
YVETTE GUIGNEAUX:

Okay. Hello, everyone. Welcome to ICANN's Data Protection Privacy Issues Update Webinar. My name is Yvette Guigneaux and I will moderate today's webinar and the Adobe Connect chat.

Before we start, I would like to remind everyone to follow the ICANN accepted standards of behavior. I will go ahead and those in the chatroom below. Today's webinar will be lasting about 60 minutes, including a Q&A session at the end. To facilitate global participation, we are also providing interpretation services today in Arabic, Chinese, French, Portuguese, Russian, and Spanish. This webinar is being recorded in English and the previously mentioned languages. Links to the recording and presentation materials will be posted on the ICANN data protection privacy section of our website.

We will answer questions at the end of the webinar. Please submit all questions via the Adobe Connect question chat pad. Please include your name, your affiliation, company, organization, along with your question in the box to the bottom right labeled "Submit questions here". We will only be taking questions via that Adobe Connect question chat pad.

I'd like to take a moment to welcome all of you to today's webinar. Our presenters in ICANN include, in the order that they will be speaking, Theresa Swineheart, Senior Vice President for Multi-Stakeholder Strategic Strategy and Strategic Initiative; Goran Marby, President and CEO; John Jeffreys, General Council and Secretary; David Olive, Senior Vice President Policy of Development Support; and Akram Attalah, President of ICANN Global Domains Division.

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Lastly, I'd like to remind you to mute your computers and your phones. That about does it for me. Okay, now, Theresa, over to you.

THERESA SWINEHEART:

Hi, Yvette. Thanks so much, and thank you, everybody, for joining. It's great to see such a large number of participants having joined us today. As Yvette has mentioned, we have several speakers on our webinar to cover a wide range of areas. Our agenda is going to include a general update on our overall activities. I will then touch specifically on where things are with the expedited policy development process, also known as the EPDP. I know many of you in the community are following this closely and involved in that. So, that will be a very good update for us to have. The third area we're going to focus on is the Registration Data Access Protocol, or RDAP as it's known, and an update on that. Then, we'll go to questions and answer. As Yvette has said, if you could provide those in the chat, specifically.

We're going to keep these updates brief and high level because we really want to allow some time for questions from you and the chance to be able to answer those. If I could just have the next slide, please, that would be great. Perfect.

Before we go to our first speaker, aside from myself obviously, I just wanted to share with you this high-level draft timeline to give you a sense of all the different moving parts and the interconnected aspects of them as they relate to the overall GDPR-related discussions and some of the preparations specifically with regards to the law itself.

As you may have noted, the board had reaffirmed the temp spec on the 21st of August for another 90 days. It may be helpful to note that the board is expected to consider reaffirming this again in November and how this compares with the other milestones of both the EPDP team and how it has set out to achieve its objectives as well as the recently opened public comment period on the RDAP profile, so you see some interconnected aspects there as well.

We hope that this webinar specifically will also help you connect some of the different moving parts that you may be involved with, with other activities and the various other pieces that go on.

As you can see from the timeline, there's several aspects that are also leading up to the next ICANN meeting, ICANN 63 which will be held in Barcelona in about two weeks. At that meeting, there's also several sessions which we'll touch on at the end which are some high-interest topics and then some stakeholder-related sessions.

So, with that, I'm going to turn it over to Goran who will provide some more details on where we are in our process. Goran, to you. Thank you.

GORAN MARBY:

Thank you, Theresa; and hello, everybody. For me, it's morning, so I'm going to wish you a good morning. Before we start, I'm going to take you a little bit step back. It was only a year ago in August last year where we came out the first time and talked about actually inventing a process for community interaction when it came to GDPR.

As some of you may recall, there was a lot of resistance from some when we actually opened this up for community interaction. [inaudible] proposals that they should be handled as a pure compliance issue only by between some contracted parties and ICANN Org Compliance.

I was open then and I was open now that I thought this was too important to have anything else than a community interaction. So, we actually did invent the process, but made it possible.

The end result of that process that we invented was the Expedited PDP, which I'm very grateful for the community's work on. The outcome on the first part of the process actually did create a less legal uncertainty for the contracted parties when it came to the collection of the data itself and also provided us guidance about what we then called the [inaudible] model, which in essence shows what kind of data can you show and which information do you have to have contained.

We said [inaudible] that was probably the easiest part of the process because the next part of the process is about who can access to the data.

So, right now, we are in the process of trying to figure that out. From a legal perspective, is it possible to have a unified access model or giving the people that would need information a unified experience where they get access to the data.

This is a little bit harder than the first one because the law is very specific about the role of the data controller. Later, John will provide an update on avenues we're exploring to provide that legal clarity.

I have received a question of why we're doing this right now. As you may recall, the [inaudible] has asked us, as well as our own board, as many of you community members, but also people outside the ICANN community.

I've said all along that this doesn't take away the importance of the ICANN policy work. The only thing we're doing now is to figure out a way if it's legally possible to have a unified access model. We also need your continued input. This is very important.

There's a lot of communications, including from the European Data Protection Board, to make progress on a consistent mechanism for access to registration data. But, ultimately, it is up to the community to decide whether to support a unified access model as a consensus policy.

Later on, David Olive will provide you with an update on the Expedited Policy Development Process, which made recommendations from the [standard access] mechanism.

Our work and engagement with the European authorities is aimed to try to determine whether such a model can be implemented, compliant with applicable law. And again, we are pursuing this path because we have the opportunity now to obtain [advice] from the DPAs while explaining what the organization and community are working to achieve.

With a better understanding of the law, we will all be better positioned to develop, implement, and enforce the legal [inaudible] unified model for legitimate access to non-public registration data.

Any legal authority will receive from the data protection authorities may also diminish the risk for contracted parties who will be unwilling to implement any such mechanism without some [resource] that it's legal. Now, John, over to you.

JOHN JEFFREYS:

Thank you, Goran. As Goran has noted, we've considered a number of different approaches in order to reduce the legal risk associated, in particular to the contracted parties, and we looked at technical approaches to determine what type of model would be in accordance with the law and we're considering some of those approaches and we'll talk about them briefly today.

The first is a technical solution for the authentication implementation for a possible model that could be build on the technology available via the registration data access protocol (RDAP). In this approach third parties seeking non-public data will submit their request to ICANN. ICANN will determine whether the query is approved to proceed. If approved, it would ask the appropriate registry or registrar to provide the requested data to ICANN, which in turn would provide it to the third party. If ICANN does not approve the request, the query would be denied.

ICANN is exploring another approach for legally recognizing ICANN as the coordinating authority of the WHOIS system, with the goal of reducing legal liability of registries and registrars with respective GDPR compliance when providing WHOIS services. This approach explores utilizing provisions under the GDPR, in particular Article 40 for ICANN to

work with the relevant bodies to develop a WHOIS Code of Conduct for the gTLD industry sector. We're pursuing these avenues to determine if they would help ICANN Org to be acknowledged under the law as ICANN has historically been understood to be a coordinating authority of the WHOIS system in particular relating to the generic top-level domains, thus reducing liability for contracted parties.

Last, or additionally, we are also doing some research to determine whether other adopted documents in the European Union recognizing the public interest importance of the WHOIS meet the requirements of the GDPR as they relate to the public interest. We're interested in hearing from you if you're aware of any such documentation that you think might provide us additional sources for this. We raised some of these ideas in discussions including in Brussels and our various meetings and we will continue to raise your ideas and concerns as we engage in further dialogue with the European Data Protection Board.

Moving on, I also want to provide you today with a short update on our litigation. As most of you are aware, in mid-September we provided an update to the community that a German high court had ruled against ICANN's plea to reconsider that court-signed decision. ICANN has been pursuing a preliminary injunction from the German court to require [EPEG], a German-based ICANN accredited registrar that is part of the Tucows group to continue to collect elements of the WHOIS data as required under ICANN's RAA (Registrar Accreditation Agreement) which permits the registrar to sell domain registrations for top-level domains.

ICANN's plea was filed to continue the immediate appeal in the ICANN versus [EPEG] injunction proceedings. ICANN initiated these

proceedings against [EPEG] to seek assistance in interpreting the GDPR in order to protect the data collected in WHOIS. The appellate court again has determined that it would not issue an injunction against [EPEG] but did not make a ruling on whether the GDPR applied to the specific scenario. The appellate court did not address the merits or the underlying issues with respect to the application of GDPR as it relates to WHOIS.

We're continuing to evaluate our next steps in light of this ruling and will look to seek additional clarity in the courts, where possible, relating to the contractual compliance with the temporary specification.

And now I'll turn it over to David Olive for an update on the Expedited Policy Development Process. David?

DAVID OLIVE:

Thank you very much, John. The Expedited Policy Development Process on the temporary specification for the gTLD registration data, also referred to as EPDP, as one knows was launched by the GNSO Council on the 19th of July with the EPDP team convening its first meeting on the 1st of August.

Representatives have been appointed from the GNSO stakeholder groups, as well as appointed representatives from the At-Large Advisory Committee, the Governmental Advisory Committee, and the Security & Stability Advisory Committee.

There are also two board liaisons as well as two liaisons from ICANN Org, one representing ICANN's Global Domain Division and the other one from ICANN's Legal Division.

In addition, anyone interested can observe the EPDP team deliberations by tuning into the audiocast that is provided for every meeting, as well as access to the view-only Adobe Connect room for information on the session and the issues being looked at.

The scope of the EPDP team is to confirm, or not, temporary specification by the 25th of May 2019, the date that the temporary specification will expire. Additionally, the scope includes discussion of a standardized access model to non-public registration data. However, the discussion of a standardized access model will occur only after the EPDP team has comprehensively answered a series of "gating questions" which were specified in their team's charter.

Since launching, the team has met 15 times, two meetings a week, two hours each and most recently completed a face-to-face meeting in Los Angeles. During this meeting, important progress was made as the EPDP team tentatively agreed to consider a number of lawful purposes for processing domain name registration data for the next stage of work which also commenced during the face-to-face meeting, which includes determining data elements required for these purposes, determining the applicable law basis as well as processing and parties involved.

The objective of the EPDP team is to share the outline for its initial report and recommendations with the community at ICANN 63 during a

high-interest topic session which is scheduled for Monday, the 22nd of October from 15:15 to 16:45 local time in Barcelona.

That completes my update. Next on this call will be Akram Attalah who will share some more information about the Registration Data Access Protocol pilot and the public comment period. Akram, I'm turning it over to you. Thank you.

AKRAM ATTALAH:

Thank you, David. As some of you may know, RDAP, or the Registration Data Access Protocol, provides access to domain registration data much like WHOIS. RDAP implementation will help standardize registration data access and query response formats. RDAP has several advantages over the current WHOIS protocol including support for internationalization, more secure access to data, and the ability to provide layers or differentiated access to registration data for legitimate users. That will not require changes to data already stored and accessed via WHOIS. It is simply an improved way to access that data.

As a prerequisite to launching RDAP across the gTLD space, we have worked with the discussion group of gTLD registries and registrars to create an RDAP profile which is now posted for public comment. The comment period will close on 13th October. I encourage you to look at the materials posted on ICANN's public comment page and provide your input on this important work.

ICANN continues to work with the contracted parties to reach agreement on proposals for SLAs and registry reporting requirements.

When agreement is reached, these proposals will also be put out for public comment.

Following these public comment periods, we anticipate publishing a final profile before the end of the year, after which gTLD registries and registrars will receive a legal notice from ICANN requesting them to implement RDAP according to the profile and in compliance with the SLA and registry reporting requirements within 135 days. RDAP services from gTLD registries and registrars are expected to be required sometime in April/May 2019.

This concludes our prepared remarks and I will now hand off to Theresa to open the call for questions. Theresa?

THERESA SWINEHEART:

Thanks, Akram, and thank you, everybody. Just as a reminder, we'll answer questions via the Adobe Connect chatroom, so if you have any questions, you still have plenty of time to type those questions into the box that's labeled "Submit questions here". We'll make every effort to answer these questions in the allotted time, and as a reminder, recording of the webinar will be made available and of course posted on the ICANN data protection privacy section of our website. Should we run out of time or if you have additional questions after the webinar has ended, please, as always, you can always email gdpr@icann.org and we will get responses from there.

With that, let me open it up for any questions, if there are any. I don't see any in the "Submit questions here" section, but maybe there's still

time to type something in. I see that there's some typing, so let me just give it a second.

While we're waiting, Goran, maybe I could ask you a question about the probability of the progress we're making and where we may end up leading that to, in your estimation.

GORAN MARBY:

Thank you, Theresa. The problem is that the law is fairly specific about the role, the individual role of the data controller. So, we actually have to figure out a way within the law to change that and the only way to change that is to lower the risk of the data controller. In legal terms, turning it into some sort of cloud computer provider.

Otherwise, the contracted parties has the role but also the liability to follow the law, as it's interpreted today. That actually creates another interesting side of things because today, clearly, the ICANN community has very little to say about who is going to get access to data for what reason and what purpose because the law defines that legal responsibility lying with the contracted parties.

So, it's not an easy task to try to, within the law, figure out a way how to diminish the contracted party's liability. It's hard to say it's even probable to do that. But I think that the engagement we have with some of the contracted parties and also the DPAs and the European Commission, in a sense, is positive. But the probability is low.

Coming back to one of the things I said, it is also very much up to the ICANN community if the ICANN community would like to have a say

about the opportunity to have an opinion about who gets access to the WHOIS data. In the current legal format, it's very little the ICANN community and its policy working process can legally have something to say about that. Thank you, Theresa.

THERESA SWINEHEART: Thank you, Goran. We have one question which I understand is coming up, so let me just give that a second. Yvette, do you know if that's arising?

YVETTE GUIGNEAUX: The question, the one in the chat pod, this new question, that is brand new. The "Submit questions here" is from Alfredo Calderon and it is a brand new question.

GORAN MARBY: I'm happy to wait for that question.

YVETTE GUIGNEAUX: I can go ahead and read it out loud. Would you guys like me to read it out loud to you? I can go ahead and do that.

GORAN MARBY: Please read it out loud.

YVETTE GUIGNEAXU: Alfredo Calderon had asked, "Does the April, May timeframe imply that WHOIS will not be available to end users as RDAP is implemented?" That's part A and he kind of has a part B to the question. "What will happen if an ISP registrar/registry does not comply?"

GORAN MARBY: There's not only implied, but from April ... When is the law [inaudible]? In April/May this year. Third-party uses of the WHOIS data is diminished because we now have public data and non-public data. According to the law and the current definition of the role of a data controller, which in the current definition are the contracted parties, they are the ones who make that decision. ICANN policies and ICANN community or ICANN Org, to a limited extent, have anything to say about that outside what is provision and the temp spec, which is ...

I really want to make sure that it's not no one's fault. It is the law. It's not a [inaudible] in the law. It is the actual law. So, I would guess that this has been carefully considered by the legislators in Europe many times.

YVETTE GUIGNEAUX: There's a question from Tijani Ben Jemaa. "How can we reduce the responsibility of the contracted party?"

GORAN MARBY: If I knew 100% secure answer to that question, I would say that, but we're in a process of trying to figure out different avenues to answer that question. One of them, as we talked about this morning, is to find a

technical solution to the problem where ICANN Org acts as an intermediate between the requestor of the data and the container of the data, which is of course will be under the provision of ICANN community policies.

The other one is to figure out, for instance, different varieties of what we call Code of Conduct, which is also described within the law but we don't know how to implement it.

I want to again emphasize the fact that nothing of this will happen if the contracted parties doesn't feel that the legal responsibilities in practice are diminished because that [inaudible] if we can't [inaudible] clear case, my understanding is, rightfully so, that as long as they have this responsibility, which also gives the obligation to them to handle the data, I would have guessed – I speak to some of the contracted parties and they are always very happy about this because [inaudible], for instance, when they give out information for these [inaudible], they do that based on their own opinions about the law. And until we get more clarity, they have a risk even giving data out there.

Again, I'm not judging or taking sides [inaudible]. ICANN Org doesn't really have a bone in this discussion. It is the community who makes the policies. We are trying to figure out a way of understanding the law.

YVETTE GUIGNEAUX:

We have a question from Collin Kurre. "I posted my question to the members of the EPDP group a few times, but I'll take the opportunity to post it here as well. Why hasn't the data protection impact assessment been carried out to clarify data flows and ICANN's relationship with the

data subject in light of its [inaudible] data controller? It seems to be useful not only to assist the EPDP members with their policy development work and could also provide clarity to inform litigation strategies.” John?

JOHN JEFFREYS:

Thank you for the question. As you know, probably from the legal postings that we’ve made over the months, this is something that’s been considered since the very beginning. One of the issues is when to do that in a way that is most timely and useful and how to do that. So, we continue to evolve the thinking of how the interpretation of GDPR applies to WHOIS. We have a number of questions which have been addressed directly to the DPAs and to the European Data Protection Board and we’ve had an ongoing discussion with European Commission about how to interpret the GDPR. We believe that those are a better format at this point than doing the assessment, but we continue to evaluate whether that assessment would be the right thing to do and when.

YVETTE GUIGNEAUX:

We have a question from Steve Metalitz. “How does the possible role for ICANN as coordinating authority map onto the distinction in GDPR between data controller and data processor?”

GORAN MARBY:

Before I answer that question, we have in this room no idea why you can’t see the posted questions, which you should. So, I ask any IT to look

into that so you can see any posted question without reading them. This is just a misunderstanding somewhere. Sorry about that.

Steve, your question is good. That is one of the questions we are raising to the DPAs. I'm trying to figure out a good way of answering that question.

For instance, if you take the example of what we now talked about, that if ICANN Org becomes the intermediate between the requestor of the information and the one who [inaudible] information, remember that in the scenario, we will be the one – ICANN Org would be physically the one. And I have to talk about the legal entity, or actually ask the question. And the contracted parties can only answer that question through us. If they receive that question from someone else, they have to say no. You might say that that will not change the responsibility at all. We don't say it will, but while we're saying it, they'll be asking the question. Thank you very much.

YVETTE GUIGNEAUX:

Next question is from Greg Mounier EUROPOL. "According to your engagement with the EDPS/COM, what is the likelihood of ICANN acting as the coordinating authority to the WHOIS system?" I think you may have already answered that, Goran, [inaudible].

GORAN MARBY:

Why don't you post your questions in the chat? I think that makes it easier, as I can see your comments, Alan. Anyway, I think I answered that question. The probability for that [inaudible] interpretation of the

law based on a technical solution I still think is fairly low, but it's high enough for me to ask the actual question. The law's intention is to have obligations for the individual data controllers.

YVETTE GUIGNEAUX:

Next question comes from [inaudible]. "Is ICANN working on any kind of certificate which duly proves that the request for information of contact e-mail has been effectively notified? And two, could you please put some examples of what would be considered as a sufficient due cause for providing non-public information?"

GORAN MARBY:

I don't think I can give you a full answer to it but let me sort of go back and put this into perspective of doing one thing at a time. Let's look at it from a logical perspective right now. The first thing, we all now agree that the contracted parties has responsibility according to the law when it comes to the WHOIS data and [inaudible] have any kind of unified access model, we then need to lower the legal risk and obligations for the contracted parties. That is the underlying question that makes a unified access model possible.

If we pass that hurdle, we still have many other questions, which may or may not be a part of the solution to continue working on. So, we are trying to do this in a step approach because if we won't find out ... I mean, there are three alternatives. First of all, some [inaudible] according to the law and therefore we can't implement any solutions. Or two, it doesn't change anything and therefore you cannot do it. Actually, four alternatives because the third one could be, yes, this is a

good working approach but there are some other issues to be attended to. And the fourth, we don't get any answers at all.

So, it might be so that in a very short while we'll go back to the community and say, "Unfortunately, there will be no unified access model." If there is a potential unified access model where [inaudible], that is something that I hope that the Expedited PDP will pay attention to and work with, because as I've said many times, then it sort of leaves my responsibilities and goes back to the community.

So, some of the questions are a little bit premature if we focus on what the real problem is right now. The legal possibility for having a unified access model for third-party access. Thank you.

YVETTE GUIGNEAUX:

The next question comes from M Ermert. "If the authorization of access to WHOIS/RDAP is under ICANN's control, will it not make ICANN a big target for complaints as an essential data controller? Is that in the interest of the cooperation? How will ICANN decide who has a legitimate reason for access?"

GORAN MARBY:

Yes. That will make ICANN, the legal entity, a big target for [inaudible] which is ... Remember ... I want to use the word corporation a little bit differently, because yes, we are a non-profit legal entity in California, but corporation means that we do this for profit, at least in my eyes, and we're not doing that. We do this based on the mission and the

bylaws of ICANN. And more importantly, we do this based on the policies also set by the community.

If the community thinks that the community wants to have a say about the uses of WHOIS data, we will not – we cannot and will not – do anything against that as long as it's according to the law, or any other law for that matter.

When it comes to who has legitimate reasons to access data, I think that's one of the problems that many of us are ... There's not a clear answer to that question and that's one of the reasons why pursuing to try to create legal clarity.

Remember, we have been successful in that once by getting a better legal clarity when it comes to the model in the first place, the [inaudible] model. So, we are pushing that. JJ, you want to add something?

JOHN JEFFREYS:

Yeah. Just going back to why would ICANN take on [inaudible] responsibility or why is it interesting to us to use an RDAP where there would be a more centralized control. It's essentially that we take this responsibility for providing the technical coordination of the WHOIS very seriously. It's been a fundamental part of ICANN's purpose since it was created. Therefore, we've been continually seeking through this process starting back over a year ago when we were first developing models about how we could allow the WHOIS to remain as close as it is now while still being consistent with the GDPR. And when we look across those models, this is an effort to change the dialogue [inaudible]

not being placed only on the registrars and registries to make decisions, as we currently are almost forced to do in the temporary specification when it comes to valuing those legitimate interests and determining who gets access to the data, the non-public WHOIS data, and how can we, consistent with ICANN's public interest role, decrease that responsibility or liability to the individual contracted parties who are not doing this for a commercial reason, the collection of the WHOIS data, but to allow ICANN's public interest role to be part of that.

So, we feel confident that, for example, the temporary spec is a legitimate way for us to collect that data and to display it. Are there other legitimate ways that could be interpreted under the GDPR to provide that via a uniform access model or other methods? That's really partly the answer to I think the last question.

YVETTE GUIGNEAUX:

We have no other questions at this time.

GORAN MARBY:

Alright. If there are no more questions, I'll look forward to continuing this discussion in Barcelona, and hopefully we will have more information by then. I also would like to congratulate the Expedited PDP for their work. It is important that we collectively continue this multi-stakeholder model. We are always here if you have more questions. You can always send in to gdpr@icann.org or please help us to continue to give comments into our work when it comes to potential unified access models.

It's especially important if you have [ideas] or legal guidance when it comes to for or against a potential unified access model.

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