpful, Rafik. Back over to you.

RAFIK DAMMAK:

Thanks, Caitlin. Thanks for this update. So we see there were several changes in the document, so I guess we need to see reaction from others and also see what we can confirm for today. Let me check the queue. I don't see anyone yet in the queue – oh, well, Marc. Yes, Marc, please go ahead.

MARC ANDERSON:

Hey, Rafik. Hello, everybody. First, looking at the changes from staff, I think this is an improvement, so thank you for that. Looking at the note to the EPDP team describing what we're intending by

the privacy policy, terms of use, and data processing agreement, first I think this is a good idea. I think previously we just had privacy policy, terms of use, and data processing agreement just orphaned with no context, really, for what we meant by them or where they were expected to be applied. So, if you haven't been following long or intimately involved with the EPDP Phase 2, I expect it didn't really make sense what we intended for these things. So I do think we need to explain these things. I think the notes are a good start.

In a quick read here (full disclosure: I haven't had a chance to fully digest staff's changes), I think the privacy policy and terms of use descriptions are pretty good. I don't agree with the data processing agreement, though. This talks about data processing between controller and processor, including scope and purpose, where applicable. My recollection is that what I think they were talking about with the data processing agreement is really the disclosure agreement, which is intended to be between the disclosing entity and the requester and governs the terms under which the requester can use the data being disclosed. So I think that's what we intend there.

But, overall, I think the changes are an improvement, and I do think these descriptions of what the three different terms of use items are intended to be used for is a good thing. Thank you.

RAFIK DAMMAK:

Thanks, Marc. Let's see if there is any other comments and let's see if there's also comments in the Zoom chat regarding, first,

using [DPA] and [DPA] agreements. Maybe we just need to avoid any confusion.

I don't see anyone in the queue. I'm assuming that there is no specific concern with the current language.

I see a question from Sarah about either changing the introduction ... Yes, Sarah, please go ahead.

SARAH WYLD:

Good morning. Thank you. I think actually my comment in the Zoom chat was a little bit inaccurate because, as I see now, the note to the EPDP team section in the document that is not highlighted is indeed not part of the recommendation. It's just a note for us. I think that is where some of the confusion lies, where it refers to the DPA. But I did want to support Marc and what he said about the disclosure agreement. I do see the introduction in the green highlights, which refer to a disclosure agreement. I think Marc was correct that that needs to govern how that data requester uses the data. Thank you.

RAFIK DAMMAK:

Thanks, Sarah. I guess we can take that into consideration. Seeing no concerns or objections, I guess, at this stage, we can close this building block. Then it can be reviewed later on in the full report. I assume here that staff can clean up the text, but seeing no comments or concerns, I think we can close it for now and move to the next agenda item.

We can move to ... it's moving quite a lot. I think it's automation. In the meantime, I see Marc is in the queue. Marc, please go ahead.

MARC ANDERSON: Thanks, Rafik. Sorry, just a quick clarification. When you said "close it," are you suggesting to just close it as is, or is staff going to take onboard the comments just made, make edits, and then close it? Just for clarification.

RAFIK DAMMAK: Thanks, Marc, for the clarification question. Since we have some suggestions, I think it's more editorial than general substance. I expect staff to do the cleanup and make the edits and then close that document. Is that okay?

MARC ANDERSON: So they're going to make the changes as suggested and then close it?

RAFIK DAMMAK: Yes.

MARC ANDERSON: Okay. Thank you. Just [inaudible]

RAFIK DAMMAK: No problem. No worries. I should have been more clear about how we will proceed. Anyway, again, as I said, it can be re-reviewed in the full report. But here, since there is no substantive comments ... And it's just about getting this in the initial report.

Okay. As Berry said, "[Stable for] important to report." So I have to speak the lingo.

Let's go to the next agenda item, and that's related to automation. Caitlin?

CAITLIN TUBERGEN: Thanks, Rafik. I wanted to note, per usual, that the text at the top of the building block is what is reflected currently in the initial report. The text that is not highlighted in green is either text that the EPDP team members had commented on prior to us trying to stabilize the text or comments that came in before the deadline that we proposed last week. So, as we go through the building block, the text that is highlighted in green is text that no one expressed any objection to, and the text that is not highlighted in green is what we'll discuss during the meeting that there were some issues with.

Back over to you, Rafik. Thank you.

RAFIK DAMMAK: Thanks, Caitlin. Let's see here. As said, the green is where there is no concern. I'm sorry, Berry. Can you share the link to the document? I think it's easier for everyone to check it. Thanks.

I guess we can discuss the language that is still in question here. This is, if I'm not mistaken, a comment from the NCSG. Anyone want to ask a question or comment on this?

BRIAN KING:

Thanks, Rafik. Apologies or you're welcome, depending on if you like the Christmas music in the background. I'm in a hotel lobby. It's a little tough to see. If staff could zoom in a bit there on that language, that'd be helpful. Thanks.

Oh, it's not blowing up the comment much. Let me put on my glasses and flip over my own Google Doc and I'll come back. Thanks.

CAITLIN TUBERGEN:

Rafik, this is Caitlin. I also [put the] comment in the chat, for those who want to review the chat. But we would recommend looking at it on your own screen possibly because you can zoom in and click on the comments.

RAFIK DAMMAK:

Thanks, Caitlin. I think also we can confirm which comment we are covering. So it's the first comment, and that is from the NCSG. I was asking if someone from NCSG can clarify here. In the meantime, I see that Hadia is in the queue already. Hadia, please go ahead.

HADIA ELMINIAWI: Thank you, Rafik. I was going to ask, what's the proposed alternative to the crossed-out paragraph?

RAFIK DAMMAK: Sorry, Hadia. You want to ask what's the alternative?

HADIA ELMINIAWI: Yes. What's the proposed alternative? Because I do not see us anywhere saying that we could automate as much as possible whenever it's technically feasible and legally possible. I don't really agree with "technically feasible," but it's fine to be there.

I just wanted to say that, practically speaking, automating as much as possible is good for everyone. A huge advantage to automation is that you can automatically produce the reports and audit logs, [in] which you will also need to prove compliance. Automation can help in detecting, correcting, and avoiding GDPR privacy violations. The most obvious and sustainable solution to compliance is actually automation.

So I would like to see a proposal on the alternative to the cross-out paragraph. Thank you.

RAFIK DAMMAK: Thanks, Hadia. I think that was proposed earlier. As you can see, the language copied by Caitlin in the chat is what is proposed as an alternative.

Now we are getting a queue. We have Brian, Amr, Alan G, Volker, and Franck. We'll start first with Brian. Brian, please go ahead.

BRIAN KING: Thanks, Rafik. See, I got my glasses on. I can read this now. I think, objectively, the “must” language there is better that currently has the line through it on the screen. That’s because, if automation is legally and technically feasible, then that’s what the system should do. I haven’t heard a good argument for doing it differently in a manual way. That would take longer and would be more expensive – to do it manually. If automation is technically and legally feasible, then we should say that’s what the system must do. Thanks.

RAFIK DAMMAK: Thanks, Brian. Amr?

AMR ELSADR: Thanks. I think the use of the word “must” here is a bit too absolute. If you replace that with “may,” it doesn’t prohibit automation in cases where it’s technically feasible and legally permissible to automate part of the disclosure process. But setting such an absolute requirement or obligation to require automation where those factors exist? It might be a little reckless of us to do so. We don’t know what’s going to come up during implementation. Sure, if there are parts of this process where it is technically feasible to automate, where it is legally permissible to automate, why not? I don’t think anybody would object to that.

But, again, when you move to implementation, things pop up. It has happened on several IRTs in the past. I think use of the word “may” gives the implementation review team a little wiggle room

here, where, if there's something, that, for one reason or another, we have not considered might not be as easy or straightforward to automate as we might think, then this doesn't become an issue that gets sent back.

Again, as long as it is technically feasible and it is legally permissible, then, sure, why not? But I think just having this absolute requirement here that locks in what the consensus policy says is not advisable. Thank you.

RAFIK DAMMAK: Thanks, Amr. Alan Greenberg, if you are speaking, we cannot hear you.

ALAN GREENBERG: Sorry. Can you hear me now?

RAFIK DAMMAK: Yes. Please go ahead.

ALAN GREENBERG: You cut out when you said my name, so I couldn't hear that I was called. I think we're wasting time here, to be quite honest. The arguments that Amr made are good in that, yes, we may find that there are practical reasons why we can't do it. But that comes down to "technically feasible," and "technically feasible" also has an implication of "at a reasonable cost." So I think we're covered by using the term "It has to be technically feasible and legally permissible."

We're expecting the SSAD to be implemented by ICANN or an ICANN contractor, so we're not saying that every registrar, every contracted party, must automate. That's a decision-making process, and that may be there. It may be centrally. But we're talking about implementation of the common central process itself, the SSAD.

So I don't really think it matters whether we say "must" or "should." I think the outcome is going to be the same. I think the lead-in to this sentence which was deleted at one point – that we acknowledge that full automation may not be possible, either legally or for other reasons – is an important statement that we should include for the benefit of those reading this report.

So I really don't think it matters which we go on this, and I think we need to move on to really important things. Thank you.

RAFIK DAMMAK: Thanks, Alan. Volker?

VOLKER GREIMANN: Thank you very much. I actually agree with Hadia and Amr here that automation is going to be a big boon that's going to be very helpful in a lot of ways. If we can automate certain aspects, be sure that we will do so because taking away manual labor and replacing that with automated labor is always going to be beneficial.

However, the decision of what part of our processes internally we are ultimately going to automate should be our own decision in the

end. So the “may” or “should” is probably the better word, rather than the “must.”

To just briefly comment on something that Alan said, I agree that, if the SSAD is some form of external platform only, then there might be a differentiation. But I don’t remember that we have necessarily agreed on that. I’m still operating on the principle that we’re all the SSAD. So contracted parties and that platform are all part of the SSAD. If you say that the SSAD must be automated where technically feasible, then that includes us, at least potentially, unless we make the decision that SSAD in itself is only that which is the gateway between contracted parties and requesters. But I don’t think we are there yet.

RAFIK DAMMAK:

Thanks, Volker. We have Franck and then Laureen. Franck?

FRANCK JOURNOUD:

Hi. I think what’s unclear to me, because we don’t know what model we’re talking about – centralized, decentralized, or hybrid – is where those decisions about automation of what part of the SSAD are going to be made. Because, if it’s going to be a decentralized system – as you can imagine, IPC is not terribly excited about that kind of prospect, or even a hybrid system ... If the decision to not automate this part and that part and that step and this step of the SSAD and of its application for every disclosure request is made in a decentralized fashion by every contracted party, that is going to take away a lot of the usefulness of the SSAD.

RAFIK DAMMAK: Thanks, Franck. Laureen?

LAUREEN KAPIN: Thanks. Just building on some prior comments, Franck is right. If it ends up that we are more in the scenario of a decentralized model, then it's all the more reason for this language about "must" to be maintained. I'm sensitive to the concerns raised by Amr and others about unexpected circumstances and the need for discretion, but I think the inclusion of the language of "legally permissible," which of course includes the balancing tests which are built into the GDPR for certain legal bases, actually build in the opportunity for the decision makers to account for situations which are, to put it in short hand, too complicated to be automated. So I think that language builds in the necessary discretion.

But, if we are in what some might view as a less desirable scenario, where this is a decentralized model, then there's all the more reason for our real crucially important task to be to ensure that as much of the system is as automated as possible and that we are driving towards a policy that has clear criteria for how this automation should take place and under what circumstances. But I strongly believe this language has to be a "must."

RAFIK DAMMAK: Thanks, Laureen. Mark Sv?

Mark, if you're speaking, we cannot hear you.

MARK SVANCAREK: Okay. Can you hear me now?

RAFIK DAMMAK: Yes, but if you can speak more close to the mic and [inaudible].

MARK SVANCAREK: Okay. What a drag. I wonder if this system has just picked up my other microphone by accident. So [inaudible] just in case it's that one.

I think we need to have some sort of indication of our intention here. It is true that we don't know the exact model. I think people have made a lot of good arguments one way or the other that, until we know the final model, the level of appropriate automation could change. But, if we're not stating upfront that we have a full intention of automating everything that is technically feasible and legally permissible, then I think we are going to get some really ambiguous results during the implementation. I think that's a factor regardless of the model we choose.

So I think it really should be a "must." I think we also know that, during implementation, people do have the ability to figure stuff out. I don't think that people – tell me if I'm wrong – really get boxed in during the implementation phase.

I'm hearing concern about which model it is. The more I think about it, I don't think that that's really a factor here. "Technically feasible and legally permissible" – those factors may change,

depending on what type of a model it is. But I think our intention needs to be the same, so I prefer “must.”

RAFIK DAMMAK: Thanks, Mark. Marc Anderson?

MARC ANDERSON: Thanks, Rafik. I find myself a little annoyed here listening to this conversation. When we first went through this exercise of looking at the automation building block, there was concern that the language in the building block made it sound like automation was not allowed. So this language was originally proposed to make it clear that automation, where technically feasible and legally permissible, is allowed. That was the original concern raised and the purpose of adding this language.

Now, as we’re looking at this language and rehashing it and rehashing it, the attempt to change this to a “must be automated” I find really frustrating because that’s not what we’re trying to do. This language was added over the initial concern that the automation building block sounded like automation wasn’t possible, and there was a request to make it clear up front that it may be automated where technically feasible and legally permissible. That’s what we were trying to accomplish. That’s all that this text was meant to do.

So arguing over changes to a “must” is really rehashing old arguments and preventing us from moving on.

RAFIK DAMMAK: Thanks, Marc. We have Alan and then Amr. I think after this, maybe we need to not quite reach a conclusion but see how we can move forward. So Alan and then Amr.

ALAN GREENBERG: Thank you very much. Just a brief note. People have been talking, but we don't know what model it is because we don't know who's going to making the decisions [or doing the] authorization. I don't think it matters. We know, for instance, that authentication providers are going to be doing some manual things. We're going to have to be looking at who is requesting it and are they meeting their commitments.

So I don't think that really matters. The authorization provider may be the contracted parties in some cases and may use manual techniques. That's not part of the core central SSAD. So I think we need to define the SSAD as not including the work done by the various providers and then move forward. Thank you.

RAFIK DAMMAK: Thanks, Alan. Amr?

AMR ELSADR: Thanks. I very much agree with everything Marc Anderson just said and also agree with something Mark Svancarek said a little earlier. I'm not entirely convinced that whichever model we end up using will make much of a difference.

What I do get a sense of here is that we all agree that, to the extent possible, whether from a legal perspective, from a technical perspective, or a cost-effectiveness perspective, if automation is possible and it makes things easier, then absolutely yes. I don't see any reason why any actor within this process would want to not automate that part of the process.

My only concern is, again, reiterating what I said in my first comment, if we use the word "must" here, then we're really locking in something that may become a compliance issue at a late date when it needed to be. If practical issues do come up – Mark Sv said that he can't think of any examples; I can provide him with a few that I've come across in different IRTs – I don't think any of us want this to become a compliance issue. Again, I think we're all on the same page. I'm not exactly sure why we're arguing about this. If it can be automated, if all the criteria we set are met and it can be done, then, sure, why not? But, if, for one reason or another, something comes up that we have not considered, then let's leave a little wiggle room here so that things can keep moving and we don't have to face some sort of implementation problem or some issue with compliance at a later date. Thank you.

RAFIK DAMMAK:

Thanks, Amr. Before moving to Margie and Franck, I think we can close the queue here since we need to find out how we should proceed. I think there are several comments, and, to some extent, we are rehashing the arguments. So we need to move forward. So I'm closing the queue after Franck, but let's hear from Margie and Franck.

FRANCK JOURNOUD: I think we can probably figure out something else between – I don't know if you guys can hear me – “should” and “must” and “may,” where we're taking in consideration the [million] factors that people have mentioned about why automation may not always be perfect. So maybe we can set that aside. I think we can find a compromise around something like “should.”

Sorry. By that, I mean I'm happy to propose by e-mail compromise language on this.

RAFIK DAMMAK: Thanks, Franck. I thought you were proposing maybe to use “should,” but you are suggesting here to propose more relevant, more elaborated, language?

Sorry. I was trying to clarify Franck's.

FRANCK JOURNOUD: Yeah. Sorry. I think playing around with the notions of cost and technically feasibility, etc., so that we ... I don't think it's just “should” or “must” or “may” that's going to be the compromise. I think we need to play around a little bit with the rest of the sentence.

RAFIK DAMMAK: Okay. Thanks, Franck. Sorry, Margie. She was before you in the queue. Margie, please go ahead.

MARGIE MILAM: Sure. I'm eager to see what Franck can come up with. My recollection is a little bit different from Mar[k]'s in that I remember that this language stemmed from a proposal that Ashley came up with after we had had some discussions at one of our face-to-face meetings. I think a lot of these issues will probably go away once we know what the model is. So, in some sense, if ICANN is the centralized disclosure, then I think the language may not be as objectionable.

I almost feel like this is one of things that we just revisit when we get the input from the Data Protection Board. We understand how the team is looking at the issue of who's the discloser. Then we go back and look at whether it's a must because I do think that the distinction that Alan Greenberg made about that it's going to be some third-party contractor that ICANN contracts with that we're talking about here really and not the other scenario is important before we settle on this issue.

RAFIK DAMMAK: Thanks, Margie. I think we are getting stuck here about using just one word. I understand that, for everyone, the term [chooser] here can change the meaning and the effect.

I'm trying to digest all the comments and all the points that were made. I understand, for example, that, for the IRT, it's about implementation and they don't have that ability to change the policy recommendation. They try to understand what the policy recommendation is saying, and they check the feasibility of how it

can be implemented. So I get the point about giving clear implementation guidance here and to not be prescriptive.

Also, I can understand the concern here that, since there are several factors or parameters that are not set yet, like the model and so on, we are trying to suggest language that can cover the different possibilities.

What I can say here in terms of action and not trying to rehash what was done before, what was agreed to before, when it happened is, I guess, is that one way is to acknowledge that we might revisit this later when we agree on who will be responsible or providing the authorization so that [ICANN], I guess, can respond, to some extent, to the concern here. I guess it's not the worst case, but if we don't have clarity to ask this question during the public comment to get input and guidance on this matter, maybe for now we can add a footnote that we can revisit the language when the determination is made regarding the authorization provider.

I think, also hearing the latest comments, maybe I'll say we have now "should," "may," or, "must," but the first proposal [said] that we should use "may" instead of "must" to give us some flexibility here. I don't think we are going to resolve it today, but I think we got all the points. I guess I'm suggesting we go with this: just to have it as a footnote and state that we can revisit that later when we decide regarding the authorization provider.

I might ask the policy staff if they can come up with some suggestion for the footnote or also for the team members, if they any suggestions. Is there any concerns or objections in

proceeding with this? Sorry, I guess I missed some comments in the chat.

I'm not seeing anyone in the queue, and I'm not seeing reaction to my suggestion – oh, Marc. Marc Anderson, please go ahead.

MARC ANDERSON:

Hey, Rafik. Just jumping in real quick. I think your suggestion to put a pin in this and say we should look at it once we've made decisions on who the disclosure should be makes sense.

I think there's a lot of good comments going on in group chat around, which, if I were to sum it up at a very high level, I think are around implementability, if that's a real word, of the recommendations. So I think it's an important discussion going on here. We definitely have to keep in mind how implementable our recommendations are and make sure we're not writing something that's going to be difficult or impossible to implement or we'll get unreasonably bogged down in implementation in. I think there's some really good stuff going on in chat, really good discussion, around that. So I just wanted to call that out.

RAFIK DAMMAK:

Thanks, Marc. I think we will take note of all those comments. We can add this about the flexibility and feasibility. So I think we have this action item: to add this footnote for now and we can revisit it later. I know it's not probably the most effective, but I guess it gives us some time to rethink and have more input at that time. Hopefully, we can reach agreement. I think just disagreeing about two words is a little bit [annoying]. I think we can do better. But I

know there's concern from all parties here. So I guess that we covered that part and we have an action to follow-up on.

So we can move maybe to the next one, the next comment. It's coming from – I'm checking – I guess, also from NCSG. Also, I see a comment from Mar[c]. But maybe, Caitlin, back to you, if you can clarify more here and give us some background.

CAITLIN TUBERGEN: Thanks, Rafik. When you see that I've added a comment from NCSG, these were comments that were added directly to the Google Doc of the initial report. Just so that all the comments were in one place, I went ahead and imported them.

With respect to this comment, it refers to the last two sentences or the last paragraph of the initial report text, which begins with, "The SSAD must allow for the automation of the processing, etc." So perhaps what we could do is ask NCSG to explain why that text is not acceptable. Then there are some comments from Mark Sv in response.

RAFIK DAMMAK: Thanks, Caitlin. I guess, yeah, we can ask if someone from NCSG can clarify that position. Any representatives from the NCSG that can give us some briefing or explanation about that?

Okay. Amr, if you have the document, you just go to the next text in yellow, if it can help you, if you have the link to the document.

In the meantime, I see that Stephanie is in the queue. Stephanie, please go ahead.

STEPHANIE PERRIN: Hello. I hope you can hear me. Basically, I believe that was Milton that made that comment. I'm not sure, though. I stand to be corrected if it wasn't. I don't agree with the "must," for the reasons that were outlined above. I think that "should" would be a better word under the circumstances, given all the variables that I have been writing about in the chat.

RAFIK DAMMAK: Thanks, Stephanie. Just to confirm – I'm trying to understand here – you are saying you are disagreeing with the word "must"?

STEPHANIE PERRIN: Sorry. My mic was off. Yes, I'm disagreeing with the word "must." Obviously, we've just had a big discussion. The rest of the sentence is okay, but it's internally conflicting right in what is written. If we say, "The SSAD must allow for automation in the processing of [well-formed] [inaudible] complete, properly identify requests from accredited users with some limited and specific set of legal basis and data processing data purposes which are yet to determined," it can't have a "must" with all of those variables. So [it should be] "should" for automation, given all the caveats.

"These requests may be automatically processed and result in the disclosure." That's okay.

In other words, you can't make a permissive statement and then start it with a "must." That's all I'm saying. So that's why I disagree with the statement.

Actually, I'm not sure we need it, if we include what we [had] up above. Just saying. Thanks.

RAFIK DAMMAK:

Thanks, Stephanie, for the clarification. I think also your either grandson or granddaughter was supporting you in the background.

So it was about that word. I understand that Mark Sv is suggesting to change it from "must" to "should."

Let me double-check here. Stephanie, I assume that's an old hand, so I will go to Marc Anderson in the meantime. Marc?

MARC ANDERSON:

Thanks, Rafik. I think changing it to a "should" would be fine. I think we've certainly heard from people that there are circumstances where they would automate requests but not in all circumstances. So making it a "should" or a "may" would account from that.

But I do agree with Stephanie's last point. I'm not sure how this adds anything over the language in the first paragraph. It does seem duplicative to me. That's all I'll say on this one.

RAFIK DAMMAK: Thanks, Marc. So we think we have also duplication at the end, and you agree that we can change to “should.”

Brian, please go ahead.

BRIAN KING: Thanks, Rafik. Just a preference for “must” language when we can get it. We can be smart about how we define what must happen and in what circumstances, but we’re defining a consensus policy here and this needs to be enforceable. Policies can be useless if it’s all shoulds and “if you feel like it” kind of language. So strong “must” language is good for enforceability and it’s clear on what the policy is.

In this case, I think the “must” is important. We’re talking about only certain limited circumstances. We’re happy to think about what those circumstances look like and what they are and what they are not and agree to that. But we got to have some “must” language in here. Thanks.

RAFIK DAMMAK: Thanks, Brian. We are here again about what the appropriate word is. My understanding is that “should” is quite a strong term, not necessarily at the same level as a “must.” But I thought [I saw] really some support in the rough consensus here to go with the “should” instead, just to be clear.

Mark Sv, you want to intervene? Because I saw your hand and it disappeared.

MARK SVANCAREK: Yeah. I was debating whether I should intervene or not. I did say “should.” We expected “should” above, or at least we’re strongly considering “should” above. But what Brian said is important. You can all tell me that I’m new here and I don’t know what I’m talking about, but “may” really seems problematic. I don’t know if “should” is enforceable or not. I see people saying that enforceability is not such a high consideration as I think it is.

I’m just hoping that we just don’t have language that disappears when we get to implementation. I think that “may” language can easily disappear. I don’t know if “should” is more persistent than “may.”

So you tell me. Is “should” language really strong? Does it survive into IRT? I don’t know. So, even though I’m caving here and saying “should,” I have to continue to express my concern that, because it’s not “must,” it may just go away when we get to implementation. Thank you.

RAFIK DAMMAK: Thanks, Mark. We have Marc Anderson and then Stephanie. Marc?

MARC ANDERSON: Thanks, Rafik. First I want to +1 Franck there. I think Mark can’t play the “new” card anymore. That’s Franck.

But I raised my hand to respond to what Mark said there because we're having similar discussions in the Phase 1 IRT around "must," "should," and "may." I think this language as a "may" or "should" is important in that it needs to be clear that, in some circumstances, the disclosure can – is permitted to – but is not required to in all circumstances. So I think that's what we were trying to accomplish. But I think that's also what we're trying to accomplish in the first paragraph.

So I still think that what we're discussing is just a little bit redundant with the first paragraph we looked at, but I do think there is value in having "shoulds" or "may"s insofar that it makes it clear that these are things that are allowed. I think, in this case, we want it clear that the disclosing entity is allowed to automate when a set of criteria has been reached. So I think that's what we're accomplished here, and it's okay to have "may"s and "should"s in those circumstances, and not just focus on the "must."

RAFIK DAMMAK:

Thanks, Marc. Alan Greenberg, please go ahead.

ALAN GREENBERG:

Thank you very much. We're reverting to terms that are not being used here. The disclosing entity ... I thought we were using the term "the authorization provider is the one who makes the decision." It might be the SSAD. It might be some other entity. It may be a contracted party. That's the one that may or may not use automation. The SSAD itself is what we're talking about here, not the various providers that feed into it. So I think we need to be

very careful. We seem to be generalizing saying this description is talking about the overall process, not necessarily how the decision is made. Thank you.

RAFIK DAMMAK:

Thanks, Alan. I see a discussion about the meaning of “should” and if it’s binding or not. Also, it’s coming from an IETF context. But in IETF, it’s about creating standards and protocols. So, in talking about requirements – I’m not a protocol designer, but, in my experience with using “should,” it means really requirements. In talking about binding, I don’t think it makes sense with that, since binding is more about contractor obligations. So I can see here the side that “should” is enough and that it’s not about enforcing or not.

But I guess, Greg, you maybe want to elaborate here?

GREG AARON:

Yes, Rafik. In consensus policies and in ICANN contracts, we do go with the RFC definitions of these words. In fact, you’ll see in those documents that they say those words are defined according to RFC 2119. So we do use the IETF definitions, and they are important. So words like “should” and “may” ultimately become optional if you’re talking about a contractual regime, which is what we’re doing here. They mean they’re optional, and whoever is implementing can choose whether or not to do it.

The only word that’s really enforceable is “must.” So, if the occasion is appropriate, “must” is the right word to use, and it means that it will always happen. You can count on it and enforce

it. The other words end up being optional, and implementing parties can decide. “May” is sometimes appropriate. If there should be an option, then let’s use that word. But, if we want something to be binding, you must use the word “must.”

RAFIK DAMMAK: Thanks, Greg. Alan Woods, please go ahead.

ALAN WOODS: Thank you. I think we’re falling into a trap of – well, we’ve fallen into the trap many times. [inaudible] and then we probably should move onto substance. But I will say, in closing, from my point of view, we cannot have rigidity here. We cannot. I think Greg is being far too rigid here in the sense that we are not making your atypical consensus policy here. We’re talking about something that specifically related to a very principle-based law. If we are going to effectively regulate based on the fact that it must be implemented in a certain way. Well, then we’re going to ultimately fail at the IRT. I think that’s what we’re trying to say.

Our entire point here is that there needs to be the flexibility so that whoever that controller at the end of the day is can be dynamic in how they approach the law and the law that applies to them because this is not a law that will always be the same, and there’s no point in us having to force ourselves to reconvene another consensus policy and another EPDP just to role back things like “must” when they’re not necessary at the moment. And we should not be slavishly sticking to something that works for other consensus policies which aren’t necessitated by a legal change.

They're necessitated here by legal change and we must ensure we have that flexibility to allow that controller not to breach that law.

RAFIK DAMMAK: Thanks. We have Lauren in the queue, and then I would like to close the queue after her, just to see how we will proceed on this point. Lauren, please go ahead.

LAUREEN KAPIN: Thanks. As I said, I'm sensitive to the need for flexibility here, especially because laws may change.

That said, I'm wondering if this proposed language, which seems to have some breathing room included by the reference to some limited and specific set of legal basis and data processing purposes, which are yet to be determined ... It seems to me that that's the safety valve here and that does give flexibility. Really, all this sentence is saying, even if has "must," is it means that there should be some agreed-upon, defined set of situations that would allow for automation. So I'm a little puzzled by why there is such resistance to use of the word "must" here when there is this built-in flexibility about when the "must" would come into play.

I ask the question to folks who were resistant to the word "must." Are you opposed to any sort of defined set of situations, where these requests would be automated? Because I don't think that's the case. But, if it is, I don't see how we really make progress on any sort of a unified system if the only thing we're going to automate is just the preliminaries – i.e., some sort of

authentication of who's allowed to use this system. But, when we get to the guts of the request, there's resistance to any type of automation. I don't think that's what I'm hearing, but, if I'm wrong, that's a real concern, I think, to our progress.

RAFIK DAMMAK: Thanks, Lauren. I said that we'd close the queue after you, but I'll allow Mark Sv to speak and then we close, definitely, the queue. Mark Sv, please go ahead.

MARK SVANCAREK: Thanks. I did want to support something that Lauren just said. The other day, we had a debate about flexibility in authorization, which was tantamount to that there will be a balancing test and, afterwards, there will be another balancing test. This feels the same way here.

But, if it were possible, I would like to see maybe some more detail here saying that processing of the syntax, looking at the content, and identifying the person are must-automate. If automation of the disclosure decision needs to remain a "should," then that can remain a "should." But, if there are portions of this that we know definitely must be automated, I think we should lay that out. If there's a controversy about whether those things must be automated, then I think we have a different problem and it would be good to get clarity on that problem right away. So that would be my final comment on this topic.

Please the queue so I can have the final word. Thank you.

RAFIK DAMMAK: Thanks, Mark. It's closed – the queue, I mean. Do not freak out, everyone. So, for this, I see we have now this discussion about the meaning of “should” and “must” and if it's enforceable or not. I'm not sure we can reach a conclusion here today, hearing all the arguments. I understand that we are waiting for guidance from ICANN org about “should” versus “must” and what does it mean, and I think this can respond to all the concerns or the questions here about what does it mean in terms of contractual obligation and compliance. So I guess we will have to wait for that guidance probably. I guess we can leave this as a note – that we probably should revisit it later – since I don't believe we can resolve it for today. So I would prefer that we leave that for now, knowing that we have to revisit based on further input, and move to the next comment so we try to use our call as much as possible.

Just checking. Caitlin, is this on the comment, or is there anything else we have to cover in this building block?

CATILIN TUBERGEN: Thank you, Rafik. Yes, those were the only two comments on this specific building block.

RAFIK DAMMAK: Okay. So we have those two comments. We could not really resolve them today – oh.

CAITLIN TUBERGEN: Apologies, Rafik. I overlooked a comment from ICANN org.

RAFIK DAMMAK: Okay. No problem. Can you please copy it to the chat?

CAITLIN TUBERGEN: [inaudible]

RAFIK DAMMAK: Thanks, Caitlin. So this is a question from ICANN org [inaudible] here. So we are back to the question about “technically feasible and legally permissible.” I’m not sure how we can respond to this. I’m looking forward to hear from team members if they have any thoughts on this question. Maybe, if Eleeza is on the call, she wants to elaborate more and explain.

Okay. I’m not sure. Dan, please go ahead.

DAN HALLORAN: Thank you, Rafik. It sounds like the comment echoes a lot of the discussion you guys had. I don’t know if there’s anything else to add. I think Eleeza had to step away for just a couple minutes and isn’t available right now. But, if there’s any questions on the comment, we can answer them. Thanks.

RAFIK DAMMAK: Okay. Thanks, Dan. No, I just want to see about the background or anything that can help the team respond to this. But, seeing

here the initial [reaction], it's difficult maybe to answer this question right now.

Checking the queue. Stephanie, please go ahead.

STEPHANIE PERRIN: Thanks very much. I think that this is an excellent question that we've been dancing around. I think the answer is, at least in my view, that the controller has to have an override on an automated system. I've been trying to think of a good example that would help Mark Sv with his final closing request for an example.

So the example I can come up with one is that NCSG has included in many of their comments on the whole WHOIS mess for many years. If you have human rights defenders or women educators in a country where that's not in fashion, they may be what might be termed sensitive clients. They may ask their registrar to please be careful or alert them wherever legally feasible if they get requests for their personal information because they've been subject to harassment and threats and all kinds of things. Under those circumstances, the registrar in that situation might want to have a manual override on any automated disclosure of their personal data. I think that's a pretty good example, and the system has to accommodate that, in my view. But, until we decide who the blasted controller is, we can't do this.

Secondly, a lot of these discriminations – what data elements routinely ought to be released and what shouldn't; I realize we discussed this in Phase 1 – are what you determine when you do your risk assessment in a data protection impact assessment,

which we failed to do on this. So we're grouping our way through, discussing potential examples, when, if we'd done it systematically, we would have a much clearer, common understanding of what the actual job is in determining disclosure. Thank you.

RAFIK DAMMAK: Thanks, Stephanie. Mark Sv?

MARK SVANCAREK: Thanks. Stephanie, I'm realizing that I did not send you my idea related to this that I promised you in Montreal. I'll send that to you today. I think I've only showed it to Volker so far.

We've already received guidance from Byrd & Byrd that, if the system falls under Article 22, it's going to be hard to defend it in total. So I was trying to think of some ways where you could send certain things down a manual path and other things down the automated path, such as "This registrant is an at-risk person," or, "This is the first time I've ever seen you making a request, so I'm going to look at you for this first time," or, "You used to have this volume. Now you have ten times the volume. Looks weird. I'm going to examine that." So there was a list of things. The thing to keep in mind, though, is that the evaluation of whether or not you go down the one lane or the other lane can itself be automated. So I will share that document so people can see what it is that I'm talking about.

I think we've already conceded that there are always going to be some paths that go down the manual versus the automated

process, and I do just want to focus on the idea that the decision of which path to go down can be automated. Thanks.

RAFIK DAMMAK:

Thanks, Mark. So I guess, for this question, I understand that there are several parameters and it will depend on when we decide the model and the other aspects. So I guess that should be deferred for later and we'll have a note that it should be answered at that time. So I'm asking staff here to take note that we can come back to this later on we are at the stage where we have several elements set to help us to answer this question.

Seeing nobody in the queue and no further comment here, if I'm not mistaken, the [inaudible] was the last comment or question on the automation.

We have 45 minutes left, so I guess it's a good time to move to the next building block.

Okay, thanks. So we move to the next building block, again, asking Caitlin – yeah – if you can give a quick review and the status for this building block. Please go ahead.

CAITLIN TUBERGEN:

Thank you, Rafik. As you can see on the screen, the majority of the response requirements building block has turned green. That was after our second reading.

But I did want to note that there are two changes that are not highlighted in green. The first is in Paragraph E. You'll note that,

after critical infrastructure, “online” and “offline” is added in brackets. That was to a point made earlier that it could be critical infrastructure online or some sort of failure and offline. That was point discussed during the last call.

Secondly, in the following paragraph, with the last sentence, you’ll note that there was an issue on the last call about the language “A complaint should be filed with ICANN Compliance.” That language has been changed to “could be filed with ICANN Compliance,” to reflect the different opinions of the EPDP team.

So those are the only two issues that to get agreement on this building block to highlight it green. Thank you. Back over to you, Rafik.

RAFIK DAMMAK: Thanks, Caitlin. Let us start with the first one. I think you said it was about “online” and “offline,” if I’m not mistaken.

CAITLIN TUBERGEN: That’s correct, Rafik.

RAFIK DAMMAK: Okay. So let’s see if there’s any comments.

Yes, Marc, please go ahead.

MARC ANDERSON: Thanks. I sort of remember this discussion, but I don't remember the context around it. I'm not sure that I object to or support this addition, but I guess I'm not really sure what problem we're trying to solve with this "online" and "offline" language. Maybe somebody could give me a little context around this. I'd appreciate it.

RAFIK DAMMAK: Thanks, Marc. Sorry. I had a problem hearing you at the end. Maybe you can just add your comment in that chat. It will be nice.

Yes, Volker? Please go ahead.

VOLKER GREIMANN: Sorry. I forgot to unmute myself. Sorry. I'm not sure that I agree that we should recommend that we communicate the rationale to the requester, at least. I think documentation is perfect, communicating that ICANN Compliance might also be acceptable. But having to communicate that to the requester – why they failed the balancing test – can, in some certain circumstances, be problematic, I think, especially if the documentation would already include some information that they are trying to get at or that would confirm part of an assumption that they were making or that would confirm some already-realized part of the danger, that would be inherently disclosed in the information.

So there might be an issue with disclosing it to the requester, especially if the [refusal] was made for reasons of life and safety of the data subject that's winning the balancing test in this case. So I'm not sure that this should be in there, and I move to strike that language.

RAFIK DAMMAK: Thanks, Volker. So probably it's better to give background and context as to why it was added. I'm asking here, Caitlin, to elaborate more.

CAITLIN TUBERGEN: Thank you, Rafik, and thank you, Marc, for the question. I believe it was during last week's meeting. There were a couple of concerns brought up with the language as it was written. I believe it was Margie and Greg who may have made these comments, but please feel free to correct me. I think that the issue that they had noted was that critical infrastructure wasn't broad enough. I think originally someone had requested that we add financial harm as well, and there was an objection to that. The "online" and "offline" was language that I believe Janis proposed to address phishing attacks or serious online threats. That was what was proposed to allow for that. Thank you.

RAFIK DAMMAK: Thanks, Caitlin, for the background. Just checking if there is any concern with that.

I guess not, but – yes, Marc, please go ahead. Just before that, I understand, Volker, you were commenting about the next paragraph. So maybe it can be confusing, but we can come back later to that. Yes, Marc, please go ahead. Sorry.

MARC ANDERSON: “Critical infrastructure” seems pretty broad to me, so I don’t see that adding “online” and “offline” helps or hurts anything, frankly. So I don’t know. I have concerns that maybe other people reading this won’t really know what is meant by this. I guess I don’t have concerns enough that I’m going to object to it, either.

RAFIK DAMMAK: Okay. Sorry, Marc. Just to clarify, you are objecting to “critical infrastructure”?

MARC ANDERSON: No. I’m not objecting to anything. I think critical infrastructure is pretty broad. I don’t think it needs to be stated – “online” and “offline.” I have questions as to really what adding the words “offline” and “offline” after “critical infrastructure” is trying to accomplish. But, as I said, I don’t feel so strongly that I’m going to object to this, either.

RAFIK DAMMAK: Okay. Thanks, Marc. Dan, please go ahead.

DAN HALLORAN: Thanks. Just to hopefully try to help out Marc, I think, from my recollection, that was an attempt to make it clear that critical infrastructure meant both things like root servers and TLDs servers, which are online critical infrastructure, and the offline would be bridges, highways, dams, and other stuff that’s not online critical infrastructure. I agree it might be confusing. Maybe

we could put examples or put better wording for that. Anyway, that's my memory of how those words got there. Thanks.

RAFIK DAMMAK:

Thanks, Dan. So it seems that the language that's supposed to add maybe more to respond to concerns and to add clarity is maybe not adding it. So I don't see support for it for now.

Let's check for the reaction to that.

I can see there is *beeping* ... umm, okay. So, if there is no support for that addition, I'm guessing that we should strike it. I understand it was proposed by Janis, [but yeah].

Yes, Margie? Please go ahead.

MARGIE MILAM:

Sorry. I was offline earlier. I couldn't respond. This language was proposed because I made the concern that there were instances where, beyond physical issues, there may be potential for an urgent response required. So I would object to moving that addition.

RAFIK DAMMAK:

Thanks, Margie. Let me check again.

Okay. I guess it's not clear to me if there is no objection to that addition. So we can keep that language, probably maybe leaving open what Dan said. Maybe we need to add some example to make it more clear as an implementation note. I think it will be

more helpful. Even listening to this today, I got confused to some extent. So we can keep this since there is no objection. We add implantation note and the examples.

I guess we can move to the next paragraph. Caitlin, can you please remind us which one still needs to be resolved?

CAITLIN TUBERGEN: Yes. Thank you, Rafik. In the last sentence – the sentence beginning with, “If a requester is of the view that its request was denied erroneously, a complaint could be filed with ICANN Compliance” – I’m noting that the language previously said, “A complaint should be filed with ICANN Compliance,” but that there were objections to that text. So we changed it to “could.”

RAFIK DAMMAK: Thanks, Caitlin. So a change from “should” to “could.” Matt, please go ahead.

MATT SERLIN: Thanks, Rafik. I’ve so far resisted getting involved in the “may,” “must,” “should,” and now “could” discussion. I think we appreciate the change in the first paragraph – changing “should” to “could.” I still think that second sentence is problematic. “ICANN Compliance must either compel disclosure or confirm that the denial was appropriate.” I don’t think we want to get into a situation where the disclosing entity does not disclose something because they believe it’s not in line with their local laws, and ICANN Compliance comes along and compels them to disclose

something. I think that's going to get us into a very, very situation and not something that I think we would support. Thanks.

RAFIK DAMMAK: Okay. Sorry, Matt. Just to clarify, you are not supporting the current proposal?

MATT SERLIN: No.

RAFIK DAMMAK: Okay. Thanks. Mark Sv?

MARK SVANCAREK: Hi. I just had a question. Is there an arbitration here? Is there an arbiter? If it's not ICANN Compliance, who is it and under what circumstances?

A related question. Surely there are other things that happened where the contract compels a contracted party to do something and, from time to time, they find that they have a local law problem with it. I think there's an exception process, and certainly you could file an injunction. So just help me to understand how this already works so I can decide whether or not I support this language. Thanks.

RAFIK DAMMAK: Thanks, Mark. Alan?

ALAN GREENBERG: My comment was going to be in a similar gist to that. Right now, if Compliance says you're doing something in violation of the contract, they can start taking remedial action ultimately and de-accredit you. So I don't see how this is different. Whatever processes kick in at that point should apply here as well. So either you agree with Compliance or you make the case "Why not?" But, ultimately, it will lead to losing registrar status if Compliance thinks you're in violation of the contract. So I'm not quite sure why this situation is different than others.

I'm not sure "compel" is the right word, as Matt implied. The words in the contract say you must do something. That implies "compel." So I think we need to be consistent in our terminology, but I don't see how this is different from other potential violations of the RAA. Thank you.

RAFIK DAMMAK: Thanks, Alan. Marc?

MARC ANDERSON: Thanks, Rafik. I think there's a couple things in here. First, I agree with Matt said, but I also want to point out that this is the response requirement building block. So both these sentences seem a little out of place. The first one deals with what the requester ... and just making a note initially that, if the requester disagrees, they should complain to ICANN Compliance. Since the requester really isn't subject to consensus policy recommendations, I think maybe taking a little bit more of a common-sense approach here would

be to change this to be that ICANN Compliance should be prepared to handle complaints related to requests that users feel were denied erroneously.

If everybody follows where I'm going with this, we can say things in the policy language about what the requester can, should, or may do, but that's really not, I think, the intended audience for the consensus policy. The consensus policy really applies to ICANN and contracted parties (ICANN, registries, and registries). So maybe what we're trying to do is add a recommendation that Compliance should be prepared for complaints in this situation.

With the other part of that – “ICANN Compliance must either compel, disclose, or confirm that the denial was appropriate” – I agree with Matt's point. This is dangerous territory. We're asking ICANN to adjudicate on whether the disclosure performed the process correctly.

So, one, I think this probably out of place in the response requirements building block, but I see Eleeza has her hand up. I might be interested in hearing what ICANN is willing or able to do in this situation.

RAFIK DAMMAK:

Thanks, Marc. Marc, I think you proposed some language. I know it was on the fly, but if you can write it down in the chat, I think that can be helpful.

We have in the queue Margie, Eleeza, and then Mark Sv. Margie?

MARGIE MILAM: Do you want Eleeza to answer Marc's question before I go?

RAFIK DAMMAK: Okay. Sure. Eleeza, please go ahead.

ELEEZA AGOPIAN: Hi. Thanks, everyone. I did have a different comment but it's sort of related. So thanks, Marc.

Basically, I guess my question here is this statement assumes that the one disclosing the data is the contracted party. If it's not the contracted party, I'm not sure how Contractual Compliance would be in a position to get involved.

I think it's also important to note that, with what the Contractual Compliance process is, I don't think it would be able to compel disclosure but would have to obviously go through their typical process of determining whether or not there was a breach or violation of the contract. Obviously, that could, at the very end, ultimately end up with de-accreditation.

I just wanted to clarify that point and also raise the question of who's the one who's making the disclosure decision. I know this group hasn't decided on that yet, but that may be why this discussion may be a bit premature to have and might be something worth coming back to or putting in asterisks on. Thanks.

RAFIK DAMMAK: Thanks, Eleeza. Margie?

MARGIE MILAM: I was going to say something similar to what Eleeza said, that it looks like odd when ICANN may be the one that's doing the disclosing.

But, that said – and also Marc's comment about that this might not be the right section for this. So those comments make sense to me. But I do want to follow up on Mark Sv's point that we need some sort of appeals mechanism, where we feel that response was erroneously denied. So maybe it's not the ICANN Compliance process but it's something else. Maybe we need a separate building block on that or separate recommendation related to that because we do have problems today with that scenario, and that's part of the problem: there's no release mechanism or appeals to have something reconsidered or looked at by someone else. So building in some sort of dispute or appeal process I think is really important here.

RAFIK DAMMAK: Thanks, Margie. We have Mark Sv, Volker, and Greg. To mindful of the time, I think we'll close the cool here and again see how we will proceed with this. Yes, sorry. Mark?

MARK SVACAREK: Sorry. Mark Sv, yeah.

RAFIK DAMMAK: Okay. Mark Sv, please go ahead, and then Volker.

MARK SVANCAREK: Sorry. I put my hand down a little too fast. We can argue about whether compelled disclosure is the right thing or whether it belongs in this section, but there has to be some sort of an escalation process, and there has to be some sort of consequence. If there is a party that is refusing to hand over data under all or most circumstances, then this whole policy falls apart. Then what was the point of even doing any of this? So there has to be some consequence for someone who is just intransigent in an indefensible way. Anybody can say, "Well, I was afraid of a fine." "Well, why were you afraid of a fine?" "Well, because I was afraid of a fine." Then there's no resource for anybody.

So, if we are building a consensus policy, there has to be some concept of not just the expected behavior but also consequences for violating the expected behavior. We have all kinds of consequences for requesters. They can have their credentials taken away, their request for indemnification. There's all sorts of consequences for bad behavior for requesters. If there's no consequences for data controllers who refuse to participate in this thing that presumably they've signed a contract to participate in, then I don't see how this is going to work.

So, whether compelling disclosure is the appropriate mechanism or some other consequence, there has to be a consequence. I don't see how there can be any consequences if ICANN Compliance isn't involved at some level. Thanks.

RAFIK DAMMAK: Thanks, Mark. As I said, we'll close the queue after Greg. So let's hear from Volker and then Greg. [I'll] take into account the comments and then placeholder language that was copied and pasted in the chat. Volker, please go ahead.

VOLKER GREIMANN: I'm also not very happy – thank you, Rafik – with the language that's proposed here because that basically indicates that every single refusal leads to an ICANN Compliance issue. As many of my fellow contracted parties know, dealing with Compliance, even if it's a case where you're absolutely in the right, it usually takes 10 to 20 times as long as answering a normal complaint does. I think responses to disclosure request are similar. So, when we're dealing with a limited resource here, opening up Compliance to every single refused complaint will just lead to longer queues, slower response times, and ultimately and unworkable system.

So I'm not saying there shouldn't be a road to disclosure, but there should be something more in there, such as a pattern of unjust refusal, not just the opinion of the requester, for example. There must be more for the road to Compliance to open a single refused request. Otherwise, we are dealing with a situation that will break the system in my view, and that's something we don't want.

RAFIK DAMMAK: Thanks, Volker. Greg?

GREG AARON:

Hello. If multiple repeated potential violations are the threshold for making a complaint, that's a problem. As Mark said, you can have these situations where the requester and the controller can have a reasonable disagreement sometimes on a particular case. That'll happen, but you have to figure out a way to resolve it. And, as Mark said, there will be cases in which the controller may be unreasonable and just says, "We have outlined how requesters can be unreasonable."

To make a request and then hear back "No" and then ask why and to hear "Because"? If the answer is "Because," that's not acceptable. Perhaps one path of escalation is to have a dialogue and have the controllers explain why they made the decision to the extent they're able to. But to have a high bar for making complaints and then not to have some sort of a process won't work. To do otherwise would be unbalanced.

So, if we need to work on something, I'd suggest that we do that. Thanks.

RAFIK DAMMAK:

Thanks, Greg. I heard the concerns with the current language, and we have another placeholder language for now. I ask everyone to look at it. But also I understand it seems that we cannot make a decision about which entity will handle the complaints and so on at this stage. That can be determined later on when we decide about the authorization provider. So I guess we can defer this for later. During the call, I think we had several items that we can respond to only when we really set the parameters to be able then to respond with more confidence and

provide a recommendation there. So I guess we can leave it for now, and probably we need to keep a note that we have to revisit this later. But we can keep now that placeholder language. Please review it in the meantime.

Greg, I'm not sure. I guess that's an old hand. But, anyway, we closed the queue for now.

Just a time check. We have 15 minutes left. I think that we could do what we can do for this building block. To be mindful about the time, I guess we can move to the next. But at least let's have a quick review but not necessarily start the discussion now and remind everyone about the remaining homework. It's important to do that by the deadline so we can prepare for the next call next week.

Let's move to the next building block. Caitlin, again, please give us some briefing and the background.

CAITLIN TUBERGEN:

Thank you, Rafik. You'll note that the text highlighted in orange at the top of the building block is what is currently included in the initial report. This proposed text was sent to the team a couple of weeks ago as a proposal to close out then user groups' discussion.

I will note that, when you click on the text, there are several comments that I incorporated that were in response to the e-mail proposals. So there's comments from the BC, IPC, and Registrar Stakeholder Group in reference to this particular proposal.

Essentially, the proposal is, “The EPDP team expects that the question of user groups will be addressed through the accreditation policy. Specifically, all requesters will need to be accredited, and accreditation will include identity verification, which may include user category or categories.”

Thanks, Rafik. Back over to you.

RAFIK DAMMAK:

Thanks, Caitlin. Let’s see if there are some comments or thoughts for now. Greg, I see your hand raised, but I’m not sure if it’s an old or new hand.

I’m not sure if you can hear me, but, Greg, if it’s a new hand, please go ahead. Otherwise, we can go to Hadia.

Okay. Hadia, please go ahead.

HADIA ELMINIAWI:

We think that it’s important to have user groups because it’s important to state or to say the understanding this group to the users of the system without actually putting some samples in there. I believe we had already a list. I don’t know if it was agreed upon or not, but we did have a list. It’s important to say what we as a group understand about who the users of the system are or would look like. To just leave it vague and say that it will be determined later does not reflect what we actually think as a group about the users. Thank you.

RAFIK DAMMAK: Thanks, Hadia. Margie?

MARGIE MILAM: Hi. I think this language is a little too vague. For example, when it talks about the accreditation policy, I don't see in the accreditation policy where it talks about this. So I tend to agree with Hadia just said, that it'll be more useful to give implementation guidance to the team that's going to look at this and have specificity on who the expected users of the system would be. So I would encourage us to go back to the version we had before this general statement.

RAFIK DAMMAK: Thanks, Margie. Hadia, is it an old or new hand?

Okay, thanks. I'm maybe just thinking here what we can do here. I'm not sure we can resolve this, but I'm trying to see how we can take the opportunity that we are reviewing now this language.

Maybe one idea is to add some examples to see how it works. We're trying here to find some, I would say – I cannot find the right word, but to resolve this because that previous language was not agreed to. So we're trying to find a compromise. I guess maybe having examples that will be more visible and easy to understand and I guess even making it more clear, if we are talking, for example, about implementation. This is the suggestion we have for now. I hope that's something that can be acceptable for you guys. If you can think about this, the idea is that maybe we can add more examples, I guess, to help for the implementation.

I'm trying also to catch up with the chat. I'm sorry if I missed some.

Seeing nobody in the queue and no comments on this, I guess we can for now go with this approach. I think we will continue anyway later on on this topic.

We have eight minutes and I think we can move to the next agenda item. I assume just [two] are up here. Can you please [fill] the agenda?

Okay. The next call would be Thursday, the 19th of December. Thanks, Berry, for the reminder. We have the Legal Committee call on Tuesday. We'll ask Caitlin maybe to remind about any of the action items or all the deadlines and homework. So a reminder about the homework prior to the weekend. Caitlin?

CAITLIN TUBERGEN:

Thank you, Rafik. I will send this along by e-mail as well. Per the updated timeline that we circulated a couple of weeks ago, the next upcoming deadline is Tuesday, December 17th, which is this upcoming Tuesday. That is the deadline for comments and suggestions on the purposes and acceptable use policy building blocks.

Just as a reminder, please put any additional comments or concerns directly into those building blocks in comment form only. Please do not directly edit the text. Then, when we go to the next call on Thursday, December 19th, we will be going over the comments and concerns noted. Thank you.

RAFIK DAMMAK: Thanks, Caitlin. Franck, please go ahead. I think you want to ask for clarification on how we will proceed.

FRANCK JOURNOUD: Well, that's it, other than restating what I just wrote in the chat. I'm not quite sure what the conclusion was on user groups. I know we didn't conclude as we didn't agree on language, but I didn't understand what we're supposed to do with the homework on this. Sorry. Can you restate what we're supposed to do or think about?

RAFIK DAMMAK: Thanks, Franck. But I guess Caitlin wanted to comment before? Caitlin, please go ahead.

CAITLIN TUBERGEN: Thanks, Rafik. I'm going to attempt to answer Franck's question. I believe that the proposal or the action item for EPDP support staff is to look at the proposed initial report text and include in that sentence a non-exhaustive list of examples of types of user groups. I believe that was our proposal going forward particularly because the language that was previously in this building block was not agreed to and there are some EPDP team members that did oppose that list. So our proposal to go forward was to just include a non-exhaustive list as examples and then see if the group could agree to that.

RAFIK DAMMAK: Thanks, Caitlin, for the clarification. Franck, does this respond to your question?

FRANCK JOURNOUD: It does. I just want to say for the record that I'm not sure what the base text is that we're working on. I don't see really that there's more support for the base text and then some, like the IPC, concerned about it and, therefore, it needs some adaptations. So it seems that the base text, which is one the screen right now, doesn't have more support than it has opposition or vice-versa.

My point is that I don't want us to assume that the discussion should start on the basis on something that ... I don't think that it has really more support than it has opposition.

RAFIK DAMMAK: Thanks, Franck. That's why we're proposing to add the examples. That can reviewed by the team later on. We are not assessing here the level of support or not of the base language. I don't think we heard from everyone because of the time constraint. We just started the review, sharing the base language that we thought can be in the initial report. We are proposing to add and to ask the staff to provide the examples. The EPDP team members can review that later on, just to move forward since there is no way to go in depth here for discussing this language.

I guess we are reaching the end of our call for today. Thanks, all, for joining. See you next week. I guess we should also say, "Have a safe flight" to Janis. See you next week. Bye-bye.

[END OF TRANSCRIPTION]