
LEÓN SANCHEZ:

Thank you all, and welcome to this Legal Committee on Work Stream 2 issues for the Cross-Community Working Group on Accountability. Our goal here is about determining how we're going to go forward in analyzing and assessing legal requests from the different subgroups.

The roll call will be done as usual on those attending the Adobe Connect room. I think Thomas Rickert is not in the Adobe Connect room, although I see him in the Adobe Connect room. But otherwise, please kindly add him to the attendees of the call.

We'll be reviewing our working methods. We have a working method established on Work Stream 1, as I remember, and also, we will be doing a fast, quick review of the current requests and assignments of legal requests that have been submitted for consideration to the Legal Committee.

And lastly, we'll have Any Other Business items, so anyone who has an item to raise is of course encouraged and invited to do so. I'm not sure if staff could kindly display the presentation that we have on the Legal Committee wiki, and actually go to page four, I believe, of the presentation because that is where we have our working method.

While we're waiting for the presentation to be loaded, I would like to just highlight how we've been working so far. Our role is filter, analyze and refine to ensure clarity and of course approve the requests for legal advice that are incoming from the different subgroups, and to determine this firm, if the case need be, is the best to respond to each of the legal requests.

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

We had this working method on Work Stream 1, and we had a budget for that. We didn't have any budget restraints in Work Stream 1, although we always have been mindful assigning only those requests that the Legal Committee felt were needed to actually have external legal advice.

We didn't have any restraint. Actually, Bernie's hand is up, so Bernie, do you want to say something?

BERNARD TURCOTTE:

Yes, León. We were unaware we were going to present the working methods, so we're going to be a little slow in getting that up as we're digging that up. Apologies.

LEÓN SANCHEZ:

On the contrary, my apologies because I didn't warn you in a timely fashion, Bernie, so that's absolutely my fault. No apologies needed on your side. On the contrary, that's on my side. While staff is working on bringing up this presentation, and of course, uploading it, as I said, I want to review and continue this call.

As I was saying, we didn't have any budget restraints, really, on the Work Stream 1, but now the game rules have changed, of course. We have a budget, an allocated budget for the CCWG Work Stream 2, and as you may be already aware, the Co-Chairs are responsible for a part of that budget.

So, we need to be, of course, mindful and careful with what legal requests we submit to the legal external counsel, as you may be aware

that most of the costs from Work Stream 1 were due to legal external advice. So, our budget is limited, and we need to be mindful of that.

Of course, therefore, this Legal Committee's role is very important in helping not only ensuring that the CCWG gets the best of advices, but also helping the CCWG to take care of our budget so that we can continue to operate with no problems.

The process that we have followed previously was that the committee would meet at least once a month, and I think that could be something that I would encourage all of us in this call to ratify or to propose otherwise. In this scope, we would review the requests documented and sent by the different subgroups, and we would, of course, call any rapporteurs should case need be to do any clarifications and requests so that we have a clear view on what legal request is actually being made and what kind of legal support is needed by any of the subgroups.

Here we have the slide. Thank you very much, staff, and I apologize again for not having notified you in advance.

So, I see Robin is asking, "Would that mean the subgroup may have to wait three plus weeks before we can address a request?"

Of course not, that's not the case. I'm just reviewing how it used to work on Work Stream 1, and that is why I invited you and encourage you to comment on this. I think that we need to be agile in our resolutions, and therefore, I think that it would be best if we review the way we would [meet].

Maybe we can say that we would have a fixed meeting on a monthly basis, but of course, we could always call for a meeting on short notice, maybe two or three days before the meeting actually was scheduled and that would allow us to take care of the needs of the different subgroups in an ideal and expedite way.

So no, Robin, I agree with you. It would be too long to have any of the subgroups wait for three or more weeks for us to actually review their request. The message is we would be holding monthly calls on a regular basis, but of course we would be able or we would be willing to schedule any other calls as the case may require.

Okay, so Ed is saying, "That sounds good, and if we recall, in Work Stream 1, we often had short meetings on short notice." So yes, exactly, we would continue to work that way, and I thank both Robin and Ed for your comments and your support for this.

As I was saying, we may call on the rapporteurs of the different subgroups just to add to any clarification that we might need in order to understand what is the legal requirement that they are asking from the legal committee and from the legal advisors, and then, we would ensure that the request is in fact a legal issue.

We have been posed with questions that are seen as being legal, but in the end, they were not really legal issues. So I think that is the filter work that we would be doing, just determining whether it is in fact a legal issue or not. And after that, we would be going back to the PCST, and of course, keep track of the legal expenses between both the PCST

and Legal Committee so that we have a clear distinction between what is related to its scope versus any other legal costs.

We need to remind that there is also a [track] that takes care of other legal issues that is not really allocated to the legal budget for the CCWG in Work Stream 2, but is allocated to the IRP implementation. So, that is a separate track and that doesn't really affect our legal costs.

Then, we can also have counsel invited to attend parts of our Legal Committee meeting to ensure any clarity or expectation on context that we would need to provide to them.

Then, we have the composition of the Legal Committee. I think it's a little bit outdated and that is because, of course, we are in the process of ratifying the interest of those in the Legal Committee to serve as members of the committee. So we have Sabine Meyer is not going to continue in the Legal Committee.

I believe that Athina will also be making some kind of movement with their community, so we're in the process of asking the numbers community to actually point us to Athina's substitute, which is going to be Mike Abejuela who is in this call. Athina has signaled us that he will be substituting here in this issue, but of course, we will be running the formalities for this to be documented.

Robin is saying that, "One of the reasons that we worked well in Work Stream 1 is because we were a small committee." Yes, that is absolutely the way we want to keep it. The committee will remain a compact route.

The only changes that I can see here that are not updated in this presentation are – as I said – the substitution of Athina Fragkouli for Michael Abejuela, and then Sabine will not be continuing their role in this Legal Committee. We would be adding also Greg Shatan, which is not in this list, but he has always been part of the Legal Committee.

So, practically, we will continue to be no more than six or seven people in the committee so we can continue to be agile in our responses to the different needs of each of the subgroups.

At this point, I would like to open the floor if you have any questions as to what I just reviewed on the way we would be reviewing the requests by subgroups, how we would be analyzing, refining, and of course, assigning the different tasks to different channels that we have to provide legal advice.

Of course, having these budget restrictions or limits in this Work Stream 2 track, what I would propose is that the Legal Committee continues to, of course, assess and analyze the requests made by the subgroups, and then determine if this is something that can be requested or –

Yes, Robin, sorry, I'm looking at your comment on the chat. Our meetings will continue to be recorded and transcribed. I don't think we will have transcription. I don't remember we have transcription in Work Stream 1. I would have to check that, because I don't recall whether we had transcription, but we will surely have the meetings recorded, as usual, so that they remain, of course, as reference and as documentation to our process. Bernie is [signaling] that this is the default.

As I was saying, I would encourage this Legal Committee to continue working in a way that we can assess the needs of legal advice for their different subgroups, but at the same time being mindful of the limited budget that we have. Therefore, when we assess the need for legal advice, my suggestion would be that we have a look at whatever question we are posed with.

If it is reasonable to have ICANN Legal provide a reply or an answer to that question, then I would encourage us to assign those questions to ICANN Legal in the first place. Then when we have the reply or the answer from ICANN Legal, of course, run a new analyze or assessment of that answer and if we do think that it makes sense and if we assess that it is actually a reply or an answer that is truthful and that doesn't seem to be biased or in any conflict, then we take back that answer to the subgroup and just leave it as is. And if from the analysis of the reply from ICANN Legal we determine that the answer is not satisfactory or we feel that it might have some kind of conflict, then we discuss, of course, the issue of assigning that question to our external legal advisors, and of course, have us provide us with an estimate of costs and times so that we can keep a tight control and track of the expenditures in regard to legal advice.

Are there any comments on this suggested way forward? I see Ed Morris's hand is up. Ed, please, you have the floor.

EDWARD MORRIS: Yes, a quick question, León. We send it to ICANN Legal, they will deal with it internally. In other words, we're not going to get [inaudible]

situation where they then send it out to Jones Day and we get stuck with a Jones Day bill against our \$1.4 million. I just want to ensure that is the situation. Thanks.

LEÓN SANCHEZ: Let me just rephrase that to see if I understood well. Your question is that if we assign any question to ICANN Legal and they go back to Jones Day, the legal costs from ICANN Legal requesting input from Jones Day won't affect our budget. Is that right?

EDWARD MORRIS: Correct.

LEÓN SANCHEZ: Okay, so yes, my understanding is that if ICANN Legal should ask Jones Day to provide the advice or the answer to the questions that we as Legal Committee submit to ICANN Legal, that would not impact our budget.

That is why we would be following this suggested path in the first place, and then after we have their reply, we would assess whether it is satisfactory to the Legal Committee and the subgroup's needs, or if it isn't, then we would, of course, assess the needs to assign this to our external advisors. Does that answer your question, Ed?

EDWARD MORRIS: Yes, that question, León. Another question: if we do get a question from the subgroup that we know from the start that ICANN Legal is conflicted, will we have the option of immediately sending out [inaudible] situations directly to independent counsel to save time, if nothing else?

LEÓN SANCHEZ: Yes, Ed. I think that that is exactly the role of the Legal Committee, to assess and to analyze whether we can assign the question to ICANN Legal or whether we need external advice. I think there may be cases in which it is clear that ICANN Legal wouldn't be able to answer a question because the conflict of interest or the bias situation would be clear cut from the question itself.

I guess in that case, yes, the Legal Committee could determine to assign the question for answer from the legal advisors before, of course, going to ICANN Legal. In that case, I guess it would be nonsense to actually go to ICANN Legal just to wait for an answer that we already know that it's going to be biased and then we will need to go to external advisor.

So yes, I guess we do have that option. What I would encourage, however, is to not rule out the fact that we could also ask for advice to ICANN Legal in the first place. But yes, that doesn't mean that we will always need to go to ICANN Legal first just to then go back to external legal advisors. Does that answer your question, Ed?

EDWARD MORRIS: Yes, it does, León. Thank you very much.

THOMAS RICKERT: León, can I get in the queue, please?

LEÓN SANCHEZ: Yes. I will go to David McAuley, and then I will go to you, Thomas. David, you're next.

DAVID MCAULEY: Thank you, León, and my apologies for being late. I'm happy to let Thomas go before me, if you would like, Thomas.

LEÓN SANCHEZ: Thomas?

THOMAS RICKERT: Sorry, I had to get unmuted. Thanks, David. Just to refresh everyone's memory on why we came up with this process: the idea was to be as cost efficient and resource saving as possible. [inaudible] with ICANN Legal in order to make sure that we're not commissioning work with external counsel where ICANN Legal already has an answer was the main driver for establishing this process.

Certainly, we are free to ask external advisors if and where we deem appropriate. However, I think we should all try to be as open as possible and try to work with ICANN Legal, because what we need is as much information as we can get in order to allow for our policymaking to be as informed as possible.

So, even if you say that ICANN Legal's position might be biased, it might still be valuable information for us to know what the advice that ICANN Legal got was in order to, let's say, protect the organization from third party claims or what have you. What we make out of that is an entirely different story, and the idea is also not that ICANN Legal gets our questions and then each and every time ask Jones Day or another firm that ICANN is working with to get their legal advice, but rather, the opposite.

The idea, again, is that we would just obtain knowledge of work that has previously been commissioned or that already has been assessed by ICANN Legal. I guess this can be a very quick turnaround with ICANN legal. "Do you have an answer on this? Yes or no?" And in case they don't have one, we can always go elsewhere. If they have one, why not ask for it? We can still ask our own legal advisors.

LEÓN SANCHEZ:

Thank you, Thomas. Next in the queue is David.

DAVID MCAULEY:

Thanks, León. Again, I'm sorry for being late. I was unavoidably detained, so this may be redundant or something that was done, but I've looked at the notes and I don't see it. My question is, do we have pending requests for Legal Committee action? I haven't seen any on the list. I'm just wondering, León, if you have some that we need to deal with. Thank you.

LEÓN SANCHEZ: Thank you very much, David. We do have indeed some legal requests already, and that is our next agenda item.

DAVID MCAULEY: Sorry about that.

LEÓN SANCHEZ: No, no problem, and as soon as we agree that this is the way we're going to continue to work, we can go to our next agenda item. So, I think that we've covered the points of process and the way we would be working, and of course, questions that have been raised have been answered already. So I guess it's okay for us to move forward to our next agenda item.

Should there be any doubts or comments on process, this is, of course, the time to raise them. If there are not, then we can go to our next agenda item. And for that, I would kindly ask staff to put on our screen the legal requests that so far have been raised by the different subgroups.

There are not many of them, but there are some already. The first is the Good Faith Conduct subgroup. Their request is to have a review by a legal expert with substantial experience in California nonprofit governance once draft guidelines are completed.

We have had some reply from ICANN Legal already, and Lori has forwarded this reply from ICANN Legal to her subgroup. Initially, this reply from ICANN Legal has been satisfactory to the subgroup.

Of course, we will make sure to forward these interactions to the Legal Committee list so that we are all aware and if we have any comments or anything to add to what ICANN Legal has replied, of course, we can always do that.

The next request is from the Ombudsman Drafting Team and they are asking a series of questions in regard to the participation. I ask staff to kindly allow scrolling so that we can all scroll on our own and review. Thank you very much.

So, the Ombudsman Drafting Team is asking for some questions and the questions relate to the participation of the ex-Ombudsman and the current Ombudsman in their Drafting Teams. You can see the questions, they're seeking advice of ICANN Legal regarding participation of the Ombuds in this specific item.

Do they need to recuse themselves from the whole work, or just to any or some question, or to any or some of the decisions? As you are aware, they are participating in this Drafting Team.

Then this has been pending, so I would ask this Legal Committee to provide their input as to whether we can submit this question to ICANN Legal. I guess it would be fair to say that they are in capacity to actually answer this question. I see David's hand is up. David?

DAVID MCAULEY:

León, hi. Just looking at the question as presented on the screen, my position would be that it would be appropriate to ask ICANN Legal and maybe give them an option and say, "Are they able to participate fully in

the group, or alternatively, should they be retained as expert advisors to the group without a hand in voting one way or the other if issues come up for vote?" But it seems to me that on drafting, I think it's appropriate question to be sent to the ICANN Legal. Thank you.

LEÓN SANCHEZ:

Thanks, David, and I see Robin is asking for clarification on which question we're referring to. The question, Robin, is on the Ombudsman Drafting Team. As the ex-Ombudsman and the current Ombudsman are part of the Drafting Team, the question is whether they need to recuse themselves from the whole work, or just to any or some discussions, or just to any or some decisions.

So, I guess Robin, you're saying that you'd like to [think] what outside counsel thinks about this issue. Do you mean having the current Ombudsman and the ex-Ombudsman as part of the Drafting Team? Okay, so any other comments on this?

I honestly wouldn't know what value external counsel would add to letting us know their opinion on this, but if the committee feels compelled to ask external advisor on this, well, of course, it's a decision that the Legal Committee should make. But I tend to lean towards David's suggestion, that I think it's a fair question that we could ask ICANN Legal, and I don't see the need to actually seek external advice on this. Ed, you have your hand up.

EDWARD MORRIS:

Yes, thanks, León. I'm on that committee too. I think eventually, I'm going to be where Robin is: I'm happy to have ICANN Legal take the first crack, but I would ask if we could have ICANN Legal actually expedite this question so it gets back to us rather quickly, because the Ombudsman are currently participating in the Drafting Team.

At times, on calls, they're often the only people in the Drafting Team, so I'd like to get this resolved sooner rather than later if we can. Particularly, if once we get a response we decide to send it out, which I'm sensing we may, although not certain. Thanks.

LEÓN SANCHEZ:

Thanks, Ed. Yes, that's actually the proposed process that I would encourage us to follow, to submit this to ICANN Legal and get a reply from them as soon as possible, and once we have that response, then we could assess whether that answer is reasonable and if it actually satisfies the need, or should we then go and check with outside counsel.

Okay, so then the action item would be to assign this question to ICANN Legal in the first place, and ask them for an expedited answer as soon as possible.

Okay, so the next question is on human rights, and it's a question that is asking what is the definition ICANN Legal uses for applicable law. And this is a direct question to ICANN Legal, so I guess there shouldn't be any discussion or doubt in assigning this question to ICANN Legal since it is a direct question from the group to ICANN Legal.

So, I would suggest that we turn this question to ICANN Legal for response, and again, should the case need be, then we can always assess their reply. If we're not satisfied by their reply, we can discuss whether it's convenient to seek external legal advice.

I see Ed's hand is up, I don't know if that's an old hand or a new hand, and then David McAuley. So, Ed? Okay, I guess that was an old hand. David?

DAVID MCAULEY:

Thanks, León. I appreciate what you suggest and I would just like to comment on it. In the interest of full disclosure to this Legal Team, let me say that I'm a member of the subteam on Human Rights. I have, on this particular issue of what is applicable law, I have taken a stand on it.

In other words, I have put an entry in on the list, and we've spoken about it a number of times in the group. Niels Ten Oever who is a very active rapporteur for the group has, in my opinion, treated this issue extremely fairly, and I'd have to say that much of the language that I posed is now in the current draft on the framework of interpretation.

With that background – one additional bit: there have been discussions on this issue where we're not in agreement. There is a strong sense among a number of participants that the term applicable law has to be given very wide reading, and there is a strong sense among another group – of which I'm a member – that it should be read narrowly.

I hope that discloses the current situation. Anyway, my point would be on sending this to ICANN Legal. I guess I have a question to you: is this

the question as received from the rapporteurs? And then secondly, it seems to me there's more to it than this.

In other words, I would ask a number of questions, such as, does ICANN Legal have a definition for applicable law? Have they used that definition in the past, and does it remain accurate – if they have one – in the context of the new Bylaw? Because it's a very specific question. Those are my concerns.

I have no problem with sending the question to ICANN Legal, I just wish that we could put more around it, but then that would be from us as a Legal Team if we agree. Anyway, those are my thoughts. Thank you, León.

LEÓN SANCHEZ:

Thank you very much, David, and I think your comments are very important and valuable. I do agree with you in that the question as it is seems to be very open-ended, and it would be good if we could add something around it as you have suggested.

So, if you agree, and of course, taking advantage of your role within the Human Rights Group, I would kindly ask you if you could draft this expansion on the questions so that we can, of course, assign them to ICANN Legal for reply, and then, of course, continue to run the process as we have discussed.

So, if you are okay with that, David, could you please provide the Legal Committee with these questions that you have just highlighted so that

we can have a look at them and then assign them to ICANN Legal for reply?

DAVID MCAULEY:

León, I'm happy to do that. I'll send that out on the list either later today or tomorrow morning and I'll send a copy to Niels, if that's okay. And I'll also describe a little bit of the context that I did just now. In other words, I want it to be clear that I have taken a position on this and it's not a settled matter. I think that's probably the way we ought to move this forward. Thank you.

LEÓN SANCHEZ:

Thank you, David. I think that is a perfect way to go. We have no reason to leave the rapporteur from the subgroup out of the discussion, of course. So yes, I would say that it would be good to touch base with the rapporteur so that he has a look at the expanded questions and he confirms that that is the need of the subgroup, in fact, to have a legal input.

So, the next step would be, of course, for you to kindly draft questions, send them to the Legal Committee list with a copy to Niels and the rapporteurs of the Human Rights Group, and to expect Niels and the other rapporteurs on the Human Rights Group confirmation, and then, of course, assign them to ICANN Legal for an answer.

Then, the next question is also on Human Rights Subgroup and it refers to what does the term respect mean according to the Bylaws in relation to core values. Well, I guess this is also something that we can ask

ICANN Legal, and as usual, when we have an answer of that, we could always review that. And if we feel it's not satisfactory, we can ask for our external counsel to provide also a look or an answer to this question.

Are there any objections to go down that path? David, I see your hand up.

DAVID MCAULEY:

Thanks, León. It's just the form of the question. Again, maybe I should include this in what I write up, but I would ask this question: "Do you, ICANN Legal, have a view on what the term respect means?" The reason I say that is I think it's the subteam's job to come up with a framework of interpretation, and the way this question's posed, it's almost saying "We'll defer to ICANN Legal on this."

It doesn't say that directly, but anyway, I would just restate the question that way, if it's possible. I could include that in the same write-up.

LEÓN SANCHEZ:

I agree, and let me be a little abusive of yourself, David, in the sense that I think all of the questions raised by the Human Rights Group seem to be on the same track.

So, if you could help us refine these questions so that we can touch base with Niels on the refined questions and see if they actually meet the needs of the subgroup, then we could have a more clear understanding of their need, and of course, a way forward to assign these questions to ICANN Legal and wait for their reply so that we can assess whether we

would be needing external advice or whether the reply from ICANN Legal is what we're looking for. Would you agree of that, David? Could you help us with that?

DAVID MCAULEY: I'm happy to do that, León. I have a very full schedule today, so my expectation – just so we all know – is I would probably not put that on the list until sometime tomorrow morning.

LEÓN SANCHEZ: Okay, I have no problem with that. On the contrary, I'm grateful for your to take on this task, so I guess that would leave the next two questions on human rights on the same case, of the same situation, so I would kindly ask you, David, if you could also add the next two questions to this exercise so that we get clarification from the subgroup, and then we proceed forward with assigning these questions to ICANN Legal. Are there any other questions or comments on the proposed way forward? David, is that an old hand or a new hand?

DAVID MCAULEY: Sorry, that was old.

LEÓN SANCHEZ: Okay, good. So, we've gone through all of the pending questions. There are no more questions pending from the subgroups and we have the action items that we will be reviewing. Mainly, we will be forwarding the reply by ICANN on the Good Faith Conduct through the Legal

Committee so that we can have a look at that and assess whether the reply is satisfactory.

Then, the second action item is that we will be forwarding the questions of the Ombudsman Group to ICANN Legal and ask them for an expedite reply for our review.

The third action item is that David will kindly refine the questions from the Human Rights Group and we will touch base with the rapporteurs of the subgroup to see if the refinement does suit the needs of the subgroup. After that, we will be assigning those questions to ICANN Legal.

Are there any other questions or any other comments on what we've discussed so far? Okay, seeing none, our next agenda item is Any Other Business. Do we have any other business that anyone wants to raise at this point? Okay, I see none.

At this point, I would like to thank everyone for their attendance, and thank, of course, David for helping us to clarify the questions of human rights, and of course, staff for this support that they've provided.

I guess that we could be looking at a next meeting maybe next week if you agree. We would be sending out a Doodle poll so that we can agree on the times and day for our next meeting, which I would suggest could be next week so that we can take care, of course, of the legal issues [inaudible] U.S. But if that is the case, then of course, I would kindly ask the staff to take that into account when building or setting up the Doodle poll, and as we of course don't want to disrupt Thanksgiving to anyone in the U.S. or elsewhere.

Thank you very much, everyone. Sorry, I see Bernie's hand is up. Bernie, you have the floor.

BERNARD TURCOTTE: Thank you, León. Just to note, as you pointed out with Thanksgiving in the U.S., it's probably going to be difficult to arrange something next week. Might we fix the Doodle poll for the week after? I think it would just make life easier for everyone.

LEÓN SANCHEZ: Thanks, Bernie. I think that is a good point, and just please do as suggested. Instead of next week, let's set up the poll for the week after. I see David's hand is up. David?

DAVID MCAULEY: Thank you, León. Earlier, Ed mentioned a request to expedite one of the questions. I forget now which one it was and I thought it was a good point. So my comment would be if we're all agreed on the list, maybe that could be expedited prior to our next telephone discussion. Just a suggestion. Thank you.

LEÓN SANCHEZ: Thanks, David. Yes, the questions that Ed referred to as need for an expedite reply were the Ombudsman questions, so that is something that we will be forwarding to ICANN Legal today, and of course, asking for an expedite reply of that.

Excellent. So, are there any other comments or questions? Seeing none, I thank you all for your attendance, for your work, and I hope to listen to you soon on our next call. Thank you very much, this call is now adjourned.

UNIDENTIFIED MALE: Thanks very much, León. Bye, everyone.

UNIDENTIFIED MALE: Bye.

[END OF TRANSCRIPTION]