
JAMIE HEDLUND:

This is Jamie Hedlund, ICANN staff. I sent out in a note earlier today proposing an Agenda for today's call. First and foremost would be to discuss and get any input from folks on the call on the proposed draft report. In addition to the report, we also received one red line from Steve Metalitz on some of the questions, and we'll go over those as well. If there's time, at the end of the call we can also discuss a staff proposal, which tends to be somewhat of a compromise, for an additional trigger. Then we can go into AOB. Does that sound okay? Is there anything else people would like to talk about or add to the Agenda?

Okay, hearing nothing, rather than go line by line through the draft report, I was going to go through some of the sections I thought would benefit the most from live input. If there are other parts people want to cover, please raise your hand. After this call, also feel free to send in suggested edits. With that, I'll start. Christopher, you have a question? Are you able to talk? No, we cannot hear you. Christopher, when you get on, let us know. Okay.

If you turn to page four in the original draft, Section 1.2, deliberations of the Implementation Advisory Group, this one is to see if there are any comments on this section, since this is a summary of the work of the IAG. Work started on January 7th, was guided by the mission and scope, and most deliberations were on the question of what's an appropriate trigger. Does anyone have any comments on that section, as written? If not, we'll move to the next page, 1.3.1, which is the summary of the [IAB 00:04:00] - a summary of the trigger. We're trying to get rid of the echo.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

If you're not speaking, can you go on mute please? Okay, so the first two bullets are a description of the alternative trigger, for which I believe there's consensus support. The first bullet describes the existing trigger, and the second bullet describes the alternative trigger, seeking written opinion from a government agency with enforcement authority stating that a particular WHOIS obligation conflicts with national law. The second, Section 1.3.2 is on the alternative trigger for which I believe there is not consensus report.

It's similar to the trigger that exists in the waver for data retention, and it is captured here as a written legal opinion trigger. That would involve a party submitting a written legal opinion from a nationally recognized law firm, indicating what the law is and explaining how it conflicts with an existing WHOIS obligation. Does anyone have any comments about the summaries of those two triggers as they appear on page five?

Okay, next then we get to public comment on questions. There are four questions here. Steve Metalitz suggested edits. He proposed eliminating the third bullet, and entering in the first bullet the word "solely" after "consisting" and "by itself" after "can" in the second bullet. Any comments on Steve's suggested edits? Or Steve, you've raised your hand, go ahead.

STEVE METALITZ:

I'm happy to walk through this. The first two are really just clarification of what I think is the question that would be asked about these. We're talking about having a trigger that consists solely of having this law firm opinion, and that's a threshold question. Then in the second one,

obviously there could be other factors involved, but I think we're asking the question, since the policy that we're seeking to implement requires a credible demonstration of legal prevention, we're asking if people think that opinion by itself, it constitutes that.

The third question, it just seemed to me that was actually more related to the first alternative trigger, the proposed alternative trigger. I think this is intending to get to, "Is the status quo acceptable?" So I wasn't quite sure why it was in here.

JAMIE HEDLUND: That's a fair point, and I guess in the back of my mind I was thinking of the new alternative, which of course would mean that this question wasn't accurately phrased. So would it be okay if it included both the existing trigger as well as the new proposed trigger, basically saying, "Are these enough?"

STEVE METALITZ: Yes. Something like that would be better, I think.

JAMIE HEDLUND: Okay. Fair point. Thank you.

STEVE METALITZ: The last point also was along more with the alternative trigger again...

JAMIE HEDLUND: Yes, so these questions were supposed to be for both triggers. Maybe it should be a new 1.3.3, so that it's not just about the one above. It's not just about...

STEVE METALITZ: I think maybe it was one. I see in the section I have it goes from 1.3.2 right to 1.3.4.

JAMIE HEDLUND: Well, as part of our accountability we're working on learning how to count here.

STEVE METALITZ: And reducing the number of headings!

JAMIE HEDLUND: Right! Chris and then Bradley. Christopher, can you talk now? Are you there? No. Okay, Bradley?

BRADLEY SILVER: Sure. I was also wondering whether or not it might be better to replace the third bullet that goes really to the heart of what we've been discussing a little bit more, rather than having ground that's already been covered either in past comment periods, or which are already implicit on asking for comments on alternative trigger and the written legal opinion triggers, to whether or not those are reasonable.

The question that I thought might be worth going for is something along the lines of, “Short of requiring contracted parties to be subject to a legal, governmental regulatory action, before they can seek relief from conflicting WHOIS obligation, what other trigger, other than those mentioned above, would amount to a credible demonstration that a party is legally prevented from complying with their WHOIS obligations?” That’s really what would be a valuable piece of input, particularly in the context of what we’ve already offered as potential alternatives.

JAMIE HEDLUND:

Any comments? Patrick Charnley? Do you hear...? You can’t in either. [unclear 00:11:57], go ahead. Yes, now we can hear you. Yes.

PATRICK CHARNLEY:

Hi. Sorry, I was struggling to mute then. I agree with that. I was also going to suggest an addition actually, which was going back to a point we weren’t able to get to the bottom to, and therefore might be suitable to public comment. It’s how you determine whether a legal opinion would be an accurate trigger in the sense of whether the firm is standing. At the moment, I think the wording is “nationally recognized law firm”, is it? Whether we want to open up a question about how you determine whether the legal opinion has indeed come from a firm or whatever the...

Because we didn’t... We discussed that a lot but we hadn’t come to a conclusion on that. So that might be suitable for public comment.

JAMIE HEDLUND: National reputation... Nationally recognized, yeah. Right. Okay, try one more time, Christopher? Okay, never mind. We'll keep moving along until... Here you are. Go ahead. Yes, we hear you.

CHRISTOPHER MONDINI: Thank you very much. Well, first of all, thank you for the last minute suggestions that we will discuss later in the meeting. As I've made quite clear on our email discussions, I have some very general reservations about the paproach ICANN is taking and the contents of the report. Please do not accept my relative silence on the details as a general agreement. I think ICANN needs to look into this from a fundamental point of view, for reasons I'll explain later in the call.

But meanwhile, I just recall that I think it's important that you determine the extent of support for the report, for reasons best known to our colleagues - I know I've not been able to join all the calls either - quite a small number of the Membership of this Working Group actually participates in the calls, and a very small number of people have driven the process. I don't think this is a majority report. I suggest at the end of the day, and quite soon, you have a formal poll of all the Members of this Working Group and we try and determine really whether this is a majority report of this Working Group.

ICANN has got this area wrong for the last nearly 20 years, and I think it's time to correct matters, particularly in the European context, as I instigated in one of the messages I sent to the group, major changes are afoot, which will result in much more restrictive approaches to the use

of private data in a wide range of contexts, including WHOIS, I would guess. I think we're trying to tidy up the past, instead of reformulating and redesigning this for the future.

As some other comments and questions on Jamie's new drafts, basically I'm glad to see the tectonic plates are moving. I'm not quite sure if they're moving in the right direction, but we can discuss that later when you come to it on the Agenda.

JAMIE HEDLUND: Thank you. Christopher, I assume when you mentioned the new draft, you meant the new alternative proposal?

CHRIS MONDINI: Yes. This question of 50 per cent of somebody; whether... Yes. I'll come back to that in detail. I think some of the points have already been queried. I recognize that somebody somewhere is trying to move the tectonic plates. This may be the way to solve it. I'd rather wait until we hear from the registrar community and some of the registries, bearing in mind that at least in the EU we would advocate a single registration procedure for the whole of the EU. All this business of national jurisdictions in this particular area of privacy law is getting a bit old-fashioned.

JAMIE HEDLUND: Understood. Okay, so if it's all right with you, Christopher, we can take up the suggestion of a poll assessment of the view of the group on the report towards the end of the call, after we get through the rest of it.

Okay, so now going back to the report itself, I think the next section that I had hoped to get input on was Section 6 on page 13.

STEVE METALITZ: Jamie, this is Steve. Before we go there, I had a question for Christopher.

JAMIE HEDLUND: Please go ahead.

STEVE METALITZ: Christopher, your reference to the changes that are taking place now within the European Union on data protection, is it your recommendation that we should leave these things in status quo until that EU process is completed? In other words, if there's going to be a new data protection regulation, should we wait until that has come into force, or at least has stabilized, so its text is stabilized before we decide how to proceed? I'm just not clear what the significance of that reference was.

CHRIS MONDINI: Well, I would certainly take advice to start with, and not necessarily from me, I'm just a private citizen. I retired from the Commission more than ten years ago. There are others with much more detailed knowledge of the exact situation of this legislation in Brussels, and we have a large amount of information about that, some of which I sent to you, courtesy of the Internet Society's works. Jamie, you have a very competent staff

in Brussels, ask them to tell us what's going on. Certainly there will be a single regulation that will reduce the scope for variation between the member states.

There will still be some margins of appreciation in the data protection offices. Some have already complained it would be very costly for them to implement it - and bear in mind the Commission would be quite happy to have greater powers invested in the European Data Protection Office. In terms of the timetable, we're coming closer to a decision, but Jamie, you've got the staff and the context on the ground. I'm not even in Brussels. Ask the office in Brussels to answer Steve's question. Thanks.

STEVE METALITZ:

Well, this was... Just to clarify - my question was really whether that was what Christopher was suggesting. I certainly have a lower level of insight into this than Christopher does, I'm sure. I wasn't clear whether he was saying maybe we should put everything on hold until the law changes, or... I'm not sure if that's his position or...

CHRIS MONDINI:

Well, the law will change, so there is a case for taking account of the changes that have been negotiated, and the level of the negotiation is much higher today than it was when this group started its work. Very suddenly, a case for putting things on hold in the sense of not having to come back to this in a few months' time, after the regulation has come into effect. From that point of view, there's a case for caution.

But that doesn't really affect the underlying concerns that I've outlined in the past regarding this report, which placed the burden of proof on individual registrars and the separate legal procedure, which for each exception. I think the underlying philosophy is mistaken. You cannot, as ICANN, in effect as the respecting national and European law, in this case, of an exception. No. The underlying philosophy has to be that ICANN's policies respect the applicable local law, and that was written into the Articles of Incorporation, and insofar as there's maybe some legal room in the current bylaws, that doesn't apply.

The AOI prompt the bylaws on a matter of this scope. So I would still have reservations about the philosophy, concerns about the philosophy, underlying the policy you guys have apparently put together ten years ago. We're still working with it. It's high time we put that all to bed, archive it, and redesign a policy that respects ICANN's obligations and its contractors to respect applicable local law.

JAMIE HEDLUND:

Thanks Christopher. My understanding would be that any change to the procedure would not be affected by changes in any laws, whether national or European directives. The procedure would be the same, and would be, again, unaffected, immune, to any changes in potential laws.

CHRIS MONDINI:

Well, that's a big subject, which could exercise us for a long time. I don't intend to take the time of this conference call on that one. But as a long time supporter of bottom-up consensus-based policy developments by ICANN, you can't go so far in this particular case, as far

as I can see, in the GNSO of all places - you can't go so far as to say in effect this is a legislative procedure that trumps national law. I've just been reading the 25 pages of GAC comments on the CCWG report, and over and over again, governments from all over the world are saying, "Okay, go ahead and do your stuff in ICANN, but please remember that the law prevails in the relevant jurisdictions."

The funny thing is that with different hats on, you guys support that principle when it comes to trademark law. You don't support it when it comes to data protection and privacy law. It's not playable and it will not help when this comes to roost in CCWG and accountability debates. You guys just got it wrong. You cannot attempt, through ICANN policy development, to overrule national law.

JAMIE HEDLUND:

Thanks Christopher. This procedure is aimed directly at creating a mechanism by which contracted parties can invoke a procedure to make sure that they are not in violation of local law. Can I suggest we move forward?

CHRIS MONDINI:

Just a final comment, even if you accept that procedure, it can, as you've suggested, and you've suggested yourself now, it could be vastly simplified - first by shifting the burden of proof, and second, why not? In all other policy areas, notably security, ICANN pursues international best practice. Why not take international best practice in privacy protections? Anyway, I'll leave you to get on with it. I'll listen to the discussions and probably come back later in the call if necessary.

JAMIE HEDLUND: Thank you. Now, unless anyone else... No one else has their hand up. Maybe we can go to Section 6, which contains the somewhat more fulsome description of the consensus and non-consensus proposed triggers. I won't really read through them, but would be grateful for any comments or reaction to this additional text, either here or... Steve, is that a new hand?

STEVE METALITZ: It is. I think... Just looking at the consensus recommendation, the two bullets under that, I think that's a reasonably good description of what we put forward, but I'm just wondering whether you would put in the appendix perhaps the actual language that we put forward?

JAMIE HEDLUND: Yes, I would. That occurred to me after I sent it out.

STEVE METALITZ: Okay. I think as long as it's in an appendix and is referenced, that's fine, so people can see what was proposed.

JAMIE HEDLUND: Okay. Then just because I did not include it, and because there may be people who haven't seen it since you proposed it and we discussed it a while back, we'd circulate this again for another round of reactions. Okay, well, then that is all the areas on the draft report that I was hoping

to get feedback on. Any last comments before we move to the next discussion, which I guess is on the new idea?

Okay, so earlier today in the email I sent, it included a rough description of another alternative trigger, under which contracted parties representing 50 per cent or more of the registrants in a particular jurisdiction could submit a request for a waiver, a petition for relief, based on a law or regulation that they believe - that would be cited - that they believe would conflict with their WHOIS obligations or obligation. This would then create an obligation for ICANN to investigate whether or not the cited law or regulation conflicts with the WHOIS obligation.

ICANN may, in all likelihood, would be required to hire outside counsel to investigate whether or not there is a conflict, and then come back to the community, as well as to the GAC rep, if there is one, soliciting comment on whether to provide relief. Since I sent out that email, there's been some additional traffic by Michele, who I don't believe is on this call, indicating that it may be almost impossible to determine whether or not you've got 50 per cent of registrants in a particular jurisdiction.

An additional comment, at least internally, has been on the question that, Steve, you've raised in the past, on law firms; in that law firms may give conflicting opinions. I guess the advantage of this approach is that because ICANN would be hiring the outside counsel, it would not be biased towards one result or another, since we are neutral, we are just trying to find out whether or not there is in fact a conflict. With that, I

open the floor to anyone who'd like to take a stab at whether or not we should include this in the draft report. Brad?

BRADLEY SILVER: Thanks. Jamie, can you say a little bit more of your actual thinking about this, in terms of its compliance with the underlying policy and the credible demonstration standard?

JAMIE HEDLUND: So, the idea would be that in a case where there is a conflict, the ICANN opinion - and again, likely supplemented by outside advice - would provide that credible demonstration.

BRADLEY SILVER: Right, so really just be virtue of the fact that the opinion is being solicited by ICANN - and I think that makes a little bit of sense - that it would be less likely to be a bias opinion. But it would still be an opinion, nevertheless, from a law firm... Go ahead.

JAMIE HEDLUND: No, please. I'm sorry - I interrupted.

BRADLEY SILVER: I guess I'm slipping back into the same concern that Steve had expressed earlier. It just seems to be a bit of a circumvention of the existing procedure, simply by virtue of the size of the registrar concerned, or the group of registrars concerned, that they would be able to tip the scales

and trigger this procedure. Whereas, far be it for me to make the case for the registrars, there doesn't seem to be any real substantive reason why a small registrar, who may be suffering from a conflict, should be in any different position than a registrar that has many registrants.

JAMIE HEDLUND:

Those are both excellent points. On the second one, the idea was not that a single registrar that accounts for more than 50 per cent would file a petition - rather it was a group of registrars, who together... So the smaller registrar could join that. On the earlier comment, this was not designed to be a popularity contest, so if you can get registries accounting for 50 per cent of more that they don't like something, therefore we have to pursue it.

The idea of the threshold was to create a level of concern, so that if it really is an issue and if there really are registrars concerned about this, then there should be a lot of registrars concerned about it. Even then, even there were a conspiracy of contracted parties to tip the scales, that's only the first part. The second part is we have to go out and find out whether or not there is a conflict - that's point one. On point two, it would be that the opinion would go to the GAC rep, and as you've seen with some other similar petitions, there have been GAC reps who've not been shy in disagreeing with where registrars or registries have come out in the past.

Third, it would also be subject to the crucible of public comment. So if it would be just a bunch of registrars getting together and saying, "Hey, wouldn't it be great if we didn't have to do WHOIS anymore in X

country?” that would be teased out in the second and third steps. But the idea is not to circumvent the policy or the procedure, or not to have them no longer have to demonstrate or... Not just them, but to no longer [dobiata 00:39:50] the need for a credible demonstration of legal prevention. Christopher?

CHRIS MONDINI:

Yes, I'm back online I think. Thank you. Well, first of all, as I said earlier, on the call, I welcome that there's some movement. I think this does move at least in the direction of simplifying the procedure and aggregating it. One of my earlier concerns was the idea that each individual registrar would have to initiate the whole procedure of including the triggers. Secondly, I think it was [unclear 00:40:47], Jamie. There's never been any question of not doing WHOIS anyway.

I think to pick up your words, WHOIS or its successor is very important, but the fact that the information is made publicly available contributes to the fact that the information is often incorrect. So I know a particular registry quite well, and they invest a great deal in ensuring the accuracy of their WHOIS data. One of the guarantees of accurate WHOIS data will not be made indiscriminately public. Regarding the mechanics of your proposal, frankly you've taken me a bit by surprise. It's come at the last minute. I need to reflect and I certainly need to - and so will you - to consult before defining it.

I see potential statistical problems, issues to be resolved. Are we talking about all registrants, or just the gTLD registrants? I think Michele already suggested that the statistical base should be the registrars rather

than the registrants, and certainly in Europe you would want to clarify that this does not include ccTLD registrants, who by the way, in general, enjoy adequate privacy protection in the ccTLD registries. Then I see some administrative problems cropping up. Who's going to do all this work?

For Europe I would certainly recruit the ICANN office in Brussels to collect all the relevant data from all the relevant registrars. But beyond that I think it's too soon to ask me to respond in any greater detail. It doesn't necessarily solve all the problems that I would have, but it's certainly an improvement. One final little point is vocabulary. Please don't use the word "petition". You cannot ask people to petition for the right to respect the law. That is a mis-designation. If you substitute the word "petition" perhaps with the word "register", they would register in a particular category. But petition, no. Petition tends to be invidious.

Let's see how this goes, because I would defer, I would certainly be very interested in a wide range of opinions and comments from registrars. A final point - in Europe, all the European GAC Members meet regularly, normally in Brussels, and if it was a question of the opinion of the relevant GAC Members, I would certainly expect them to do this collectively through the high level group of European GAC Members. So we would recommend a one-off for at least 28 member states. One procedure, one registration, on block.

JAMIE HEDLUND:

Okay, Christopher, thank you. Ashley?

ASHLEY HEINEMAN:

Thanks Jamie, and thanks for your comments earlier. It clarified a few things I had questions about, particularly with the reference to the petition and what it would be used for and what would be the basis of it. From the US Government perspective, I can't speak on its behalf today with respect or not we support including this. I think generally our position has been we're open to additional new triggers, if ultimately the decision can be verified that it came from a credible source.

I think if I had to speak as to where we'd likely come out, it comes down to again having to come from the appropriate government authority, because otherwise, as was indicated earlier, we're at the basis of what we've been talking about to-date, which is the opinion of a law firm. In this case it would be ICANN seeking guidance from its law firm. I think at the end of the day, what's really important to the US Government anyway is verifying that whatever the position that's ultimately taken is the correct one.

I think at the end of the day, if we had to figure out who's best placed to verify it, it's the relevant government agency. We're still open and willing to discuss that - at least, when I say "we" the US G. We're just not in a position at this point to say whether or not we can support inclusion of that particular [unclear 00:46:55].

JAMIE HEDLUND:

Okay. Thank you Ashley. Fair enough. I gave a whole hour's advanced warning, I don't know why you can't clear it! Okay, Christopher, is that an old hand? So what I suggest, or what we could do on both the draft report as well as this additional proposal is send out a revised draft that

incorporates some of the edits that have been provided on this call and by email, and then also include a more robust version of this new proposal, if we can work it out internally, to get people's views. Bradley?

BRADLEY SILVER:

I just had a thought that occurred to me, and I guess it's subject to a couple of caveats. If you can overcome some of the issues that have been raised with determining the number of registrants in a particular country, and how you would get there... What about if instead of the event triggering ICANN obtaining a legal opinion, which I think we've already discussed the potential pitfalls of, it triggered the ability of ICANN to seek an opinion from the government agency charged with enforcing that particular country's privacy laws.

In other words, basically looping around to the alternative trigger that there's the most consensus around at this point. That may go some way to addressing the concern that individual registrars or registries wouldn't want to approach the agency directly, but that if there [was a critical mass 00:49:11] of concern. ICANN can do that anyway, at the moment. ICANN can also get an opinion from a law firm now, if it wants to, if there's a significant number of concerns or complaints from contracted parties in a particular region. That's always been the case, I assume.

But in terms of triggering something that would oblige ICANN to go out and seek an opinion, wouldn't still... If we're in some sort of agreement that the best form of opinion, if it's possible to get one, would be that of

the agency responsible for enforcing and interpreting those particular laws?

JAMIE HEDLUND:

Yes, absolutely, and that approach makes a lot of sense. The only concern is what happens if the agency doesn't respond. Some expressed the belief that a lot of these agencies are not in the business of providing advisory opinions or the equivalent, and so they would be not likely to respond, but maybe there's a way of combining that. You give an agency so much time to respond, and if after that period the agency doesn't respond then ICANN can go to a firm...

I'm just making this up as we're talking. But I agree with you, that an opinion from the regulator, the agency with authority, is going to have the most credibility. Anyone else have thoughts on this? Okay, so Bradley, we'll include that idea in this new draft proposal as well. One would be ICANN gets a law firm opinion, two would be ICANN seeks the opinion of the relevant agency, and third would be ICANN seeks relevant agency and if no response within six months, then ICANN seeks legal opinion from that jurisdiction. Okay, Any Other Business? If not...

CHRIS MONDINI:

Well, there's still the question of the eventual poll of Members.

JAMIE HEDLUND:

Yes, thank you for reminding me.

CHRIS MONDINI: Please don't take this as a specific criticism or undermining of the work of our group here, but having participated in quite a few groups, Competition and Consumer Choice, the CWG - a lot of these things have CW in them -, the basic fact is that out of a large demography of people and institutions who are interested in a subject and will be affected by the outcome, a small number actually register to join the group, and with a few valiant exceptions, an even smaller number manage to come to the meetings, speak and contribute to the drafting.

This is all very well, and it may be human nature and almost inevitable, but we do need - and I think ICANN across the board - needs a reality check from time to time. Because you can't go through that process with such a small number of people, albeit volunteers and often extremely competent and committed, but such a small number of people can't just be assumed to the majority and the consensus of the bottom-up process. I'm recommending in this case, particularly because I have some doubts, but more generally I think ICANN should look into the question of the reality check as to what has really been agreed.

JAMIE HEDLUND: Stephanie?

STEPHANIE PERRIN: Apologies for being late. I shall listen to the recording of course. Secondly, I haven't had chance to go through this proposal in detail, I just wanted to raise a couple of caveats. Number one, I'm not entirely convinced that you could say that ICANN is neutral, because ICANN has basically been pushing this policy, which I don't think is very neutral. So

just a little caveat there. Secondly, and at a practical level obviously, ICANN has a compliance function, and for a compliance function it's useful to have free access to data.

Secondly, the problem with asking for government advisory reps to opine on this, is to the exception of the EU that is more organized and has the Commission as an observer, other countries are not that well organized. We [unclear 0:56:11] other countries, it is going to be the commerce department or industry department equivalent, and they are not as well aware of what their data protection commissioners might find, or what their supreme court might find in a case. I believe I've raised all these objections in the past and I'm just raising them again. I will respond and put this in an email. I would have put this in the chat but I don't seem to be able to type into the chat. I don't know why. Thank you.

JAMIE HEDLUND:

Okay, thank you. So originally I had thought about suggesting a poll after this call, but I wonder if, with the proposed revisions, whether it wouldn't be better to wait until after the next call. On the other hand, the proposed revisions aren't going to change that much, so maybe if we sent out the paper again and then separately sent the new proposal, or some variation of it, and asked people to express whether or not they support the paper and/or the proposal, that would at least get us to understanding where we are with Christopher's question of whether or not this should be a minority report.

I will add that when we send out the email, it would go to everyone, all 80 or 60 or so people who are part of the IAG, allowing everyone to contribute their view. Steve, do you have a question?

STEVE METALITZ:

Yes. It really was related to your last statement. We have a very large group here that's signed up, and a much smaller group of people that actually submitted statements of interest - I think it's 27, which is supposed to be a prerequisite - and we have a smaller group yet that actually has participated. This call has fewer than some of our previous calls eve, but... I'm just trying to understand what the purpose of a poll is that goes out to 80 people, 60 of whom I'll estimate have never participated.

JAMIE HEDLUND:

For what it's worth Steve, I agree. That is a fair point. On the other hand, we don't create... There's no polling qualifications within ICANN, and as we've seen elsewhere there may be - I'm sure there are - more people who are following both the calls, and reading the transcript, and reading the email thread, and not [monthly 01:00:08] participating. Unfortunately, it seems that in a lot of ICANN-related discussions there is a smaller number of people that are actively contributing than are following with interest the discussion.

STEVE METALITZ: I guess I'm wondering what the significance of the poll would be. Because if it's a poll about whether to put out a paper... Again, this is not a PDP either. This is a group to advise the staff.

JAMIE HEDLUND: Yes, no, that's absolutely right. There are recommendations or proposals that are one supported by consensus and others not, so the idea would be, in an ideal world, that there would be a majority consensus support for the report as a whole. I would not have thought of necessarily doing a poll, except for Christopher's view - and I think there were some others - that this document should be reflected as a minority report. I don't know how to confirm or get away from that without doing a poll.

STEVE METALITZ: I would suggest that you have a minority of this small group of active people that think there needs to be a poll. I think this is really, again, advising the staff. I'm comfortable with whatever decision staff wants to make on it, but I'm just not sure what significance you're going to be able to draw from a poll... I agree with you that this is a problem that exists in many Working Groups. This is not a Working Group in the same way, but it does exist in many Working Groups.

It's more extreme here. I think lots and lots of people signed up for this that we never heard from again, as far as I can tell. I'm just suggesting staff should exercise its judgment about whether having a poll would really add anything to the process. That's all. Thanks.

JAMIE HEDLUND: Okay, understood. Anyone else have an opinion on that, as far as whether or not we should have a poll? Some people are typing. Brad?

BRADLEY SILVER: I was just going to say that isn't the process we're currently undertaking, whereby the report goes out to the list for comments, enough of a poll to determine whether or not consensus exists or whether or not they're minority views? At this point, if there is a minority view that's expressed, we can discuss on the call whether or not to include it. There has to be some level of qualification to have someone's views incorporated in the scope of this, which is either by participating on the email list, or by joining these calls, which isn't a terribly high bar to impose.

I don't think it's fair that at the end of the process suddenly everybody gets to put their hand up and say yay or nay. I think the process has been ongoing and it's been transparent and the report is out there for people to comment on.

JAMIE HEDLUND: Okay. All right. Let us think about this. We can also do the poll and then consider afterwards what, if any, significance it should have. Christopher?

CHRIS MONDINI:

Hi. Thank you for this discussion. I think it's been useful. I must say the chat is going so fast I can't keep up with it. As I've said before, I think we should have a poll, I think the questions should put all the members of this group on their metal. Part of ICANN's problem that I outlined earlier is that far too many people think they can sign on for something, perhaps listen to a bit and read a bit, and proceed in placidity. You will not get international buy-in through either the accountability mechanisms or the bottom-up process if this goes on.

You must formulate the question in a way that really puts people on the line. I think in America you say "step up to the plate" - it's something to do with the railways. You have to ask people to step up to the plate and give an opinion. I say this advisedly, because a year ago my position on this was not to participate in this group, because I thought - and still feel - that the primary requirement is for ICANN's legal service to discuss face-to-face with the data protection authorities in the EU.

I think that would have been a more efficient way of solving the problem. I do not want to be either the authority on European privacy law, which I'm not, or the primary or intermediary between the European concerns and the rest of this group. But that's where we seem to be. I think the poll is important and I'd recommend the staff run the question through the group, just to pick up whether there are any concerns about the language of the question.

As a good old bureaucrat, I'd suggest to defer the poll until the next draft of the report, including the outcome of this discussion today has been included in it. I think we can include Steve's amendments, which have finally got through to me - thank you Steve. We can include

Jamie’s alternatives, without the petition, and so on and so forth. Let’s update the report. I maintain a personal reservation on the overall approach, but that’s for me to say and if I need to say it again, but in terms of the procedures of the group, I think Jamie has a good indication as to what to do next. Thank you.

J AMIE HEDLUND:

Thank you Christopher. So yes, given my own legal background I would think it would make more sense to do a poll, if we’re going to do one, on a more complete document. At least that way we can avoid doing two polls. Why don’t we do that then? We’ll update the document with both the edits received to-date, as well as the third alternative, and then send that around, and then have a discussion on our next call, and then after that call we can do the poll.

One additional reason to do the poll would be to indicate what might be a minority position, so that we know if a position does not enjoy certain majority support, that it could be included in a minority statement, and we won’t know what a minority is until we know what a majority would be. Unless anyone has any additional questions or input, we will conclude the call now and give everyone back 15 minutes. Next week we’ll try to be more efficient, in the next meeting. Anyone else? Going once, going twice. All right. Thank you all.

[END OF TRANSCRIPTION]