
[Foreign language]

UNKNOWN SPEAKER: Hello?

MARIKA KONINGS: Good morning. This is Marika Konings from the DC office, we'll get started in just a few minutes.

UNKNOWN SPEAKER: Okay.

MARIKA KONINGS: Thank you for your patience.

UNKNOWN SPEAKER: Hello?

JAMIE HEDLUND: Good morning. This is Jamie.

UNKNOWN SPEAKER: Good morning Jamie.

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JAMIE HEDLUND: Apologies for the delay. If you're not identified in the chat room, could you please identify yourself? One of those numbers is mine, the 202 39 69. There is another 202 ending in 0298? Does that belong to anybody?

UNKNOWN SPEAKER: Hello, do you hear me? Hello? Do you hear me? Hello.

MARIKA KONINGS: Hello?

UNKNOWN SPEAKER: Do you hear me?

MARIKA KONINGS: Yes, we can hear you.

UNKNOWN SPEAKER: Yes. I am in meeting now?

JAMIE HEDLUND: You are.

UNKNOWN SPEAKER: I am [inaudible] time.

JAMIE HEDLUND: Terrific, welcome to the call.

UNKNOWN SPEAKER: Thank you.

JAMIE HEDLUND: Okay. Anyone else who is not identified in the chat room? On Adobe?
Okay. In that case, we're just going to go ahead and get started.

We had sent out last night a draft agenda, as well as a document to start the meeting off with. The first item on the agenda is to review the draft changes to the mission and scope document that we discussed on the last call.

Then to review the notes and output on the question about the appropriate trigger. And then next, move to the third question from the scope and mission about public comment. And then finally, any other business, including scheduling the next call. Does anyone have any feedback on the proposed agenda?

All right. If not, I would propose then moving to the document itself. As you will recall, from the last meeting, there were requests to make some of the language about the objective of the IAG more neutral. We've attempted to do that. If you go down, scroll down to the mission scope section of the document in the first paragraph, we made changes to again, try to change this into a more neutral document.

Any questions about the changes or suggestions for additional changes?

So it now reads, “The IAG’s mission is to identify any problems with the procedure, and suggest improvements that may be necessary to improve accessibility, it should say, to contracted parties.” And then it just makes a factual statement, “To date, no party has invoked the procedure.”

PATRICK CHARNELY: This is Patrick Charnely. I think that looks good.

BRADLEY SILVER: I agree. It’s Bradley Silver.

JAMIE HEDLUND: Thank you. Next paragraph. It again tries to make the mission more neutral. The IAG’s mission and scope will focus on whether to recommend changes to the procedure, and not ICANN’s contractual requirements.

Okay. Hearing no objections, I think we can move to the next item, which is basically to review where we are on what seems to be the meat of the discussion, which... Okay. Before we get to that, we were supposed to talk about process, and should the procedure be revised to allow for invitation prior to contacting. What the notes capture here was, there seems to be consensus support for not starting off just with process, but moving to the trigger, and through [inaudible] process.

A question came up...

UNKNOWN SPEAKER: Apologies for that.

JAMIE HEDLUND: While describing the trigger, we're going to talk about the trigger, those will be addressed there. So then we move to the discussion on the trigger, and looking at, as I said, what seems to be the main substance of the work of this IAG, which is looking at whether additional triggers should be added, or whether the triggers that exist in the current procedure should be modified.

And this first section sort of captures the, what seems to be a pretty wide divide on this issue, with some believing that the existing triggers are inadequate and need to be modified, and that operator should not have to wait for some sort of process to be, an investigation to be launched. And then others believing that the fact that no one has invoked this procedure is not indicative a need for additional triggers.

But that the existing triggers are, in fact, pretty broad, and that essentially they're sufficient. Any one disagree with that sort of current, that summary of where people stand on this question?

Okay. So, I think, you know, this next session summarizes where we were, what the legitimate authority can [inaudible]. What might be helpful to focus on really is, this idea that perhaps a legitimate authority could give essentially an advisory opinion. Sorry. The question is, whether a legitimate authority could give an advisory opinion as to a WHOIS obligation being in conflict with that authority's national law.

And we kind of left open the question about... There was general agreement that that would be okay, where there was less agreement was, or less fulsome discussion, on whether that opinion had to be triggered by some interaction with an operator, usually registrar. Or whether, instead, they, you could, you know, just be, the advisory opinion could be issued without any sort of formal tie to a registrar.

And related to that, whether, if the legitimate authority did issue an advisory opinion, whether it would apply only to a registrar or operator that formally solicited that opinion, or whether it would apply to all operated in that jurisdiction.

So I wonder whether we want to have more discussion and see if there isn't an agreement among on this call, or making potential modification to the existing procedure that would allow, number one, allow for advisory opinions, and two, whether it had to be tied to an operator, and whether it would apply to, you know, jurisdiction wide or only to an operator that triggered the, or solicited the opinion.

MARKIKA KONINGS: Hi Jamie. Michele raised her hand.

JAMIE HEDLUND: Oh, thank you. I have no idea who was speaking, but Michele is Michele and he is a he not a she, but that's okay.

MARKIKA KONINGS: I'm sorry.

MICHELE NEYLON: That's okay, we'll forgive you, this time. Jamie, two things. One, could you please enable scrolling on the document, because I have a sneaking suspicion that you might be looking at a slightly different part of this to the rest of us. So being able to move it would be helpful. If you don't, I think somebody has done that now, or maybe somebody has, no they haven't. They just scroll further on.

I've already said what I... I've already given my opinion on this entire thing, so I'm not going to bore you all by repeating it. But I'm obviously of the opinion that the current triggers are completely inadequate and the process is, speaking as a registrar, completely broken and ridiculous. But I've already said that, so I'm not going to say it again.

JAMIE HEDLUND: Right. You were very clear on that, and I hope I captured that in the notes on the document. There is also, obviously, a strong sentiment on the side, and so, you know, other than this issue of EPA advisory opinions, I am not imaginative enough to see a different way forward.

MICHELE NEYLON: This is Michele again. The one thing I would add is that, it's a registrar who is an affected party. I mean, as a registrar in a country within the European Union, I have contractual obligations enforced on my by a California corporation that put me directly in conflict with both Irish law and European law. So that is a problem, and that problem needs to be addressed.

From my perspective, it doesn't matter a damn whether some third party, who is not directly party to the contract, that forces upon an obligation upon a registrar, doesn't like that. It causes problems for the registrar, registrars who are party to the contract, who are set up within those jurisdictions with data protection legislation. Thanks.

JAMIE HEDLUND: Thanks. I don't, I think sort of taking the other side, based on what's been said in this group, there is no issue about whether there may be conflicts. The issue is a procedure on how to address the conflicts. Maybe I should say...

PATRICK CHARNELY: ...with certainty.

JAMIE HEDLUND: Say that again? I'm sorry.

PATRICK CHARNELY: This is Patrick Charnely speaking. And also how to identify the fact of the conflict, I suppose.

JAMIE HEDLUND: Right, absolutely. And so, there was a policy that was adopted, that allowed for, that allows for a waiver under certain circumstances, and so what this group is charged with is looking at whether it's appropriate to revise that procedure. And Michele, obviously, EU and others have a

very strong view on that. Steve [Metalics] and Bradley and some others have an opposite view. This, as I understand it, this IAG is charged with coming up with consensus recommendations on changing it.

We can, any output would definitely will obviously reflect the differing views, but in terms of coming up with a consensus recommendations, that seems to be elusive on the biggest issues.

MICHELE NEYLON:

All right Jamie, it's Michele. Just, in relation to all of the policies and everything else, I mean the policy that currently exists, predates a couple of important contractual and policy type changes that have come into being since then. There are now two gTLD registries who have a different WHOIS policy, both dot [tell] and dot [cass] have WHOIS policies that are compliant with EU data privacy.

Neither of those, I think, were in place when this policy came into existence. So the question, of course, from perspective would be, if it is possible for a gTLD registry to have a WHOIS policy and... Sorry. Be compliant with their contractual obligations, without having to go out and hurt small animals, why isn't this the case for registrars? Thanks.

JAMIE HEDLUND:

So you're suggesting that it's a human rights issue that you need [inaudible] as well.

MICHELE NEYLON:

Of course, of course.

JAMIE HEDLUND: Ashley.

ASHLEY HEINEMAN: I think Jamie called on me. This is Ashley Heineman here from NTIA. And just to kind of capture the US government's perspective. We're fine talking about additional trigger, and we understand this exercise to be about trying to improve the current procedure. And from our perspective, and I think Patrick touched upon this in his previous comment, we just want to ensure that there is proper verification.

So, we're here to try to make the procedure better. We are more than happy to talk about triggers, but at the end of the day, it's having the proper verification in place.

JAMIE HEDLUND: And when you say verification, you mean verification that the letter came from the right place, or...?

ASHLEY HEINEMAN: Verification, not even... I mean, I don't even think it came from the right place. It's that the information that's provided is accurate and correct.

UNKNOWN SPEAKER: [Inaudible]

ASHLEY HEINEMAN: Well that's part verification, but we're having an internal conversation here.

JAMIE HEDLUND: Yeah. So, that goes to the procedure that, we were talking about last time, about if it's GAC member, if it's a DPA, you know, or the equivalent, from a GAC member country going, building into the procedure a link back to the GAC member to confirm the veracity of the content. Is that fair?

ASHLEY HEINEMAN: I think that's one way, but the stuff that's.... I'm sorry. There is a whole lot of echo. Is that me or someone else?

JAMIE HEDLUND: If you're not talking, please mute your phone or make sure you're on Adobe and phone active. Go ahead.

ASHLEY HEINEMAN: I'm sorry, that was me. In our internal conversations, it's almost as if there needs to be multiple steps in verification, and maybe that then all has to be fulfilled by having a kind of bad stock of different opportunities. I mean, GAC is one potential mechanism, but as I think Michele has indicated on the past call, there is not always a GAC representative for the country in question.

I think the next point of our conversation for the agenda, a public consultation, is that a possible means to have A) another option, or way to verify, but perhaps, and I think we talked about this at some point on the last call, you know, if we could have in place within ICANN a privacy expert, or a privacy lawyer, to provide some sort of an analysis. I mean, I think there is a number of different ways that you could approach verification, I'm not sure in a good place to say which is the best, perhaps there is a couple of them that are necessary, but that's kind of our current thinking.

JAMIE HEDLUND: Okay thanks. All of that makes sense. The last thing about the ICANN privacy person, I mean, we're hearing that in a number of forum, and it would make sense then, but that also brings up the other question of, trusting ICANN analysis, which was touched on yesterday, in the last meeting, although in a slightly different context.

MICHELE NEYLON: Jamie, it's Michele.

JAMIE HEDLUND: Yeah, go ahead.

MICHELE NEYLON: I'm going to do something I rarely do, I'm going to agree with the NTIA. I think there is a couple of things there. It is important to recognize that not all countries do have a GAC member. If there is a GAC member that

can, so somebody who is already within the ICANN circus, that's great. But it's dangerous to assume that that person exists.

I mean in terms of who is the right entity, I mean, in the case of the European Union member states, as far as I'm aware, we all have DPAs, and all of our DPAs are members of Article 29, and Article 29 has written to ICANN on WHOIS, on several occasions, over the last 10 years. And they've also said as well, they don't want a situation where these issues are placing an unreasonable burden on contracted parties. Thanks.

JAMIE HEDLUND: Right. And maybe that could be resolved by [inaudible] suggestion of using public comment to flesh out whether or not Article 29 is in fact the legitimate party.

MICHELE NEYLON: Jamie, with all due respect, Article 29 is made up of the DPAs of the 28 member states. I mean, I'm having difficulty wrapping my brain around a query about whether Article 29 are a legitimate authority or not. My head is hurting. My head hurts thinking about that.

JAMIE HEDLUND: Well I apologize for that. That was not my intention. But I know on the last call, that there was, there were some who read the question about whether Article 29 is in fact a legitimate authority, when in fact, when it lacks authority to enforce privacy laws. And the individual DPAs, obviously, are have that authority, but the question about whether to

accept their view is, we've seen that in lots of different places where it was not, even within the GAC, there was disagreement about their authority.

Okay. So, who is next? Bradley?

BRADLEY SILVER: Actually I was just going to... I think you already said what I was going to say, to remind, from the prior conversation around Article 29.

JAMIE HEDLUND: Okay. So then let's say that we reach wild agreement on the process for determining whether or not, determining both the validity of the content of a communication from the equivalent of a DPA as well as the legitimacy of the body itself. Still, the prior question is, how does that get invoked? So is there support for modifying the current procedure to allow for DPAs, either on their own, or you know, as part of a request, to issue an advisory opinion on the conflict of the WHOIS application with national law?

Because right now, as I understand the procedure, that is not, that kind of opinion is not contemplated. Is that something that maybe used and would be worth pursuing?

MICHELE NEYLON: This is Michele. I am supportive of anything that makes it easier for a contracted party to trigger this process. But for the record, I still think this process is completely not. Thanks.

JAMIE HEDLUND: Okay, we'll go back to that in a second, but the question about the process being completely not, does anybody, does anyone object to the idea of a DPA providing an advisory opinion, and that being sufficient subject to verification to invoke the procedure?

PATRICK CHARNLEY: Bradley, Patrick Charnley speaking, you go first.

BRADLEY SILVER: I'm sorry...

PATRICK CHARNLEY: I was just going to say that, you know, in principle it's fine to talk about DPAs in some countries giving authority to statements, but we can't be certain of that in every territory, so those people expect some sort of caution in taking that as an authoritative as necessary.

JAMIE HEDLUND: Absolutely. DPA is shorthand, but the idea would be that there still would be some form of verification and validation that whatever the authority is, is in fact, the legitimate authority.

PATRICK CHARNLEY: Well I don't mean that they are just authority, but that the opinion that comes out is correct.

JAMIE HEDLUND: Right. And it talks about the legitimacy of the authority as well as of the opinion.

PATRICK CHARNLEY: Yup.

BRADLEY SILVER: Right. And that the DPA itself has some power to enforce, that there is some force behind its opinion as well. I mean, I don't think that that would require an amendment of the current procedure, because I think it's phrased broadly enough to capture such an opinion. If you were this enforcement authority behind it.

PATRICK CHARNLEY: Yup.

JAMIE HEDLUND: Michele, you've written some things in the chat. Do you want to explain what your, elaborate on your comments there?

MICHELE NEYLON: Yeah, thanks. Michele for the record. I'm a bit confused by these comments about the legitimacy. I mean, okay, country X has a DPA, the DPA is the DPA, they have an opinion, done. I mean, I don't understand questioning the legitimacy of the DPA. I mean, either they're a DPA or

they're not. I mean, from my perspective, that's a fairly binary type thing.

I mean, either you are the data protection authority for a particular country or you're not. I mean, I'm confused about that. I don't understand, like, okay sure, maybe identifying which entity fulfills that function where it's not 100% clear, or maybe they have some strange naming schema, but I mean, if they are the data protection authority of a particular country, you know, and they've given an opinion on a particular matter, how is ICANN is qualified to question that?

I mean, that's a matter of national jurisdiction. It's not a matter for ICANN. I'm quite confused by that.

JAMIE HEDLUND:

Ashley had her hand up. Ashley, do you want to address that?

ASHLEY HEINEMAN:

Sure, sure. I just wanted to provide, perhaps, an example of what I think some of the previous comments were going, at least in the United States, it's not so much the legitimacy of the institution, it's of the decision and viewpoint. I mean, using the US as an example, we have a number of different authorities, but it kind of depends on which one is the correct one, whether it's the FTC, whether it's law enforcement, that they're not always going to be the same.

We have different laws that have to be taken into consideration, so it's not necessarily ICANN being the arbiter of who is the legitimate entity,

it's just making sure that they have the correct information that's applicable in this particular case.

JAMIE HEDLUN:

Right. And just to clarify for the record, ICANN does not have an interest in identifying within sovereign countries who is in charge. That would be something either for the GAC, or ascertain through public comment. Go ahead. Ashley, you've got your hand back up again.

ASHLEY HEINEMAN:

I'm sorry, I forgot to take it down.

BRADLEY SILVER:

That was me, it's Bradley. I guess the question is, you know, the advisory opinion of a DPA does not necessarily lead to government taking any action against the registrar, right? I mean, I think that was the point. It had to be a credible demonstration of legal prevention. I mean, we're still at the point where there are obviously different levels of advisory opinions, and we've discussed a number of them from law firms, to ICANN itself, to DPAs, and I realize that we're kind of getting closer and closer to the core of what would represent the requisite authority, or a truly credible demonstration of legal prevention.

But I think what the underlying policy requires, and what the procedure, I think, correctly implements, is the right balance between someone saying that something is not in compliance, and someone actually saying it in a way where it comes from a source that actually amounts to a credible demonstration of legal prevention. And I think that notes an

element of action, as opposed to a mere opinion. And so, I guess if, you know, in an instance where DPA actually has the authority, and to enforce its advice on a particular issue, then that arguably meets the current procedure.

If it's really an opinion and the government has no appetite, or authority, or interest in taking that forward, then arguably it does not. And it's merely an opinion that hangs out there.

JAMIE HEDLUND: Michele?

MICHELE NEYLON: Thanks. Michele speaking. Okay, I mean, I don't know what this kind of hypothetical is that Bradley is referring to. Again, it's confusing me. I can speak, from an Irish perspective, the DPA is the ultimate authority on data protection and data privacy legislation and the enforcement of same, in the Irish jurisdiction. If they issue an opinion on something which impacts an Irish company, then the Irish company better sort itself out, or make sure that it's compliant with the opinion of the DPA, or it can end up in a world of pain.

It's not something that is open for debate or discussion, because they are the arbiter of all of that. Now, maybe in some jurisdictions, that isn't the case, and maybe that is something that happens in some parts of the world, I can only speak to what happens in Ireland, I'm sure Volker can speak to Germany, and he does have lots of fancy letters

after his name, and Theo might be able to speak to what happens in the Netherlands.

But in Ireland, if my DPA says X is bad, don't do it, and I do it, for lack of a better word, I'm screwed. Thanks.

JAMIE HEDLUND: Okay. Anybody want to address Michele's comments? I mean, it sounds like we're back to... I'm looking at Volker's comments in the chat, sorry. Go ahead Theo.

THEO GEURTS: Thank you. This is Theo for the record. I would like to echo Michele's points there. We are in the same boat here in the Netherlands, and that's why I'm also glad we are going to an unified... That we are going from a directive to a law that will be applicable to all of the 28 member states, then we are no longer talking about directives and implementations of the directives, but it will be law.

So that is also one point to consider for the near future. Thank you.

JAMIE HEDLUND: All right, thank you. Okay. Starting to say, Volker in the chat, is raising the question about the, I think the utility of DPA, or changing the procedure to include an option for DPA advisory opinion, because DPAs often don't give advisory opinions, and is pushing hard for... Not pushing hard. But he is saying that what's left is legal advice, presumably from a reputable law firm of some sort.

And on the last call, there was disagreement over that as well. And I think, Steve [Metallics] who sends his regrets for this call, made the point that it was inevitable that we would receive conflicting legal opinions, and what would the community do with that? Does anyone want to again, sort of make the case for a legal opinion from a nationally recognized law firm?

UNKNOWN SPEAKER: What do you mean by nationally recognized?

JAMIE HEDLUND: So that's also a question, but let's just assume, for the sake of argument, that it's a legitimate law firm. The question here is whether an opinion from a legitimate would carry, or should carry, weight?

UNKNOWN SPEAKER: Who would the law firm be acting for? For ICANN directly, or...?

JAMIE HEDLUND: As far as ICANN could solicit that, but it was raised in the scoping mission was the idea that a contracted party would solicit the opinion from the law firm. But that's not to say that ICANN couldn't do that as well.

Michele.

MICHELE NEYLON:

Thanks. Just to those queries about the nationally recognized law firm, that's a terminology that ICANN has used elsewhere. I think the general idea, and Volker or Luc, or somebody correct me if I'm wrong, I think the idea here is that, you know, it is a law firm that exists. It's not some random guy who went off and got a law degree online and operates out of the back of his car, but then again that does entirely break the entire Lincoln lawyer concept.

I mean, the way that this is kind of panned out around the data retention exemption process, has been far from ideal. And there have been comments submitted both by GAC members, including the EU on that particular process. And they've also made comments on this particular process that are very similar in that, you know, the thing is you don't want a situation where, of course, you have your 25 different law firms submitting 25 completely different opinions, but you wouldn't actually have that issue if you work on the basis that once you grant one waiver to a registrar, or a contracted party, in a particular jurisdiction, that that waiver is granted automatically to all of the entities, within that jurisdiction, without any further process being involved.

The problem at the moment is, for some reason, and I honestly don't know where the hell that came from, is that you have to, even if a registrar in a particular jurisdiction were to get the data retention exemption, any other registrar in that same jurisdiction, still has to request us, which is kind of weird.

So I think that' part of where the potential conflict comes up. So the first registrar in jurisdiction A is going to have one legal opinion, if there is none of this kind of every other registrar in the same jurisdiction

having to request the same terms, then the conflict issue is mute.
Thanks.

PATRICK CHARNELY:

Although I suppose, just to develop that a bit further, if... Sorry this is Patrick Charnely speaking. What I think one of the issues that comes up in the notes from last time, is that you do get lots of different opinions from law firms all the time on all manner of issues, and what you're suggesting there is that one opinion that since you can apply across all, then you avoid that situation.

But I suppose the reason that you get a lot of different opinions from law firms is that there is a vast range of quality across law firms, and there will be differences in opinion over the law. So I would just say that there is potentially a danger in accepting one law firm's opinion as necessary as being correct. The comfort point in itself demonstrates the issue with taking law firm opinion.

MICHELE NEYLON:

This is Michele. What would you suggest that people do instead? I mean, if you know full well there is an agreement, a term and an agreement, if in conflict with your local law, you hardly are going to advise one of your clients to sign that contract, or to comply with that particular clause. So how can ICANN enforce a clause in the contract that you know to be in breach of local law, I mean, I just don't understand how you can get around this.

I mean, the things around, there are certain areas of law where there might be, you know, in conflicts around interpretation, but I can't imagine a situation in which any law firm acting for any registrar is suddenly going to say that, "Oh no, no, no, no. ICANN is 100% right and please go ahead and breach European data protection law."

PATRICK CHARNELY:

But I suppose that goes back to the issue that you're talking about one country, and we're trying to do something that's broader than that. Sorry, Bradley, go on.

BRADLEY SILVER:

Yeah. Thanks. I do think the point does come back to, you know, you say if you know that something is in breach of EU, or whatever jurisdictions data protection law it is, I mean, frankly, it's as many of us know, on any legal issue involving agreement, or interpretation of legislation, one lawyer will say, you know, can make an argument as good as another lawyer can make another argument.

In many instances, one argument may indeed be better than the other, and at the end of the day, if one can't come to an agreement, the court has to decide. In this instance, there is no mechanism for that in the context of providing council's opinion. In this instance, the only theoretical way in which to, you know, determine which is the better opinion is for someone to make that decision. And we've already explored the question of whether ICANN can step in and say, we prefer this opinion or that opinion, because they're not in the position to do

so, and they're frankly not, shouldn't be in a position to do so since they, of course, are party to the contract anyway.

They're not exactly in an objective position to make that determination either. So I just think there are too many holes and too many problems with getting an opinion, and the idea of a nationally recognized law firm, as I think, any of us who have dealt with outside council can attest, is that unfortunately, being at a reputable law firm, is not necessarily a mark of quality.

And there may be sole practitioners who are truly in a better position to opine on certain things. And so, even on that basis, I think it is just too fudgey [sic] to figure out if the opinion itself actually amounts to what the policy requires, which is the credible demonstration of legal prevention, as opposed to just an opinion about that.

JAMIE HEDLUND:

But would subjecting it to public comment mitigate the risk that there was a crank lawyer that didn't know what he was talking about, or she was talking about?

BRADLEY SILVER:

I don't think so. I don't see how... I think public comment can be very useful. I think it has a place in this process, but I really think that the place that it's maybe least useful is whether or not the public thinks that a lawyer says is correct. I think that dilutes the pool even further.

JAMIE HEDLUND:

Volker?

VOLKER GREIMANN:

Yes, thank you. I mean, there is an easy solution. I can accept full liability for all of the violations that registrars have committed, are committing by implementing stuff that they are required to under RA, and not getting an exception from ICANN, even though they provided a legal brief that they states they should get an exemption. That would be the easiest way, but ICANN is not willing to do that.

So what are we supposed to do? We have two opinions maybe that say, have different opinions on what is possible under the law. I think ICANN should err on the side of caution here for the registrars, because one of the main principles of the ICANN registrar agreement, and [inaudible] agreement of ICANN, is that ICANN will never force a contracted party to act contrary to what is legal under local law.

That's independent from the entire WHOIS debate, and it's only referenced in there. And that should be the main concern for ICANN and the registrars, to be in a situation where when you err, when you have a decision to make, you always err on the side of caution. So if you have a law firm that states one month, and the other law firm that states two months might be okay, then one month would probably be the way to go, because the registrar cannot afford to be dragged into court over data protection issues that may cost them tens of thousands of US dollars just in fees.

That's not even taking into account lawyer's fees that they will also have to expend to defend themselves. Frankly, I do not see even any merit in

this discussion, other than by vested interests that want to put the registrars in danger of having to pay these costs. Frankly, ICANN should err on the side of caution in favor of their contracted parties, not in favor of any vested interests that might have other interests at heart.

Unless ICANN is willing to fess up and pay for those legal risks.

JAMIE HEDLUND:

Okay, Patrick.

PATRICK CHARNELY:

I was just going to return to a point that you made yourself, actually a moment ago, about the law firms, separating out the point that has just been made about, you know, where ICANN should make its call. And that you're referring to an opinion of a crank law firm, but I think that it's important to be clear that you could have the three top firms in any country, opining differently on a point of law, and I accept that what Michele says that there may be cases where things are very clear, but really, I think, as Bradley said, those who deal with outside law firms quite regularly, will not it's unusual to get an opinion that's the same from two law firms.

So we're not talking about crank law firms, we could be talking about the top firms not agreeing on the same point, and therefore it just doesn't seem the right way to go to me.

JAMIE HEDLUND: Yeah, understood. And I was sort of trying to take an extreme case, but you're absolutely right. Law firms will often give you opinions that one wants. But that goes back to the advocacy of public comment as a means of sucking out what's right and what's not. Particularly if it involves GAC members.

PATRICK CHARNELY: Yeah, but what is, is it the right way to go to sort of accept the testing model that is flawed with the hope that a capsule will save the system, I'm not sure.

JAMIE HEDLUND: Okay. So next, I've lost track of who is next. Is it Volker or Ashley? Who had their hand up first. Ashley, go ahead.

ASHLEY HEINEMAN: I just wanted to comment that... Oops, is it my turn or no?

JAMIE HEDLUND: Yeah, please go ahead.

ASHLEY HEINEMAN: I just wanted to touch upon the last comment regarding the public comment process. I think that's worthy of conversation. At least at this point, my view is that couldn't be a standalone safeguard. I mean, it might be part of a package, but I think part of the issue is, is that who is going to...? The amount of time and energy necessary to bird dog that

sort of thing is going to be complicated, but it definitely could part of a broader process.

JAMIE HEDLUND: Then do you have any ideas about what else would be included in this broader process?

ASHLEY HEINEMAN: Just to take advantage [inaudible], I would reiterate what I've said previously, which is, reaching out to the GAC, and perhaps having some sort of legal expert at ICANN to have some kind of role to kind of follow up on these, whether their legal opinions, or whatever it is, the trigger is going to be at this point, to check on the validity of it.

JAMIE HEDLUND: Okay. Volker, I think you're next.

VOLKER GREIMANN: Yes, thank you. One of the problems here is that we're talking about written laws and what the courts make of it. There may be not even specific written phrase that says, place [inaudible] is okay, six months is okay, this data is okay, this data is not okay.

It will be a very general rule that's written down in law and that will be interpreted by the courts. Now, there may be legal opinions of what they think is too risky, what courts will probably turn down, what courts

will probably accept, but that is why I am saying, we should always err on the side of safety for the contracted parties.

Of course, there should be an objection process, but I don't think a public comment is the right way to go about it, because you might get comments from people who have an interest in having it differently, and they will just provide their comments, even though they have no legal background, and no knowledge of the facts.

For example, if Steve comments on German law, I would frankly say that is his interests talking, and not his legal knowledge over German law. So basically what we would be looking for is if a registrar comes forward and says, "This is what we have from our law firm. This is what we need to have to be in compliance with our local law," then ICANN will take that, apply that to that registrar, and maybe go to the GAC and say, or the specific GAC member for that country and say, "This is what we have on the registrar. Would you be able to confirm or deny that this is what is actually the case in Germany?"

And if the GAC member then goes to his, the relevant bodies within his country and comes back with a statement saying, "No, this is overreaching for these and these reasons," then we would have a discussion. But just a public comment where everyone can say something, I think is worthless. It has to be some form of authoritative voice that comes out in opposition of what the registrar has provided as a legal opinion.

JAMIE HEDLUND:

So that then raises a question, if we were going to go that route, about who is an authoritative voice. Obviously, a GAC member might be that person. An ICANN privacy expert could be that person, although that, you know... Some may have issue with that. I'd be interested in hearing if there are other authoritative sources other than those, particularly for non-GAC member countries.

Michele, you've had your hand up for a while.

MICHELE NEYLON:

Thanks. Michele for the record. And I'm going to have to drop off in a couple of minutes, because my day job is getting in the way. Just briefly, to figure out the public comments, I don't have an issue with opening stuff up for public comments, that's fine. It's the quote/unquote ICANN way of doing things, which is fine, but the question, of course, is, who is making comments and what authority do they have, when you're dealing with things which are matters of jurisdiction, matters of national law?

So for example, if somebody wanted to ask who is company X, on what authority is company X able to speak on topic Y, or something like, then okay. Theoretically I don't have a problem with that, but it would be completely ridiculous for an entity in, I don't know, I'll pick Argentina, to start querying the validity of, I'll pick Germany, Germany state of privacy laws. I mean, that's completely nuts.

I mean, much as we in Europe may look at some of the US legislation and think it's strange and everything else, and may not like it, it doesn't apply to us. So we don't have any standing. And I have standing when

it comes to Irish law or other laws which directly impact me, and directly impact my business. I don't have standing for laws in, I don't know, China or whatever, and it's the same thing with this. Thanks.

JAMIE HEDLUND: Thanks. Patrick.

PATRICK CHARNELY: I've taken my hand down. I was going to say something previously, but we've moved on. I'm also going to have to drop off, by the way.

JAMIE HEDLUND: Okay. So, let's see. The next thing, this has been a really good discussion, in my view, for what it's worth, and I have a sense that we could discuss it, these issues for a lot longer. I'm not sure it makes sense to move to the next question, which is on public comment, although we've already touched on it, really without coming to some conclusion on the question of the trigger.

And I would be interested if anyone has any views on how to reach a conclusion, how to memorialize that. Certainly we can write up the notes, and then turn that into a paper illustrating the different arguments, but if anyone has other ideas, please do share them. Ashley? That was old.

Any thoughts on that? On either on not touching public comment question yet, until we sort of finish discussing the trigger comment, or on next steps moving forward? Volker?

VOLKER GREIMANN: Yes. One thing that I would like to make sure of is that, unlike what we have experienced in the past, that this cannot be a negotiation where we come with a legal opinion that states this is the law, this is what we have to abide by, and ICANN comes back to us and say, “How about this?” Without any legal foundation? So just because they think it might be easier to stall that to the community.

That is not the situation. This is not a negotiation, this is a legal question, whether A or B, and with very real risks to the contracted parties. So, unless ICANN can provide a very definite source that states what the registrars have provided, that the legal council that the registrars have provided, or reputable law firm engaged by the registrars have provided, is not the entire truth, then it should be taken as gospel.

JAMIE HEDLUND: Okay. Patrick.

PATRICK CHARNELY: I think that’s a difficult position to support on the basis that, it assumed that the law firm opinion is credible, correct, the rest of it, and puts a higher threshold on showing that it isn’t. But as we’ve identified, there are major issues with getting consistency out of law firms, and people being able to have the adequate assurance that the opinion that’s been put forward is indeed, at law, correct.

VOLKER GREIMANN:

Can I come back to that? I mean, I agree that different law firms have different opinions, and I agree that there will probably be some margin of error within that. However, we as registrars cannot afford that margin of error against us. It always has to be, we have to be in a situation where we can be legally certain that what we're implementing, that what we, of course, customers to provide what we're storing as customer data, is what we are allowed to store.

So, what I'm saying is, we go out, we pay a big law firm money to provide us with an opinion of what they think is what we can do and what we can't do. And we provide that to ICANN. That's an incredible cost and effort on our part, already, just to be able to comply with the [inaudible] process as it is. Then ICANN needs to go out and find an authoritative source that says, this is not the case, or this is wrong here, and here, and here, and this is where you don't have it right.

And can be certain, in a way that the registrar can be certain that this is correct, because the registrar then assumes to be, to take the risk of the ICANN's position to be right. [CROSSTALK] ICANN can provide that. ICANN should say, "Okay, we'll grant this for the time being, and once we have better information, other information that contradicts what you're saying, that is more reliable than what you've provided," the registrar's provision should count. It should always be in favor of the contracted parties, unless there is a significant, how do you? Preponderance of information that would suggest that a different part may be possible.

JAMIE HEDLUND: Okay. Bradley, you've had your hand up for a while.

BRADLEY SILVER: Yeah. I mean, I just think that some of what Volker was saying, I think, does point to some of the problematic aspects of starting off this process with an opinion from a law firm. So, if a law firm gives an opinion, ICANN receives it, then surely ICANN needs to seek its own legal advice, and that's already provided for in the conflict procedure as it exists, with a step by step process whereby there would be general council analysis, and then ICANN would then suspend any proceedings against the registrar for potential breach based on that, and that there has to be a report to the Board for decision, and that there is a potential for comment regarding that decisions that the Board can make a determination.

I do think that the process by which particular contracted provisions, which obviously were not, you know, drafted in a simple fashion, were results of a great deal of discussion and negotiation between ICANN and registrars should be undone in a way that it doesn't include these safeguards. So, I mean I do appreciate the position that the registrar is in, in relation to a potential legal threat, but I also think that if one looks at the current procedure, and you know, the basis on which ICANN would suspend any enforcement of the problematic provisions against the registrars, that may be an issue.

That addresses those concerns, and I think, already incorporates that.

JAMIE HEDLUND:

Thanks. Volker?

VOLKER GREIMANN:

Yes. I'm not saying that there shouldn't be some sort of possible feedback from other parts of the community, but I'm seeking a commitment that the registrar would not be put in a position that requires them to violate local laws, and requires him to first be sued, and then find out that what ICANN forced him to do is illegal under the law. So if the registrar goes out and provides a legal opinion, then there might be different legal opinions that state something else.

However, that may be the reason because the point of law is not clear, or has not been determined by a court yet, and a court may very well find that the other legal opinion is right, but it also may very well find that the registrar's legal opinion is right, and this is not a question of what anyone wants, it's a question of legal security. As a registrar, I cannot accept any situation and I can also state in its agreements that it would not put registrars in any situation, where it would be required to break local laws.

And in some cases, these laws are interpreted by courts. In most cases, actually this will be the case, and these interpretations are sometimes a bit like a lottery. There is certain indications of which way a court will turn, but if one, if there is a difference, for example, between two months, than that might be just an interpretation of what these law firms think, the next court will decide, or might decide if faced with a situation like that.

And if there is any uncertainty on how a court may decide, then lets err on the side of safety, because ICANN, as I say it again, should not put registrars in any situation where they would be required to break the law or violate any legal provisions.

JAMIE HEDLUND: Okay. Bradley, is that an old hand?

BRADLEY SILVER: Yeah. I think we're repeating some of the same positions we've repeated before. And again, I think, what we need to come back to is the question of not whether or not the registrar should suffer any harm, or be put in a position where they're in fact, of being accused of breaking the law. The question is, does the procedure allow for a way to activate a mechanism that releases the registrar from their possibility.

And you know, we need to be focused on that mechanism, that trigger. That's what we've been talking about this whole time. And you know, anything that happens after that trigger, I think is not necessarily within the ambient of what we're trying to figure out here. And so, all of the things that Volker mentioned about, you know, potentially being dragged before a court, or you know, put in a position where they may have liability, I think it would be addressed, as long as there is a credible demonstration of legal prevention, which may just, you know, amount as much as a letter from the relevant enforcement authority saying, in our view, this is contrary to data protection law.

And that would be sufficient to trigger the procedure.

JAMIE HEDLUND: Okay. So one reason that, oh sorry. Michele.

MICHELE NEYLON: Yeah, I'll keep this brief. I mean, just the thing here is ultimately, if the current process worked, and it was possible for those of us who are impacted by the current contractual obligations, and are in jurisdictions where this is an issue, if the current process worked, believe me, we as a company would apply it, and I'm sure key systems, EURO DNS and the other registrars who were on this call, would all have applied.

The problem we have is not so much getting it to a point where something that we can actually trigger it, but getting it to a point where it's something you can trigger, without ending up in a world of pain. I mean, the kind of thing that has happened in the past with some of these processes is that you end up having to, quote/unquote, negotiate matters of national law, and you can't negotiate matters of national law.

And I'm not a lawyer, but even I know that. That's quite easy. And the costs and everything else, around this kind of process, are big. I mean, for a small registrar, or even a medium sized registrar, the legal costs involved escalate very, very quickly. I mean, if you're being billed out at, I think our lawyers charge between 250 and 400 Euro an hour, so you could be looking at running up 10, 20, 30, 40,000 Euro in legal costs for something simply because ICANN has a significantly larger budget at its

disposal, and will throw both its external legal counsel and its external legal counsel's external legal counsel at you.

And that is a problem. Thanks. Just Jamie, one other matter, which is not directly related to things being discussed, but I think it's something we do need to address, and there is one more to do with process, but the SOIs for this particular group, they don't seem to be complete. Thanks.

JAMIE HEDLUND:

Okay. I urge everyone on the call to check out review their SOIs, or submit them if they have not already been submitted. They should have been submitted before this process, even before we started with these calls.

Let's see, Volker.

VOLKER GREIMANN:

The other alternative, if ICANN is not willing to have whatever public backlash there may be from giving the registrars what they have requested, is that if ICANN is so sure of their position being right, i.e. it's so sure the legal opinion provided by the registrar is not correct, that they in turn, then say, "Okay, we've got the legal opinion. We don't think it's correct. Here is what you can do. This is what we are willing to grant you as an exemption. And for any difference between this and your legal opinion, if you're sued for that, if you have any legal costs, if you have any business costs, if you have any damages for this, we will indemnify you fully for that."

That would be a solution. That would make sure that ICANN only contests legal opinions where they have different legal opinions that they've obtained, that makes them sure enough, or sure with the significant security that, what they are providing is correct, and not what the registrar is providing, and putting their money where their mouth is for any cases where they're not correct about it. Up what they think might be the law.

I think that would be a solution that could be acceptable for many registrars, but I don't think ICANN would go that path for some reason. I mean, on the one hand, ICANN is very sure that their legal opinion is correct, and that the registrar's legal opinion is incorrect, well then put your money where your mouth is.

JAMIE HEDLUND:

Yeah, just to be clear. This isn't about dispute over a legal opinion right now, and ICANN's view [inaudible] process to make sure that registrars are not in conflict with national law.

There is one thing that's been raised in the chat is the idea of an independent privacy officer within ICANN, that's independent in a way that the ombudsman is, which I assume means would report to the Board rather than the CEO, or ICANN staff. And so I was just wondering if anyone had a view on if there was such a person, whether that person could be entrusted with the responsibility of determining the extent of [inaudible] privacy laws and potential conflicts?

Michele?

MICHELE NEYLON: Thanks. Michele for the record. Obviously, I like the idea because I was the one who suggested it in the chat. So that's no big surprise. I think the thing is really, the privacy issue with, and it's which you could also classify it as a human rights issue, is something that is much bigger and broader than WHOIS, it's something that impacts a whole bunch of different things around policy contracts and everything else.

And a lot of organizations, even quite small organizations, have privacy officers or somebody entrusted with that. So it's a bit surprising in many in many respects that ICANN is an organization of its size, especially when you look at the remit and the fact that ICANN is a data controller, I mean, that's an important thing. ICANN is a data controller, and yet, even though it is not, even though it is a data controller, it does not have anybody in charge of data privacy, which is rather odd. Thanks.

JAMIE HEDLUND: Ashley?

ASHELY HEINEMAN: I'm not opposed to the idea of a data privacy officer, but I think, at least from my perspective, it's more important to have a legal expert. Somebody who understands privacy laws, not necessarily, I'm not opposed to a privacy advocate, but I see more of a need for someone with privacy legal expertise.

MICHELE NEYLON: This is Michele, just briefly. I wasn't saying I would actually agree with you. You're looking at somebody, a privacy officer be about somebody with a legal background, or whatever, someone who knows what the hell they're talking about, who understands the legislation and everything else. I'm not talking about some kind of tree hugging whack job, who thinks that they know everything about privacy, and doesn't actually have any qualifications. Thanks.

JAMIE HEDLUND: And I was going to apply. Volker?

VOLKER GREIMANN: Sorry, old hand.

JAMIE HEDLUND: Okay. Michele, is that an old hand? Okay. All right. Anything else anyone wants to say about the trigger before we close the call? Particularly any ideas on moving forward? I would be particularly interested in what kind of documents for the next call might be helpful.

ASHLEY HEINEMAN: Jamie, this is Ashley. I just have a question with respect to how you kind of foresee this group moving forward? And I apologize if this conversation has been had before and I wasn't there. But it's just not clear to me, I mean, the conversation is great. I think it's helpful to get all the views on the table, but in terms of, is there is going to be a point

in time when we put pen to paper? And if so, how is that going to play out?

How much...? The biggest issue for me is that I can't speak as an individual. I have to be able to communicate with my inner-agency colleagues, and having, like knowing what the direction is, and having access to documents, preferably at least a couple of days we have a call or need to take action, is kind of the constraint that I'm working under. So I didn't know if there was kind of a vision in your head as to how this group was going to proceed.

JAMIE HEDLUND:

Yeah, so like the transition, this would all happen in the dark of night. No. I apologize for the lateness of the documents getting to people this time, and I would commit to getting people whatever follow-up documents we decided are most helpful, you know, well before the next call, which would be the next, first Wednesday of April.

This group is charged with making recommendations. So at the end of this, or revealing what the recommendations should be made. So my sense is that this group does need to put out some sort of output document, that has any recommendations, and that might be necessary, as well as summarizing those points in which consensus could not be reached in outstanding issues.

So, this discussion today has been helpful in fleshing out people's views. I can capture those in a document for the next meeting, but if people think that something else might be more helpful, or that the additional

documents would be helpful, additional outputs would be helpful, I'm happy to do that as well.

The... Can people hear me?

UNKNOWN SPEAKER: Yup.

JAMIE HEDLUND: Okay...

MICHELE NEYLON: Yes we can, loud and clear.

JAMIE HEDLUND: Okay. So I would not expect, Ashley to answer your question, I would not expect the next call to be decisional. My sense is that this group is not really in a position to make any, reaching final conclusions or, you know, even draft conclusions. And part of that, obviously, will depend on what output we provide as staff support. Is that helpful?

ASHLEY HEINEMAN: I think so.

JAMIE HEDLUND: Okay. So, in that case, we'll work on summarizing where the issues and where people stand on them for the next call. And on the next call,

maybe we can start talking about draft conclusions or points that would be made in an output document, based on the discussion we've had, the discussions we've had to date.

And if we need to have more discussion around these points, we can do that too. Okay. Anything else anyone would like to say before I close the call?

All right. Thank you very much all for participating, and I look forward to talking to everyone in a month.

[END OF TRANSCRIPTION]