JAMIE HEDLUND: This is a facilitated recording of this meeting. This is the second meeting of the IAG on WHOIS Conflicts with National Law. At the last meeting, there was a lot of discussion about – it wasn't a terribly long meeting, but there was some discussion about the charter and the scope and mission, as well as how we would work going forward.

The proposed agenda for today is first to see if anyone has any comments or thoughts from the last meeting, but then in the substance of the meeting, it's to discuss and see if there any more comments on the scope and mission of this IAG, and then second is to discuss the first question in the charter having to do with the existing process.

With that, I'll ask: does anyone have anything that they would like to say about our first meeting three weeks ago?

Okay. The next issue is to discuss and hopefully reach a final agreement on the scope and mission of the IAG as reflected in the charter. Does anyone have any questions about that or have any comments about it as it's laid out?

All right. Hearing none, we'll go to the next—

STEVE METALITZ: Jamie, this is Steve Metalitz.

JAMIE HEDLUND: Hey, Steve.

STEVE METALITZ: I t raise my hand in the Adobe Room.

JAMIE HEDLUND: Oh, I'm sorry.

STEVE METALITZ: Michele did also.

JAMIE HEDLUND: Thank you for pointing that out. Go ahead.

STEVE METALITZ: Thank you. I had one comment on the mission and scope, and one more general question about this call. The second sentence on the mission and scope says, "The IAG's mission is to make procedure more accessible to contracted parties." I think that presumes that it is not currently accessible, or not currently accessible enough. I don't make that presumption, so I'm wondering whether that's really an accurate statement of our mission, or whether we're supposed to identify if there are hurdles to accessibility for contracted parties that ought to be addressed – something along that line. I just think the way this is phrased it kind of assumes a conclusion that I don't think is being made. That's my substantive comment on the mission and scope document.

My procedure comment is really just to say I see that, again, in the Adobe Room, about half of the people are just listed by part of their numbers, so I'm not quite sure who is on this call. I don't know if this was done the last time or not, and maybe it was – I wasn't on the last

call – but I wonder if we could just have a roll call of who is participating. Thank you.

JAMIE HEDLUND: Absolutely, and Steve, that's a great point. As you all know, we've rolled out a new conferencing platform, and often it will only, when it's linked to Adobe Connect, spit out phone numbers.

So yeah, unless anyone objects it would make sense to do a roll call now. This is Jamie Hedlund.

STEVE METALITZ: This is Steve Metalitz from the Intellectual Property Constituency.

BRADLEY SILVER: This is Bradley Silver with Time Warner.

JAMIE HEDLUND: Hi, Bradley.

SETH REISS: Seth Reiss with ALAC.

MICHELE NEYLON: Michele Neylon, registrar.

ASHLEY HEINEMAN: Ashley Heineman here, NTIA.

JAMIE HEDLUND: Hey, Ashley.

HOLLY RAICHE: Holly Raiche for The Internet Society of Australia.

KAREN LENTZ: This is Karen Lentz and Anna Loup from ICANN on the call.

MARGIE MILAM: I'm Margie Milan, staff.

KEVIN KREUSER: Kevin Kreuser, ICANN.

ALLAN GHAZI: Hello?

JAMIE HEDLUND: Yes?

ALLAN GHAZI: Do you hear me?

JAMIE HEDLUND: We do.

ALLAN GHAZI: This is Allan Ghazi from Palestine.

JAMIE HEDLUND: There's a horrible echo. I don't know if you have both the dial-in and the audio on for Adobe Connect. Could you repeat your name?

[ABDUL]: Hello? Hello?

JAMIE HEDLUND: Yes.

[ABDUL]: Hello?

JAMIE HEDLUND: Yeah, that's better.

[ABDUL]: Did you want [inaudible]?

JAMIE HEDLUND: Yes, if you could just repeat your name. I'm sorry. There was an echo before. I didn't get it.

[ABDUL]: Yeah. I'm Abdul from Cameroon.

JAMIE HEDLUND: Okay.

[ABDUL]: I want to just ask some question about the national laws comprised to my country. In Cameroon, we don't have—

JAMIE HEDLUND: Sir, would it be okay if we just finish the roll call, and then we'll get to your question?

[ABDUL]: [inaudible]

JAMIE HEDLUND: No, I'm sorry. If we could just finish the roll call first and then go to questions.

ALLAN GHAZI: Hello? That's me again: Allan Ghazi. Hello?

JAMIE HEDLUND: Yes?

ALLAN GHAZI: That's me again. Allan Ghazi.

JAMIE HEDLUND: Okay, thank you.

ALLAN GHAZI: From Palestine.

JAMIE HEDLUND: Yes, I understood that. Okay. All right. Thank you. Anyone else? If not, we'll move on. Steve asked a question. We'll address that first. Then we'll move to Michele, and then to Abdul. Is that acceptable?

Steve, I think you were asking whether the phrasing of that sentence that suggests a presumption that there is a problem should be rephrased to something along the lines [of] looking at whether there is a problem of accessibility. Is that correct?

STEVE METALITZ: Yeah, to identify any problems and suggest improvements to deal with that, or something like that.

JAMIE HEDLUND: Does anyone on the call have any thoughts about that?

BRADLEY SILVER: I'd agree with that. I think that it kind of bleeds over into the following sentence as well, making the link between the fact that no party has invoked the procedure and implied that it's not a useful tool as a result of that fact. So I think some of the changes just along the lines that Steve suggested would be helpful to clarify.

JAMIE HEDLUND: Just so I'm clear, are you okay with the factual mention that no one's invoked it?

BRADLEY SILVER: Sure.

JAMIE HEDLUND: But you just don't want it biased that that means therefore there's a problem?

BRADLEY SILVER: Correct.

JAMIE HEDLUND: Okay. To me that sounds reasonable. This group is to explore that exact question: whether there is a problem and if so, how to address it. [Karen Newbin] has been working on this issue longer. I'm not aware of any conclusion made previously that there is a problem or that the process, the way it plays out, has created barriers.

KAREN LENTZ: Thanks, Jimmy. I agree with that. I think that the charter kind of came out of our summary analysis of public comments, and there may have been some comments expressed to the effect that the procedure could be more accessible, but I agree that in terms of fitting the mission for

this group that language does sort of create a presumption and we could make it more neutral.

JAMIE HEDLUND: Okay. All right. Does anyone object to the idea of [making] at it? Obviously we would be happy to redline it [in the existing] document and send it around for consideration, but before that, I just wanted to see if there's anyone who has a principled objection to modifying the text to be more neutral.

[ABDUL?]: I think it's okay.

MICHELE NEYLON: Before dealing with the charter, I have more kind of basic question, which is one to do with the process itself. I'm trying to understand exactly where this group's work kind of feeds in. It's an implementation advisory group, but I don't really understand what an implementation advisory group is. Is it following the same kind of process as a standard PDP within the GNSO, or is it doing something else?

I'm tied to that. I asked one of your colleagues – this is going back several weeks ago – about statements of interest, conflicts interest, and group people's affiliations with various groups. I'm just working on the basis as I'm within the GNSO and so would Luke be. That's kind of what we're used to. If it's something different, that's fine, but I would like to understand exactly what I'm dealing with.

JAMIE HEDLUND: Sure. Let me take a stab and then, Karen, if you could correct anything I get wrong. First of all, everyone should submit a statement of interest if they haven't already. I don't know if that addresses your complex conflicts of interest issue or not, but at least part of the process is in place.

Secondly, I think it was in 2008 when the Board adopted a GNSO recommendation to come up with a process for dealing with the situation in which an obligation under the contract dealing with WHOIS conflicts with local national law, and what would a contracted party be able to do in that instance so as not to be in violation either of the law or the agreement.

Following Board approval, there was a design of a process to address those instances. That process was an implementation of the GNSO recommendation or the Board action, and it's been in place for several years.

There have been comments from the community that it was not ideal because, unlike the data retention waiver, which someone can obtain based on opinion from a reputable law firm, in this one you actually had to show they were in a legal process as a result of carrying out the WHOIS obligations.

We kicked off a comment period to look at this. From that came the idea of doing an implementation advisory group, which would have the responsibility of looking at the current process and deciding what if any changes should be made.

The outcome of this group will presumably be a consensus-supported document, which will then go to the GNSO for their review to ensure that it is still in keeping with the policy that they developed. In other words, it doesn't go beyond the policy. It doesn't contradict the policy.

After minor changes, it will then go to the Board for approval, and then there would be a new process, or maybe the same process, [and there would be] confirmation of the existing process.

Does that help?

BRADLEY SILVER: Yeah, thank you. The thing I was having difficulty understanding was where the hell it went. If you're saying to me, "Okay, we come up with something" – are we going through a comment period on it? I just want to understand, if we come up with something, where does it go? Is it going back to the GNSO and the GNSO has some obligation to do something with this, or can they just kind of go, "Oh, that's a lovely bit of paper. We're going to ignore it"? It's just trying to understand how that kind of fits. I think your explanation has helped, but I see Karen's got her hand up, so maybe she can add a bit more meat to that. Thanks.

JAMIE HEDLUND: All right. Go ahead, Karen.

KAREN LENTZ: Thanks, Jamie. To your question, Michele, on the process – Jamie said this as well but I'll just build on how I understand it – the GNSO did a PDP on this topic already, and what came out of that was the existing

procedure. So there are policy recommendations that we're not seeking to change.

What we are seeking to consider is whether the implementation of that, which is the actual procedure, could be adjusted in some ways to make it more effective.

That's what this group would discuss, and should there be an outcome where it's suggested the procedure could be modified and used in these ways, the idea is to put back to the GNSO to either say, yes, this is an acceptable implementation of our original policy recommendation, or it's not. It's intended to end up back in the GNSO in terms of some focusing on implementation and making it consistent with the existing policy that we have on it. I hope that that helps.

BRADLEY SILVER: Okay. Thanks.

JAMIE HEDLUND: All right. Let's see. Abdul, you said you had a question. Hello? All right. Holly?

HOLLY RAICHE: Just a question. It's really a follow-on from Michele. Once this group decides that there are really serious problems with the procedure that says, "Wait until there's been some kind of litigation involved," what if we say something along the lines of, "There needs to be a serious change," and we go back to the GNSO and say, "You did come up with something. [inaudible] on the track. This isn't working. You need to

revisit it"? Is there a consequence from making that statement [inaudible]?

JAMIE HEDLUND: Sure. This group, as I understand it, is empowered to recommend substantial changes to the existing process, so long as they are consistent with the policy. What you described to me could very well fall into a significant change that would be consistent with the policy. I don't have the language of the policy in front of me right now, but my understanding is it's pretty broad.

For example, it doesn't distinguish between whether you have to be sued, or a waiver-type mechanism could be used in the absence of the legal process. I don't know if anyone from staff has a different view.

For example – I don't know if this helps – if this group came back and said some wholesale changes needed to be made to the WHOIS obligations under the agreements, that would go outside the scope of this IAG.

HOLLY RAICHE: Right. Okay, thank you.

JAMIE HEDLUND: I don't see any hands up, so maybe with that we can go back to see if we're closed out on the scope and mission. Does anyone have any additional input on the scope and mission of this group as laid out in the draft charter?

All right—

KAREN LENTZ: Jimmy, there's a hand up from Ashley in the Adobe.

JAMIE HEDLUND: Ashley? Sorry.

ASHLEY HEINEMAN: Yes, thank you. No problem. Perhaps this is just a [nit], but looking at the second paragraph under mission and scope, in the first sentence there that starts: "The IAG's mission and scope will focus on changes to the procedure," would it be less presumptive, recognizing that that's probably the direction that this group is going to go, in the direction of changes, and more reasonable here to say, "Focus on recommending possible changes"?

JAMIE HEDLUND: Yes. That's along the lines of the comments from Steve and Bradley to make it more neutral. Yeah, and it makes it clear that this group is not assigned to make changes. Yeah, it's to look at whether changes should be made. Does that help?

ASHLEY HEINEMAN: Yes it does. Thank you.

JAMIE HEDLUND: Okay. Following the third paragraph in the charter, there are a number of bulleted questions, and on the last call, there seemed to be support for structuring these calls around these questions. So as laid out in the agenda, we would start with the first question on process.

Does anyone have any issue with going down that path or want to have [it] considered as an alternate way of moving forward? Okay – go ahead. Ashley, or, sorry [inaudible].

UNIDENTIFIED MALE: We have to move forward.

JAMIE HEDLUND: Okay. Okay, Ashley?

ASHLEY HEINEMAN: I just wanted to mention – and I don't want to hold up discussion of these questions – that in preparing for this meeting and looking at the questions, at face value it seems appropriate for, yes, invocation prior to contracting, but what we found was it was hard to grapple with some of these process questions without addressing the trigger questions first, so it would be hard, at least from perspective, to come to any definitive resolution, from the USG anyway, without having a conversation, one that's the second issue prior to the first. So, just that point.

JAMIE HEDLUND: Okay. That makes sense. Obviously whatever triggers are agreed to would have a major impact on what kind of process is used.

Does anyone object to starting with the questions under the trigger bullet first? Then while people think about that, Steve?

STEVE METALITZ: I don't object to that. I would agree with Ashley that logically some of those questions may come first, but I don't want to undo what this group decided on the first call, which I wasn't able to participate in. So I'm happy to go either way, but I think there is some merit to what Ashely was saying. Thank you.

JAMIE HEDLUND: All right. Okay – go ahead.

MICHELE NEYLON: I disagree because I think the crux of the issue from a contracted party's perspective at the moment is when you can invoke this. Not how you can invoke it, but when.

One of the key problems, speaking as a registrar, is that I cannot invoke this until I end up in litigation or something like that, which is why it's never been invoked, which to my mind is completely illogical and completely ridiculous.

JAMIE HEDLUND: Right, but, Michele -- correct me if I'm wrong – I think the issue you raised there is really about the trigger and not the process of when to

invoke. In other words, the first question is pretty narrow, and it's basically should you be able to get a change prior to executing a contract or not? It doesn't say anything about on what basis you would get that change.

MICHELE NEYLON: Yeah, but it's a pretty simple thing. Just very ,very simply, asking somebody to sign a contract that has clauses that are illegal is ridiculous. So you're effectively stopping people from signing a contract because the contract has clauses that mean they cannot sign the contract.

JAMIE HEDLUND: Right. I'm not disagreeing with that, but again that tends to go more to what makes it illegal, rather than at what point is the change incorporated into the contract, either by way of the text of the original agreement or by way of a waiver instrument which theoretically could be granted simultaneously with the contract. I'm just making this up, obviously.

MICHELE NEYLON: I think Seth has kind of helped a bit here by suggesting that we agree that the issue of when is encompassed within the trigger. I think that my problem is trying to separate the two. For me, it's just making my head wan to explode. So I think the two are interlocked. You can't really break the two apart.

JAMIE HEDLUND: Okay. At the very least, both will be discussed, and no one's going to concede anything by discussing one first, then the other. This is supposed to be an open, constructive exercise.

So it seems that we have a couple of options. One is you do the triggers and bake into the discussion about the triggers the sort of process question as relevant.

The other is we do what was agreed to on the last call, which is talk about the process first. The problem with that is if the discussion really remains within the boundaries of those questions, you don't get into any of the material questions surrounding what causes the process to be invoked, no matter how it is. Maybe there's another option that I'm not thinking of.

Looking at the chat, which I should be doing more – let's see. I guess taking Michele's and Seth's suggestion from the chat that we just try to conflate the two, are people okay with that?

BRADLEY SILVER: It seems to me that the process question has a purely process element to it and then it has more of a trigger-related element to it. I don't think it really matters what order they're discussed in. I think that as long as there's a clear discussion about process and the question of being able to invoke a [inaudible] contracting as an issue in and of itself will come up regardless of what order we discuss these questions in.

But I think, just to recognize, as you have as well, Ashely's concern that people's opinion on when it can be invoked will depend very much on the standard for what that invocation is. I think perhaps if folks really do

want to discuss the process part first, then I don't have any objection to that, as long as we can come back to the question of process after we've discussed the question of trigger because I don't think that anyone's going to be able to express a full opinion on process until we've had the trigger conversation.

So we may need to have the process discussion at the beginning, and then afterwards, or as part of the trigger discussion as well.

JAMIE HEDLUND: Okay. At the risk of appearing talked down, how about we start with the trigger and then go to the process, and during the discussion of the triggers, where appropriate, the questions of process could also be addressed? It just seems to me that the trigger is really the big issue, and the rest of it flows from that.

Does anyone object to [inaudible] the conversation?

All right. With that said, let's go to the triggers. First, the overall question is what triggers would be appropriate for invoking the procedure? As mentioned earlier, right now the trigger for invoking this procedure is a legal process, civil or criminal, against a contracted party for violating national law while remaining faithful to the contractual obligations of the RAA, [the registry agreement.]

Anybody want to take a stab at making a proposal as to what triggers would be appropriate?

All right. Is the existing trigger sufficient? Michele?

MICHELE NEYLON: Well, I clearly think that the existing trigger is completely ridiculous and totally inappropriate. ICANN has received multiple letters from data protection authorities via Article 29. You've also received comments on this particular project from the European Commission, which would also more or less agree with what Article 29 has said. It's clear that data protection authorities have issues with the current triggers.

To be perfectly frank, I think the current policy is flawed. It's like you're asking us about something that has already been stated clearly by Article 29 and others, so I think it's already clear that there is an issue here.

JAMIE HEDLUND: Okay. Mr. Metalitz?

STEVE METALITZ: Thank you. I think it might be appropriate to look at what the trigger is now. As I read the procedure – I'm sure Karen's probably putting the link into this procedure if she doesn't have it in already – it says, "At the earliest appropriate juncture on receiving notification of an investigation, litigation, regulatory proceeding, or other government or civil action that might affect its compliance with the provisions of the RAA dealing with WHOIS." Let's understand what the trigger is now. It could be litigation, but it could be an investigation. It could be some other government action that deals with this issue of whether there's a conflict between the contractual obligation and the applicable law that comes from a government agency or a civil action.

So it's not quite right to say that you have to have litigation. There certainly could be circumstances in which there could be other action coming from the agency that would qualify for the trigger.

Some of the questions that are on the mission and scope document kind of get into this, about what kind of data protection authority are we talking about? There are authorities that actually have the obligation or the ability to enforce the laws of their jurisdiction, and then there are others like the Article 29 Working Party that don't have any law enforcement jurisdiction.

So I think it is important to draw a distinction between those two, but I guess the point I wanted to make is that it's not quite correct to say that you have a litigation or proceeding pending in order to trigger the procedure now. You have to have notice of an investigation, litigation, regulatory proceeding, or other government or civil action. So I think that's already fairly broad. Thanks.

JAMIE HEDLUND: Right. Thank you. Anyone else?

I'm not seeing any hands. Going to the first bullet under this category – sorry. Would evidence from a data protection authority that the contract is in conflict with a national law be sufficient to trigger the procedure? If so, how would ICANN define which data protection authority is an acceptable authority? Would the authority have to be a nationally-representative body? Should a regional body's opinion carry the same weight as a national or a local authority?

Steve, you touched on this. Do you want to elaborate further in light of this [inaudible]?

STEVE METALITZ: Yeah, unless someone else wants to get in the queue. I think these are the right questions, and certainly if you had some communication from the data protection authority the registrar – let's assume it's a registrar at this point – that the contract is in conflict with national laws – I think that could take various forms, but I think if it's an agency that has the authority to enforce those laws and authoritatively interpret those laws, then that meets the current trigger, perhaps. Maybe that needs to be clarified, but I think that's pretty close to what we have now.

I think in the current procedure we have an answer to the second question about how would ICANN define which data protection authority is an acceptable authority, and I believe it's that ICANN can check with the GAC about this.

JAMIE HEDLUND: Okay. Your comment, Steve, has prompted a lot of discussion in the chatroom. Anyone want to weigh in with those comments?

I see that there's a question about how data protection authorities actually act. Some countries don't. They only investigate. There are some countries where there isn't a DPA. State attorney generals are not nationally recognized, even though they are the primary drivers of enforcement in the U.S. I think there's probably an argument to be made that they are effectively recognized through the Constitution, but

I guess a big question is: what impact should, as is said here, regional bodies like Article 29 have? How should ICANN react to this?

KAREN LENTZ: Hello, Jamie?

JAMIE HEDLUND: Yes?

ASHLEY HEINEMAN: I just wanted to touch upon something that Steve said earlier. It was actually something I mulled on before the call. When it comes to what's an acceptable authority – I don't know how to affect this recommendation – this might be something useful to seek back advice on with respect to how each of the GAC representatives' respective countries view this matter and how they would recommend we proceed on this subject.

JAMIE HEDLUND: What about the other idea that if ICANN gets a letter from some body it just goes to the GAC member, assuming there is one from that country, and ask, "Is this a legitimate authority?" rather than try to scope it out ahead of time?

ASHLEY HEINEMAN: I think that's certainly something to consider and discuss. I think it kind of comes down to verification as well, beyond if it's an acceptable body, but also making sure that that's where it actually came from.

JAMIE HEDLUND: Okay. Anything else on – Steve, is your hand up?

STEVE METALITZ: Yeah. Again, just to level-set us, the procedure we have now says that when ICANN get this notice from a registrar or registry, they should consult with the registrar. They should consult with the local national enforcement or other claimant. Then it says – this is not totally clear, but I'm just saying what the current procedure is – "Pursuant to advice from ICANN's Governmental Advisory Committee, ICANN will request advice from the relevant national government on the authority of the request for derogation from the ICANN WHOIS requirements."

I think that means what you just said, Jamie, which is that ICANN goes to the government and says, "We have this notice from a registrar saying that XYZ Agency has raised this national conflicts issue. Is this the right national government authority to be dealing with on this?" But I don't think that that paragraph from the procedure that I just read has the clearest language in the world, and maybe that could be clarified to specify how ICANN should handle this. But again, that's the current procedure.

JAMIE HEDLUND: Okay. Just to clarify one thing – and there's been a lot of discussion about what is the right kind of authority and how do you determine that – the question also asks, "Would evidence from a DPA that the contractors in conflict with national laws be sufficient to trigger the procedure?" So this would be a change from, as I read it, the existing

process, and rather than a party coming into ICANN based on some sort of action or investigation against it – Steve, I'm not trying to narrow it; I'm just trying to abbreviate for the purpose of this discussion – but would it be enough if a DPA said, "Write to ICANN," and gives its opinion that a particular provision in the RAA is in conflict with that with national laws?

\ Is that sufficient, or do people feel like the DPA still has to actually have an ongoing investigation for proceeding against a party?

Michele?

MICHELE NEYLON: If in [inaudible] at the moment the current process is perhaps to be an ongoing proceeding of some kind, which means already that it's gone beyond an academic issue to being an actual case of some kind, be that whether it's a civil case or something else, which I think is too far. If the European Commission were to write to ICANN, which they already have, saying that certain aspects of some of these policies were in conflict with European law, or if the Irish DPA were to write to ICANN, that should automatically cover registrars on registries in those jurisdictions. This shouldn't be a case of it having to go to an actual, I don't know, some kind of investigation in order to trigger this because that does seem to be backwards.

JAMIE HEDLUND: Okay. Leaving aside the issue of whether the commission or Article 29 is the right kind of body, just assuming that whatever body writes ICANN to express its view that there's a conflict with its national law, does

anyone object to modifying the process to allow for relief to be given based on that kind of a letter?

Steve?

STEVE METALITZ: Again, the policy that we're working within says that the registrar has to credibly demonstrate that it is legally prevented from complying. That's the policy which we're trying to implement here.

I think there's a big difference between the letter coming from the European Commission and the letter coming from the Irish Data Protection Authority, which actually has the authority to enforce the laws. But leaving that to one side for the moment, I think you could have a letter, such as what you described, that amounts to a credible demonstration that the registrar in this case is legally prevented from complying. Again, I'm not sure that isn't already covered by the procedure, but I don't see a problem with clarifying that.

Again, the standard has to be an incredible demonstration of being legally prevented from complying with the contract because of applicable national law, or applicable law. Thanks.

JAMIE HEDLUND: Well, what about – sorry, there's an echo now – the instance in which there is no named registrar and the Irish DPA writes and says, "ICANN, your RAA has provisions that are in conflict with our national law? Because that would be different I think than what's required under the existing procedures.

STEVE METALITZ: Were you directing that question to me or the group?

JAMIE HEDLUND: Anyone who wants to respond, but to you primarily, yeah.

STEVE METALITZ: Okay. If that happens, I don't see what the problem is with a registrar that's subject to that country's law sending that into ICANN, saying, "Look, here's my credible demonstration. I'm legally prevented from complying."

JAMIE HEDLUND: Okay. Let's see. Michele, is that a current hand?

MICHELE NEYLON: Yeah, that's a current hand. Unfortunately, Luke isn't actually dialed in for a variety of technical reasons, but have a look at some of the stuff he's putting in the chat. First off, just going back to something Steve said earlier, I think there may be a misunderstanding of how European legislation works The European Union via the European Commission [can't] set laws and policies that are automatically binding across all 28 member states. It depends on various different things, but there are different ways in which they're [enacted.]

So to say that there's a massive difference between the European Commission and the Irish DPA is actually incorrect. Certain things are set at a European level. Certain things are set in such a way at the European

level that they have to be transposed into national law. So there are differences there.

With respect to the entire thing around jurisdiction of what's binding and all that, if for example the Irish DPA has ever written to ICANN stating that a particular clause in a contract is not compatible with Irish law, then that should cover and all Irish companies, be they registrars or registries, in all future dealings with ICANN. It shouldn't be a matter of every Irish registrar or registry having to go to ICANN to repeat something that ICANN has already been told.

JAMIE HEDLUND: Okay. All right. We will capture that in the note. Yeah, they're two separate issues that seem to require some sort of resolution or an attempt to resolve. One is what's a proper authority and how is that determined? I mentioned on this call we can argue until we're all blue in the face as to whether or not the European Commission or Article 29 count. Those seem like binary questions that might be best sent to the GAC for resolution. But maybe this group can agree on criteria.

But then the second issue is, assuming that the authorities recognize if it's sufficient to trigger the process, [whether] it gives a blanket opinion or does it have to be tied to a particular operator?

Michele, go ahead.

MICHELE NEYLON: Just this thing about the particular operator aspect of this: in relation to the 2013 RAA, there is a waiver process which currently is being

handled on a per-registrar basis. To be perfectly blunt about it, it has proven to be overly burdensome, incredibly slow, ineffective, expensive, painful, and just generally horrendous.

If you have a look at the timelines around the number of registrars who have started the process of trying to get a waiver, the number of registrars whose applications for a waiver have been recognized as actually having applied for a waiver, opposed to starting the process, and the number of registrars who have successfully navigated the process, it's pretty clear from where we're sitting that that process is quite broken.

If you look in the chat, Luke from EuroDNS I think has been out trying to work on this now for well over a year, which is far too long.

JAMIE HEDLUND: Sorry. When you say "the process," are you talking about this process or the data retention?

MICHELE NEYLON: The data retention.

JAMIE HEDLUND: Okay.

MICHELE NEYLON: I use it as a very good example of how not to run a process. The idea should be that if a contracted party with ICANN or a party who wishes to contract with ICANN is informed, either via their DPA or legal counsel

and that that evidence is presented to ICANN that there is a conflict with the law, then that should suffice. Yet as has been seen, on several occasions – I don't know how many registrars in this stage have tried to go through this process – the entire thing has been an uphill struggle for the registrars who have tried to engage on this.

The question some people are asking is why this particular process that we're looking at hasn't been invoked. The answer is: just look at what happened with the other one. It's overly burdensome.

JAMIE HEDLUND: Right. Steve?

STEVE METALITZ: I actually would agree with Michele. There are a lot of problems with the data retention waiver process. We would I'm sure disagree about what those problems are, but three points. Obviously, this is a separate process. It's not the same process. Second, to say that people aren't invoking this process because of their experiences under that process doesn't take into account the fact that this process had been in operation for five years before that process even existed, so it certainly doesn't explain what's happened from 2008 to 2013. The third point I would make is just that unlike what Michele is talking about, our concerns about the data retention process are a matter of public record. They're cited in our comments on the preliminary comments we filed on July 3rd in this process. Our public comments are out there, so I don't know what Luke's experience has been because there's nothing on the public record about it that I know of, but our concerns about the data

retention waiver are a matter of public record. We think it has been a very unsuccessful process and should not be followed in this context. But I think we would have a very different set of reasons than Michele does. Thanks.

JAMIE HEDLUND: I think one thing that would be really helpful, Steve, picking up on your public comment comment, which is that this conversation, which seems to me to be a good one, would be to outline the debating points. It would be extremely helpful for people who feel strongly about these issues one way or another to submit written comments to make sure that staff accurately reflects in any document coming out of this what stakeholders' views are. So it's not a requirement, but to the extent that people have strong views on any or all points, I would really encourage you to submit them.

But we will of course capture all the notes, and any document that comes up we will intend to make as consistent as possible with the discussion and what's in the chat.

All right. Let's see. Would it make sense to go to the next bullet? Okay, so the next bullet under triggers says, "Similarly, would an official opinion from a government agency provide enough evidence?" In other words, this would be an additional trigger point to the existing process. "If so, which agencies would be most appropriate? Would it have to be an agency tasked with data protection? What about a consumer trust bureau or treasury department that includes consumer protections in its mandate? Or would a foreign ministry provide the best source of

information? Which bodies would be considered authoritative enough to provide accreditable opinion?"

The first question is similar to the one we just discussed: is it enough to get an official opinion from a government agency in order to warrant really from the contract? I imagine – okay, Michele?

MICHELE NEYLON: I think you know what my answer is going to be to this one, don't you? I would say yes.

JAMIE HEDLUND: It would be presumptuous and top down.

MICHELE NEYLON: Oh, come on, Jamie. I think you know where I stand on this one. Joking aside, I think the thing is obviously you need to have some kind of idea of which agencies you should be dealing with on these matters. I think it's important that the data protection authorities or authorities that have a clearly defined data protection or data privacy are always engaged. There are always going to be differences between let's just say using broad, sweeping terms law enforcement security on one side versus data protection/data privacy on the other. Though they may agree a lot of the times, there is going to be conflict between the two. So any government advice should clearly come from somebody that is able to show that they have consulted with the relevant data protection/data privacy authorities at a national or supranational level.

JAMIE HEDLUND: Okay. Who makes the determination? Is that something we go to the GAC for?

MICHELE NEYLON: Who makes the determination or which authority is most competent?

JAMIE HEDLUND: Whether a government agency in question is the right one, or appropriate.

MICHELE NEYLON: What if they contact another GAC member?

JAMIE HEDLUND: Well then, that's a different question.

MICHELE NEYLON: [inaudible] because you can't go to the GAC and ask the GAC at the moment about anything to do with Ireland. We do not have a GAC member. So you cannot expect the government of France to make a ruling on a bit of paper from the government of Ireland. That's crazy.

JAMIE HEDLUND: Okay. So at a minimum, it would seem possible to develop some criteria, like some of the ones that you listed.

MICHELE NEYLON: If there is a GAC member there, fine. I don't have a problem. If Ireland had a GAC member, then the Irish GAC member would be the appropriate person to approach about something involving Ireland. But if there is no GAC member, then you can't take it to the GAC.

JAMIE HEDLUND: Understood. Okay. But then it would, again, still make sense to probably include some general criteria so that the Department of Natural Resources is not viewed as relevant.

BRADLEY SILVER: I think, though, that the issue still comes down to giving some entity or person the ability to say that the authority that's providing the opinion meets those criteria, and that is still somehow going to come down to having to find the right person. If there's no GAC member associated with that particular country, then I think you're still I think in a position of putting ICANN in the middle of basically being an arbiter, having to make its own determination of whether or not a particular government agency has the mandates and the ability and authority to interpret and enforce these particular rules since those are I guess what have to come to down to what's required for a credible demonstration that that they're being legally prevented from fulfilling their obligations under the agreement.

So I think the further away you get from the nationally or recognized authority in this area, the further away I think we get from meeting the policy behind this procedure.

JAMIE HEDLUND: Okay. That makes sense. I guess the only other issue is whether people want to spend time now going over the more specific question about which agencies would be most appropriate. I guess in that case – yes, go ahead. Sorry. Steve?

STEVE METALITZ: I was just going to say I think you've posed the right questions, which is, "What are the criteria?" In other words, what would the question be? I think Bradley is onto something here by saying, again, go back and look at the policy. Can you credibly demonstrate that you're legally prevented by the local national privacy laws or regulations from complying? If you have an agency that has the authority to enforce local national privacy laws or regulations that legally prevent you from complying with the contract, then that's the right agency, I think. They could be called different things in different countries undoubtedly, and it might be called any of these things that are listed in the sub-questions in a particular country.

If there is a GAC member, presumably they're in the best position to identify what agency meets that description in their country. I'm not sure in a case where there's not a GAC member what the best way to proceed is, but a growing number of countries are becoming GAC members [according to] the number of governments. So that could at least deal with a good deal of the problem. If they're asked the right question, which is, "Is this an agency in your country that has the authority to enforce privacy laws and regulations that would prevent the registrar from complying?" that should be a question that most governments can answer. Thanks.

KEVIN KREUSER: For the EU, it's fairly easy to ascertain that the European Commission maintains a list of proper data protection authorities. In countries where it's not so obvious, I don't think some agency is going to opine on the matter unless they are somewhat legitimate. But it's fairly easy to ascertain. I don't know that we need to debate a lot about what would be the proper authority, as long as define kind of the parameters of what would consider.

JAMIE HEDLUND: Okay. Next bullet: "Would evidence of a conflict from ICANN-provided analysis provide sufficient information to invoke the procedure, and if so, what type of evidence should this analysis cite?"

Anyone want to speak up in favor of ICANN-provided analysis? Don't all jump in at once.

MICHELE NEYLON: I have my hand raised, but not to provide support that [inaudible]

JAMIE HEDLUND: All right.

[BRADLEY SILVER]: I think just for all the reasons [inaudible] flow exactly from the conversation we had about the prior bullet, I think we're moving even further and further way in concentric now from the underlying policy purpose of the procedure, and I think that ICANN has a lot of valuable

contributions it can make, including an opinion on whether or not an obligation may conflict with a law, but not sufficient to trigger procedure and I think not sufficient to establish that there is in fact a credible probability that registrars are prevented from complying with its contract.

JAMIE HEDLUND: Okay. Anyone else? Michele, you want to talk about how much you respect ICANN's analytical abilities?

MICHELE NEYLON: Jamie, do you really want me to answer that?

JAMIE HEDLUND: Just making sure we have a fulsome conversation.

MICHELE NEYLON: Okay, since you did ask. Imagine if for example ICANN is made aware of the fact that a particular stipulation in the contract is going to cause problems across multiple territories. Then surely that would fit into ICANN's risk analysis that it conducts anyway. Why would ICANN, as the corporate body, put itself in a position of increased risk by forcing people to something that they already knew was going to cause a problem?

So to answer your question, yeah. If ICANN had analysis to say that that process needed to be invoked, then, yeah. Sure.

JAMIE HEDLUND: Luke asks, "What do we mean by policies?" Okay, that's part of a different string.

All right. Bradley? Sorry.

BRADLEY SILVER: Sorry, that was an old one. I should take that down.

JAMIE HEDLUND: Okay. All right. Last bullet, and then we'll wrap up: "Is the procedure allowed for a written opinion from a nationally-recognized law firm to provide sufficient" – sorry. I think it was supposed to say – yeah. "Would it be a sufficient trigger to have a written opinion from a nationally-recognized law firm? Would that provide sufficient evidence for a trigger?" That's what we have now in data retention. "What types of firms could be considered nationally-recognized? Should it be accredited or made to prove its competency? So how, and what does ICANN do if it receives contradictory opinions from two firms? How do we determine the more valid argument?"

Michele?

MICHELE NEYLON: Thanks. I think this is an important one because the problem with data protection authorities is that a lot of them they're not going to advice. They investigate particular issues. They investigate claims. They don't act a lot of the time in an advisory role.

For example, I can ring the Irish DPA and ask them a specific question and maybe or maybe not I'll get back an advice, whereas I can go to external counsel and get them to say, "Well, look, this clause in the contract is in conflict with the legislation here, here and here."

This thing around the nationally-recognized aspect I don't really understand. A law firm is a law firm. I assume that lawyers all have the proper degrees and everything else. I'm not aware of anybody pretending to be a lawyer when they're not, leaving Hollywood aside, obviously. So I'm not really sure what to do with that.

On the contradictory opinion thing, I don't know how you'd handle that one. Maybe take it to the [inaudible]

JAMIE HEDLUND: Okay. Steve?

STEVE METALITZ: Thank you. I'm not sure exactly who is on this call, but I may be the only person, or one of very few, who is a lawyer in a nationally-recognized law firm. I agree with Michele: I'm not quite sure what that means, but I think my firm would probably qualify. I think this is definitely not a basis on which you should be able to trigger to this process. I think we've already seen this. This is one of our big complaints about the data retention waiver process. Granted, that's a separate process but it was allowed to be triggered by a letter from a – I think it was the same phrase – nationally-recognized law firm. Those letters fell in our view – and we've put our public comments on the record about this – far short

of really establishing what needed to be established in those waiver requests.

I can only respond to the ones that were made public. I don't know about ones that haven't ever been made public.

But I think that exposes the pitfalls, and of course the last question, which I don't have a good answer for either, about contradictory opinions from two firms, is almost inevitable, I think, if you go down this route. So presumably that would not be as much as a problem if you're looking at a government agency. They're going to have consistent views within the agency once they reach an authoritative decision.

But with law firms, you're inevitably going to have that problem, so I don't think this should be an appropriate trigger. I don't think it would amount to the credible demonstration of legal prevention that the policy calls for.

KEVIN KREUSER: Yeah. We have had that issue where we've had conflicting opinions, and that's part of the request for waivers. So it's something that we have to struggle with, interpreting what is the proper thing to do.

JAMIE HEDLUND: All right. We're almost at the top of the hour and the end of the call. Summing up at a very high level, it seems that there is a pretty big divide over whether additional triggers are appropriate in order to invoke the process. For some of them, their view is expressed that they're actually already encompassed by the current process, but then

the question is whether there has to be a party, [an] interest, or it could be applicable to all operators.

There was also not a lot of enthusiasm, though no outright hostility, towards an ICANN-provided analysis, and there was also disagreement about the desired ability of allowing nationally-recognized law firms to provide an opinion that would be the basis for relief.

One way forward: we will capture all this in notes and send it out, and then I guess work our way through the rest of the questions at the next couple of meetings and then, based on all the input, figure out a way forward.

The next meeting we agreed on the last call to have the first Wednesday of every month. That would be March 4th. We'll send out a Doodle poll on time, and I think we do have to rotate the schedules to make sure that there's maximum participation.

I said thanks for your comment in the chat, Steve. I didn't suggest that you were for it. I just said that there wasn't any outright hostility to the level that sometimes is expressed towards staff. But understood that you didn't think it was appropriate, and Michele had [wrote] in support for it.

Does anyone have any issue with the next meeting being on March 4th? It's well after the Singapore meeting.

We'll send a Doodle poll out for time. Anything anyone else wants to bring up before we close out the call?

All right. Well thank you very much. It was a great exchange. I look forward to our next call. Look for e-mails and invites coming up probably over the next few days. Thank you.

[END OF TRANSCRIPTION]