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DIANA MIDDLETON: Hello, everyone. Can you hear me?

UNIDENTIFIED MALE: Yes, I can hear you.

UNIDENTIFIED MALE: Yes, I can as well.

DIANA MIDDLETON: All right. We were just waiting for a couple more people to join. Until, then, I'm just going to get started. Hello and welcome to ICANN's Data Protection Privacy webinar. I'm Diana Middleton, project manager for the Multi-Stakeholder Strategy and Strategic Initiatives Department.

Before we start, I'd like to remind everyone of ICANN's standards of behavior. You can find them in the link provided in the chat room. We'll be holding all questions until the Question and Answer portion of the webinar.

When we reach the Question and Answer portion, I would like to remind all participants to please state your name before speaking for transcription purposes, and to please utilize your mute button when not speaking. If you're on the phone, press #3 and the operator will put you into the queue.

Let me also add at this point that while this call is in English, at the same time it is being translated into six additional languages: Spanish, French,

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*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.*

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Chinese, Russian, Arabic and Portuguese. So if you want one of those lines, same thing, just hit #3. You can ask your question, and we will then hear the interpretation.

Also, instructions on how to submit questions via chat are posted in the chat room. Should we run out of time or if you have additional questions after the session, please e-mail them to [gdpr-questions@icann.org](mailto:gdpr-questions@icann.org).

This session is being recorded, and links to the presentation materials will be posted to the ICANN Data Protection Privacy website. If you could just hold for one moment, I want to make sure we have our presenters online. Lastly, I'd like to remind you to mute your computers and phones. And with that, I will now turn it over to Göran Marby, ICANN's President and Chief Executive Officer.

GÖRAN MARBY: Hello, everybody. Can you hear me?

UNIDENTIFIED MALE: Yes, we can hear you.

GÖRAN MARBY: Thank you. For me, it's very early in the morning, so I will say good morning to you all, and thank you for participating in this call. As a reflection, I would say that we have entered something that ICANN as an ecosystem has not dealt with before. And I say this because if I made

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any mistakes in this process, I'm very sorry for that. It's been done with good intentions.

I personally believe that we all have to learn something from this, and that is how to deal with legislators making laws that will have an effect on ICANN's ability to create policies. And with this, it's also important to say that many of those laws are made with good intentions. The road to hell is sometimes paved with good intentions.

Another thing I ask myself is why we were never given the chance or the ability to discuss this particular legislation within ICANN. My understanding – I might be wrong – is that it was never brought up, for instance within the GAC. And this is not a criticism of the GAC, it's just a reflection.

I think we all could agree it would have been better to have had this conversation before the European Commission actually laid down its proposal, because what I now understand is WHOIS was never discussed during that process within the European Commission, in that process that leads up to the actual legislation.

And unfortunately, that leaves us with one important question unanswered: the balance between the usage of WHOIS and the privacy concerns. And the only one who can now answer that question are the European DPAs.

And that's not a bad place to be at all, it's just that that leaves us with a period of uncertainty. It would be so much easier if the European Commission had worked with us in the beginning. We need to find a better way going forward to deal with things like this, and I look forward

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to work together with the GAC to make sure that we avoid any future mistakes.

And the consequence of this uncertainty is very much for our contracted parties, who really are the ones who are the frontline of this legislation. And I do understand their concerns, but I also understand the concerns of the users of WHOIS – law enforcement, intellectual property, security, etc. No one likes an area, a time of insecurity.

But remember that ICANN has a big tent, also including people knowledgeable and very passionate about privacy. I just again wish that we would have had this discussion several years ago. But we didn't, and we are where we are.

So, the early signs are pointing that the real possibility that the main registrant and data practices – certainly for individuals residing in Europe – will be different from May 2018. And based on initial reviews, communication, including with some DPAs, we understand that the compliance with GDPR will have an impact on the WHOIS system and the domain name space.

We are seeing an increasing potential risk that the incoming GDPR regulation will mean a limited WHOIS system. We appreciate that for registers and registrars, this regulation would impact how you will do your business going forward.

We hear you. Someone is talking. Probably more interesting than me.

We hear you when you tell us that noncompliance with GDPR is not an option for you, and we will share our legal external advice with you as it

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comes in. We also acknowledge the GDPR may require a shift in the way we previously looked at privacy issues and how they [inaudible] WHOIS, especially going forward. That is what I'm learning, and I'm taking this issue seriously. And I'm digging in deep to make sure we understand potential impacts.

And as far next steps goes, we do appreciate the work that has been done and gone into the user stories to reiterate the importance of WHOIS to multiple stakeholders. We commissioned, as I said, a legal analysis, and we'll soon have the first phase of this work.

We have seen the legal analysis commissioned by the GNSO PDP Working Group looking at the next generation of WHOIS. Also, we are engaged with the DPAs in Europe on the issue to help understand how GDPR impacts, how we might maintain, or even get clarity with regards to the existing policy as best as possible.

With impact on the current implementation of WHOIS, we realize this is important not only to the contracted parties, but also to others using the WHOIS information, including rights holders, law enforcement, DNS abuse researchers, etc., who have had a need for accessing WHOIS registration data.

We have a lot of work to do, and we need your continued engagement and participation. I've said this over and over again, but I believe that we're in this together. We have to work together to minimize the unclarity of the situation, and making sure that we can continue working together.

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For me, the multi-stakeholder model is like democracy. Just because you don't like the end result, you still have to like the process itself. And I think that ICANN together – all of us – can find ways of working forward. Thank you very much.

THERESA SWINEHART:

Wonderful. Thank you very much, Göran. This is Theresa Swinehart, Senior VP for Strategic Initiatives and Strategy with ICANN. I'm going to go through just a short overview of what we've done, a recap [of recent] activities. And then we'll open up the discussion for both hearing from participants what they're hearing and some of their engagements, and of course being available to answer any questions around that.

So with that, I think everybody is aware that the topic of WHOIS is not new. It's an essential part of the registration directory services and a part of the registration of domain names overall, and is also something that's captured of course in ICANN's Bylaws as well, most notably in certain provisions which were in one of the slides earlier on.

In relation to preparing for the GDPR – and as Göran has highlighted, this is something that we are following very closely, and we've undertaken a few activities. These include looking at two tracks: one is of course specifically how does the GDPR affect the personal data that ICANN collects and processes for internal and external services, and so that's one bucket of work that's under way.

And then the other – which many of you have been involved with and helping out within the context of also putting together the user story

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matrix – is the personal data that participants in the domain name ecosystem collect, display and process, including the registries and registrars pursuant to the ICANN contract.

And the work around this includes not only understanding and looking for clarity around the potential impact, but also engagement and outreach to a range of stakeholders and the conducting of the legal analysis to help the relevant stakeholders with the facts and information around this.

Now, I think an important aspect to note is that the work in this area, specifically with regards to the GDPR and the impact on the current WHOIS system, is not replacing any of the existing policy development work that is underway. And as many involved in the ICANN process know, there's work underway with regards to what future areas may look like.

As we know in the end, it's going to be the European Data Protection Authorities who will interpret and enforce the regulation, and the European courts of course that will resolve any disputes. So with that, clarity around the impact is fundamentally important in order to assess what kind of impact it has, and if anything needs to be done to address that.

As part of the work that was undertaken to prepare both for the legal analysis and also the engagement was working with the community to help pull together what we call a matrix of data about the user stories. That is to help inform the discussions with the relevant parties. And we compiled that with the help of everybody along with a high level

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summary that has been put out, and we have since then also received some additional user stories, so we will be putting out a next generation in order to make sure that's reflected.

But what we received to date is input from about 12 organizations and individuals across a range of different user types and interested parties. We ended up in the current iteration of this with 29 user types, 72 different purposes for about 97 different data elements. And I would encourage everybody to take a look at the matrix. I think it's an interesting compilation of the range of uses that different parties use outside of [specificity] within the context of the contract.

Examples include the use of the data by consumer protection agencies to investigate fraudulent or inaccurate information, or DNS abuse security researchers for data research and statistical analysis around DNS abuse, or identifying domains that may be compromised or used for DNS abuse, or also domain administrators who utilize the data to verify nameserver platforms for a domain name, or to assist in identifying domain name registrants and the performance of their work. So there are a wide range of different areas.

Obviously the compliance with the local laws is expressed or applied in the existing ICANN agreements with the contracted parties, and this goes then again to the reasoning of needing to get some clarity on the implications around this. And the individual entities will obviously also need to be making their own decisions with regards to the legal obligations, but we hope that the matrix and the information that is collected in this and provided out to the community and for the engagement discussions is useful to these conversations.

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If I could go to the next slide and talk a little bit about the recap of our engagement activities, that would be great. Let's go just two more slides, I think it is. Okay. Great. Let me talk a little bit as we go into this area on the engagement.

We know that many of the stakeholders are engaged in many different dialogs, and we'd welcome also hearing how those dialogs are going. In our context, the engagement has included with the contracted parties, with the European Commission, with the DPAs and with the other pertinent stakeholders in and beyond the EU.

While this is specifically EU discussion, there are obviously global implications around this as well. And for ICANN as a global organization, that is part of what we need to better understand, the relevant aspects with regards to the implementation itself and any clarity that might be needed around that.

The purpose really of the engagement is to really better understand on the various areas of the impact to raise awareness of the frameworks that we have in place to also give some clarity around ICANN's remit and the bottom-up multi-stakeholder consensus-making policymaking process within our mission and role. That is we have existing policies, future policies that may be developed or are developed by the community through the bottom-up, multi-stakeholder process.

Providing information also on privacy and data protection-related work at ICANN, notably the WHOIS and other activities that are underway, and then sharing the information around the matrix information and the gathering exercise. And the really intention is to gain a better

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understanding of the relevant aspects of the GDPR related to the work of ICANN and ICANN's contracts with the registries and registrars.

Let me go to the next slide and touch briefly on the legal analysis. I know that this has been something that has come up in the different dialogs, and Göran had touched upon. As many of you are aware – and we had also provided in a blog on September 11<sup>th</sup> – we have engaged a specialist European law firm, Hamilton, to assist us with this legal analysis. This is a European firm with strong experience with European DPAs, so that is really the intention there.

With regards to the analysis, we're looking to have it serve as a building block and input for community discussions. That is it does not replace the need for the community discussions about how to approach this issue in the ICANN space. And the approach is really an iterative one, which we would like to have come in phases.

The first phase is anticipated to look broadly at the issues and our space, and identify the potentially challenging areas with WHOIS, our agreements and what questions we think need to be asked of DPAs and others to get to the next stage of the analysis. This will be published, and you as a community will also have the opportunity to comment on this and provide feedback about questions being asked and analyzed.

We anticipate that this first initial phase should be ready to share with the community prior to our upcoming ICANN60 meeting. Then we would look at the second phase of the analysis which would dig deeper and look at how the answer to the questions identified in the first phase apply to our community.

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The reason for an iterative phasing is that things are shifting, and the phased approach allows for refined analysis as new information and understandings develop over the coming months. We'll be publishing the information and the updates on our data protection and privacy page. We've also listed there the background information that has been provided to Hamilton, and you can find that on the link that is provided in this slide here.

Let me go to just in conclusion, some upcoming things at the ICANN60 meeting. Wonderful. Thank you.

So as many of you know, our annual meeting is coming up in Abu Dhabi, and at the request to the Business Constituency, there will be a cross-community session that's scheduled on Thursday the 2<sup>nd</sup> of November at 10:30 a.m. local time, and we're working with the community on the preparations around that and how to put that session together and helping to provide support to the community around this. And we'll be putting additional details about the format and the key objectives of this session out shortly, as soon as the Business Constituency and the community [with us] help put that together.

With that, let me open up both for any updates that participants may have on their observations in relation to the GDPR work, and to share that, and also if we can answer any questions, and look forward to having a dialog here. Thank you.

Does anybody have any items to share? May I call on Michele, please? If you could just introduce yourself to everybody who doesn't know you, and then make your remarks. Thanks.

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Operator, could you open up for Michele, please?

MICHELE NEYLON: Can you hear me now?

THERESA SWINEHART: Yes. I can hear you. I hope everybody else can.

MICHELE NEYLON: Okay. I'll try that again. I'm the CEO and founder of Blacknight, an Irish registrar. I'm also one of the GNSO Councilors for the Registrar Stakeholder Group, co-Chair of the current RDS PDP, and previously served on the Expert Working Group on next generation directory services, which is why we just called it the EWG because that was too much of a mouthful.

Theresa, this is all quite interesting, but there are a couple of queries I would have. As part of the RDS PDP, we had a dialog and interaction with several representatives of European-based data protection authorities and others who are experts in the field of data privacy, going back over the last couple of ICANN meetings, and then a follow-up on that was third party legal advice to address some of those questions.

The question I suppose I would have around this is, is there going to be an overlap on the two sets of questions that are being asked of the third parties that ICANN has engaged? And secondly, what are you going to do if the legal advice coming from the law firm you have just engaged conflicts with the legal advice that we got in the RDS PDP?

THERESA SWINEHART: Thank you, Michele. This is a legal question, so I'll need to take that back on notice and consult with the experts and get back to you on that one. So I hope you can bear with me while I get back to you on that question.

MICHELE NEYLON: Okay.

THERESA SWINEHART: Apologies. We have a little bit of a technical glitch.

GÖRAN MARBY: Hello.

UNIDENTIFIED FEMALE: Hi.

GÖRAN MARBY: Can you hear me?

UNIDENTIFIED FEMALE: Yes, we can hear you, Göran. Please continue.

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GÖRAN MARBY:

Thank you very much. This is what my team does to me. They mute me. Anyway, Michele, just to untangle your question a little bit, I'll take the last one sort of first. We've started to get the first material from our external advice, and it doesn't seem to be – remember that there doesn't seem to be a big difference between the different legal advice, which is a good sign. We are going deeper than the ones [which are] sent in and requested by the [GNSO.]

So I think that [this] would be more in detail than anything else, because the paper you received from [GNSO] is still on a very general level. So I don't foresee that that's going to be a problem. In fact, when I said that we see that the current WHOIS is going to be affected by the legislation, that comes out of looking at the first initial reaction from the law firm we are looking at, and also the advice given to the GNSO. So that seems to be in coordination there.

On your first thing there, one of our intentions has been so far to create awareness about the potential problem, within ourselves in our ecosystem, together with the contracted parties and everybody else. Also with the European Commission who then – as they have not looked into the WHOIS – you might expect that they were unaware about the situation.

And also of course with the DPAs, that's why we sent out the user cases of the WHOIS going forward. But Michele, I'm well aware of the fact that you are in the first line on this one, and as I said, my initial remark is that we do respect your concerns in this one. So, we're trying everything we can to ask the European Commission and the DPAs for clarity. They are the ones who can help us to provide us with the clarity.

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So a lot of the things we try to do – and we are doing a lot with meetings and other things – to get that clarity, they are the ones who hold that.

And I think that also answers the question from the Euro Commission which they placed on the [chat]. They could be very helpful in helping us all in the ecosystem to provide us clarity. Thank you very much.

UNIDENTIFIED FEMALE: Thank you, Göran.

THERESA SWINEHART: I think Fabricio, can you please introduce yourself? And you had a comment.

FABRICIO VAYRA: Thanks, Theresa. Can you all hear me?

THERESA SWINEHART: Yes.

FABRICIO VAYRA: Perfect. So this is Fabricio Vayra. I'm a partner of the law firm Perkins Colie, and I'm on the RDS PDP Working Group. I appreciate this call and appreciate all the effort that's gone into the data collection, etc., on user stories. But I think there's a lot of concern around this – rightfully so – on the types of questions that are being asked and the types of

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results we'll get from these questions. And I wanted to highlight something that came up during yesterday's PDP call.

During that call, we were poised with the question – and slightly paraphrasing here, but basically it was whether based on the legal analysis we received from a law firm and the answers we'd received from certain DPAs I believe back in the Helsinki meeting, whether we could come to the conclusion that gTLD policies around WHOIS were out of compliance, or in essence, illegal or not in line with current policies. In particular, in light of GDPR.

And we spent a significant time unraveling or kind of peeling the onion back on that question, and ultimately, the conversation turned to, "Is it really a question of whether the ICANN policies around WHOIS are out of compliance, or is it really a question of whether the implementation of these policies by contracted parties has not been in compliance?"

And let me highlight an issue that I highlighted during the call, which is, one of the questions we posed to the DPAs and also took that identical question and posed it to a law firm, had a caveat of, in essence, if you collect information, is it legal or is it in compliance? If you collect information and [still] collecting that information the caveat was, you don't get the consent of the data subject.

Obviously, that question in and of itself is not in compliance with ICANN policy just by default, because the ICANN policy specifically states in RAA in section 3774 and the following subsection that when collecting information, a registrar needs to provide every registered name holder – new or renewed – things like the purpose, get consent, etc.

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And so I'd be really interested to know how it is that we're taking the user stories for example and presenting them to DPAs and law firms for legal opinions. Because what we're doing is we're presenting them – as far as I can tell – the outcome of a process. We had data, and an IP attorney needs to get at that data. Or we have data and a law enforcement wants to get at that data.

But I think what's missing is what the current policy actually requires, not necessarily what contracted parties have been doing today. And then ask the question, does that current policy that should have resulted in consent and all these other things being told to the registered party, does that policy actually fall in compliance, or are there tweaks that need to be made to the policy?

Because right now, I think if I were to look at a user story, it's a little bit of a data in a vacuum and doesn't tell the full context of the actual policy. And again, during the PDP call, I remember being asked this question. "So, what do you think?" And I said I think the policy itself actually probably complies substantially with what we're being asked by the GDPR. Does the process today comply? Probably not. Last time I registered a domain name, I don't remember a registry asking me for consent, or at least I didn't see it conspicuously noted to me. But the policy says you need to have that.

So just to wrap this up, we just need to make sure that the questions being asked here are going at the right thing, which is the ICANN policy, and not the implementation. Because if asked inappropriately, the result we're going to get back is either going to lead us to a change in policy, or a compliance issue, which are two completely different

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outcomes and have completely different impacts on the stakeholders and the DNS. So, thank you for your time.

THERESA SWINEHART: Thank you very much. And it's important the participation of firms like yours and helping break this down and adding to the discussions like this. So, thank you so much. Could I ask for the next hand that is up?

UNIDENTIFIED FEMALE: Hi. That's you, [inaudible]

UNIDENTIFIED MALE: Yes, that's me. [inaudible] currently. Thank you very much. I hope you can hear me. Hi, everyone. [inaudible] from the European Commission DG [inaudible] Data Protection Unit. Some of you might have met me during the previous meetings of ICANN when I was working in DG Connect on the relations with the GAC.

What I want to say from our side is that we are very supportive for the processes that you are conducting right now on the identification of issues related to WHOIS and compliance of WHOIS with the GDPR. We are very interested in the process, what you're discussing right now. We are waiting for the legal analysis from the law firm. And I think from our perspective, it would be very interesting to get an insight of concrete problems that the community can identify, and then from our side we would be very happy to provide as much help as possible.

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THERESA SWINEHART: Thank you very much. Let me ask Chuck if I could ask you to come online.

CHUCK GOMES: Thanks, Theresa. I'm the Chair of the almost two-year-long RDS PDP Working Group that several have referred to already. Michele referred to the advice we have received from data protection experts from Europe as well as from the law firm that we asked questions independently of, the same ones we asked data protection experts in.

I'm just going to comment on two of the statements that we got back. One of them says that the data controller is the entity that decides the purposes and means of the processing of personal data.

And the other is that ICANN is a data controller to the extent that it autonomously decides and imposes its policy on the other entities involved. I think it's really important that ICANN the organization accepts the fact that because in the multi-stakeholder model, ICANN the whole community develops policies with regard to RDS, and ultimately, those don't become policies until the ICANN Board approves them, that for ICANN to not accept the responsibility of the fact that it is a controller both in the sense of ICANN the community and ultimately the ICANN Board as the final approver of policy, that we could make a lot more progress on this issue if ICANN the organization would accept that fact. And let's move on from there and see what we need to do as the controller both from a community point of view in the multi-stakeholder process and an organizational point of view ICANN since the Board makes the final decision. Thanks.

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THERESA SWINEHART: Thanks, Chuck. This is something obviously that we're reviewing among the many other issues and legal analysis, so thank you. Thank you for that remark.

GÖRAN MARBY: Theresa, can you hear me?

THERESA SWINEHART: Yes. I can hear you, Göran.

GÖRAN MARBY: Chuck, I've read the analysis as well, and I'm going to be as candid as I can with this one. We are still – any legal advice that comes in is an advice and an opinion. Even if I did what you did, did what you said, which could sort of imply that there is no risk for the contracted parties, it's up to the DPAs to decide that. And according to the legislation, it's unclear.

So what I'm afraid of in that discussion – I'm going to say this genuinely, Chuck – is that we have to analyze things. We have to go further in that. I agree with that. We have done a short legal analysis. But in the end, it's going to be the DPAs that make that decision.

So as an example, if I would accept this and you believe that you don't have a problem, and you have a problem and you haven't prepared for it, what are we going to do then? We need to work on this together. It's

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not about moving responsibilities right now between each other to think that we could sort of get away of the problem. There is a [legislation] in Europe proposed by the European Commission, and it's accepted by the European member states and the European Parliament. That's the fact. We need to figure out together where to go from here. And as you know, I'm very open to work with you in that important group you're heading up, also with the contracted parties, but also with the other ones to see how we can gain some clarity. But in the end, it's the DPAs, rightfully so. They are the ones who are commissioned to make those decisions going forward. Let us work together. Anything we get from the legal analysis, you will get as well. We are not there yet. Thank you.

DIANA MIDDLETON: Hi, everyone. We're going to move to the question and answer portion of this section now, and James will be reading those questions.

UNIDENTIFIED MALE: First question comes from Cathrin Bauer-Bulst, of the European Commission and co-Chair of the GAC PSWG. How will these different dialogs be coordinated and pulled together by ICANN?

THERESA SWINEHART: Thank you, Cathrin. Clearly, there are many different dialogs happening, and at the ICANN60 meeting, there will also be many dialogs happening. So we're really looking to use the SO and AC channels to both get information out as far as what we're undertaking, the updates with

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regards to the legal analysis, any of that sort – ICANN meetings, blogs, info that can be posted on the website, and various other means. So really trying to use the channels that we do have in place, the blogs that we do have in place, and obviously the ICANN meetings to make sure that as much information that can be shared easily amongst each other can be done and coordinated and pulled together. I hope that’s helpful and a good avenue to go through.

UNIDENTIFIED MALE: Question #2 is from Anne Aikman-Scalese. “I am with the Intellectual Property Constituency. What work has ICANN done with contracted parties RE: necessary changes to enable consent to WHOIS information as it relates to the EU directive on enforcement of intellectual property rights?”

THERESA SWINEHART: We’re going to have to take a look at that and come back to you. This is clearly part of the work that’s underway in relation to the legal analysis and the dialogs that are currently happening.

UNIDENTIFIED MALE: Question #3 is from Steve Metalitz, COA/IPC. “To whom will the questions identified by Hamilton be posed?”

THERESA SWINEHART: I think as I mentioned during the presentation as well, Hamilton’s work will be shared with the community. We’ll be making sure that as soon as

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that's available, we'll get that out through communication through the SO and ACs as well as obviously the website and shared with the community, and then feedback will be very welcomed on that. And then we'll be looking – as I said, we have the first iteration and then the second iteration will be very helpful in doing sort of the next deeper dive around this topic.

UNIDENTIFIED MALE: Question #4 comes from Steve DelBianco: "We've seen letters the ICANN has sent to several DPAs. Can ICANN please describe responses and reactions from DPAs?"

THERESA SWINEHART: Yes. Any responses that we'll be receiving will be posted on our correspondence page. So, as soon as we get any responses, if we do, then we'll be posting those, and those will be made available to the community as well.

UNIDENTIFIED MALE: Question #5 comes from Jim Prendergast: "I appreciate there will be a cross-community session on GDPR ICANN60, but wouldn't it make more sense to schedule it on day one as opposed to the last or second to last day so that people could spend the rest of the week huddling and side-baring to try and work on solutions to this after the session? Can you move the session not Monday?"

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THERESA SWINEHART: It's a good question. This is one where we work with the community on the scheduling of this, so Steve, we're happy to work with you and the rest of the ICANN community with regards to looking whether the community could have that scheduled at an earlier part of the week. We appreciate the point of it being on the Thursday as opposed to earlier on. So happy to work with you and the rest of the SOs and ACs with regards to seeing how that might be adjusted schedule-wise.

UNIDENTIFIED MALE: Question #6 comes from Fabricio Vayra: "To Chuck's point, when and how will we drive [towards] an answer on whether ICANN is a data controller? Without this, we can't answer basic questions. Also, how can we as a group help in this critical question and others in this process?"

THERESA SWINEHART: This is really part of the legal analysis work and Hamilton's work. As soon as we have any of this information, we'll be sharing this with the community as well. So, I think as we've already said, this is part of the overall work underway, and as soon as we have that work ready to share, that'll be out there.

UNIDENTIFIED MALE: We have a follow-up question from Steve Metalitz: "So, Theresa, are there no plans to pose any of these questions to DPAs or those whom Göran has identified as making the decisions?"

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THERESA SWINEHART: I'm sorry. Can you just repeat the question?

UNIDENTIFIED MALE: Sure. "Are there no plans to pose any of these questions to DPAs or those whom Göran has identified as making the decisions?"

THERESA SWINEHART: We'll be providing the questions to the community, and I think as also I outlined in the beginning, helping identify questions that should be posed to the DPAs and sharing those in any way that we have available. So this is an iterative process, and looking and identifying what additional questions we need to be posing, what questions should be posed to the DPAs to help us get clarity around some of the issues that have been identified. And this is part of the iterative process of the legal analysis that we're looking at in relation to the work with Hamilton.

UNIDENTIFIED MALE: We have a question from Bradley Silver. "Will ICANN make both the Hamilton opinion available as well as the questions that ICANN posed?"

THERESA SWINEHART: Yes. We will. I know that we still have some hands raised as well, so perhaps I could jump over to the hands and then go back to some of the questions that are being posed. And clearly, if we don't reach an answer to all the questions that are being posed, we'll be happy to follow up offline on those. So with that, could I go to Thomas?

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THOMAS: Thanks very much, Theresa. Let me just check. Can I be heard?

THERESA SWINEHART: Yes, we can hear you.

THOMAS: Awesome. I have to apologize for the background noise. I'm traveling, so I hope the sound quality is okay. First of all, I would very much like to thank Göran for confirming that this is a collaborative effort and that risks are shared primarily between ICANN and the contracted parties.

I would like to urge ICANN to really implement and operationalize this spirit of cooperation and add more transparency to what's happening. In the days before we worked on the data matrix, Theresa, that you referred to, we had a couple of discussions with community representatives, and we've asked to jointly work with ICANN on the statement of work to be presented to the law firm that shall carry out the legal analysis.

And actually, we have provided input to the matrix. There was basically silence, and it was only after the fact that we heard that ICANN had already commissioned a legal study, and at that point in time through blog posts, we learned that ICANN has an engagement plan with respect to GDPR.

I would really like to encourage ICANN to change this working method from reporting to the community after the fact to actually working with

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primarily the contracted parties by keeping the community apprised of the plans and on the briefings. Because as you know, when you commission a legal study or when you're talking to DPA, the responses that you get hugely depend on the briefing and the information that you convey. And since there's a lot of uncertainty with DPAs at the moment on how they should respond to the whole area of DNS and WHOIS, I think it would be unfortunate if they got conflicting or contradicting messages from contracted parties from ICANN and from other parts of the community. And therefore, I think the better everyone is aligned, the better the chances are that also you get responses from DPAs.

Let's not forget it's been more than 15 years back since the Article 29 group and European Data Protection Commissioners have written to ICANN, and now to go to them and reach out to them, ask them for advice, without having our own proposal on how things can be implemented, might lead to a reaction where they just say, "Okay, go back and do your homework."

So even when it comes to difficult questions, for example on WHOIS data controller, that can be determined contractually. So ICANN could state in its contract that it is the data controller for certain data elements, and others could be joint controllers. But we have to start somewhere, getting a data matrix and data-related approach on paper to present and discuss to DPAs to get their feedback. Thanks so much.

GÖRAN MARBY:

Thomas, may I? Can you hear me?

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THOMAS: Yes, I can hear you. Sure.

GÖRAN MARBY: Thank you, Thomas. And thank you for your support. I just want to [inaudible] some of your points. First of all, as I said in the beginning, if I made a mistake, I'm really sorry for it. But I thought it was extremely important to visualize for anyone [without] a potential problem for the WHOIS.

So I decided that I need to share this information with as many as possible. Within our community, within our stakeholders, within the European Commission who once upon a time proposed this legislation without taking WHOIS into account, but also the DPAs. The way I did that was to share the use cases which you helped us with, which I think has been very helpful. I think that when I was in Brussels last week, I got the immediate impression that we are very much discussed right now.

There is one thing I need to say, and that is that as I said before, ICANN is a big tent. We have different opinions within the community about WHOIS – anything from knowledgeable and passionate privacy people, and also people who are using the WHOIS system. That's one of the beauties with this system. But I agree with you in the sense that whatever it is, the contracted parties [all saw it] in the first place.

And I know I get a lot of questions about who is the data controller and everything else. We have to work through that and we are doing a legal analysis, and we will be very open to you about that legal analysis, because we're in this together. That's one thing – and I really feel

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nervous about this – now we’re going to put something back to you, Thomas.

One of the problems is that according to the way it works, if we go to – there are 28 member states, and will still be next year. Plus the [ES] countries. They all have the same law, but the DPAs are independent. And as a former regulator, I think that independence is very important. They make that decision based on their [ecosystems,] their local knowledge. They work very closely together, but they are independent.

One thing that doesn’t work is that you go up and tell them, “This is what we’re going to do.” And then you can say, “Yes.” The way it works is that you do something, and then they will make a decision if you’re complaint with the law or not.

So it’s not until they made that formal decision we will know. And that is of course something that can go into the courts. You pass through the local courts and then the European courts. This could take five to seven years.

So that’s why we have reached out to the DPAs, to give us as a group, the Article 29 group, some sort of guidance. That’s why we approached the European Commission to help us if we can provide any guidance to this one. Because the problem is, as I mentioned before, that the balance between the uses of WHOIS and the privacy part of it has not been discussed in the running up before the legislation was posed.

That’s unfortunately how it works. And I’m a strong believer in the EU institution, so it’s not that. It just becomes a practical problem for us

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that it was never discussed, and the unclarity of this. And yes, we really want to continue to work to figure out how to be compliant.

Also what I said before, just repeating it to answer any question that the legal analysis we see today, both from the ones that GNSO got in but also the ones we're starting to get in now – and it will be a flow of information coming in – shows that it will be an effect on the current WHOIS system [and enable] to be complaint with the legislation in Europe.

Now we're trying to figure out how much. And then we have to look at ways how to get out of that, but we need to understand more about the legislation going forward. Are we late? Yes, we are late. And I'm really sorry for that. And that's something I have to think about.

I think we have to think about the community, we have to talk about the GAC, how do we get access to this information and get a hold of this type of information going forward with other types of legislation? Thank you very much.

THERESA SWINEHART:

Thank you, Göran. And just to add, the opportunity when we post the legal analysis to provide feedback will be critically important. And the more quickly we can get the feedback and capture that, and make sure we get into the second iteration, will be very important. So we'll make sure to get that out and everybody will have that. Thanks.

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Let me go to – I think I have another sticker. It says, “Portuguese booth.” I’m not quite sure, but please introduce yourself and who you’re representing, and your comments.

DIANA MIDDLETON: Theresa, that one has been withdrawn.

THERESA SWINEHART: Okay. Thanks so much. Chuck, I see that you have your hand up again, and then we’ll go back to the other questions. And Chuck, also maybe you want to introduce yourself with regards to the role you have on the RDS-related work as well for the audiences that may not be as familiar with that important area.

CHUCK GOMES: Thanks, Theresa. I’m the Chair of the RDS PDP Working Group. I thought I had lowered my hand, but apparently it didn’t go down. I’ve put my response in the chat to give time for others to raise their hand. But I’ll go ahead and repeat it.

I just wanted to respond to Göran. First of all, thanks, Göran, for your response. And I wanted to point out that if ICANN accepts some of the responsibility for being a controller, I don’t think that alleviates registrars and registries from their roles as possible data controllers as well. And the legal advice we have received as well as from the data experts indicated that there is the possibility for joint controllership if I can use that term.

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So I didn't want to at all imply that if ICANN accepts responsibility as controller that that alleviates responsibility from registries and registrars in terms of where they may control certain data that ICANN doesn't. So I just wanted to make that clear. Thanks.

THERESA SWINEHART:

Thanks, Chuck. We've reached the top of the hour, and sensitive to everybody's time, let me just thank everybody for joining for this call and for your questions and this continued dialog. It's really quite important for all of us to be communicating on a regular basis around this, so we look forward to getting you updates and also your feedback with regards to the postings that we'll have underway going into the ICANN60 meeting. And of course those of you who will be there, look forward to see you there and the continued discussions.

Göran, maybe I can just hand it to you for a final remark, and then we'll give everybody their day back, or evening. Thanks.

GÖRAN MARBY:

Or even morning, thank you very much. First of all, I would like to thank you for all the people who joined on this call. It's really helpful.

Going back to what I said previously, this is the first time really, in my understanding, that we are affected by a legislation in a region of the EU. We have a lot of things to learn from this one, but we need – as I pointed out – to work with this together. There are a lot of unanswered questions right now, and maybe we don't even see the questions.

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Everything I do which I could correct, please let me know. I have no problems with that. We will be as open and transparent as we can.

I'm sorry if we sometimes move too fast, like sending out letters to DPAs and contacting people. And we do that to create awareness about a potential problem. I don't take sides personally in that balance debate. It's very hard for me to do. That is something that the community has to take and accept, and we need to figure out a way how to get this discussion back in the community as well. But we also have to respect that at the end of May, there is a new legislation.

I hope – one of the to-dos I have from this is actually unintentionally something, and that is, have all the countries had the time to actually enact this legislation? Because right now, I've got information that only a few countries have actually put it into their legislation.

So let's keep the communications open and let's continue this discussion in the ICANN way, which is open, clear, and transparent. And any time we have information, we will give it to you. Thank you very much for your support.

**[END OF TRANSCRIPTION]**