RECORDED VOICE: This meeting is now being recorded.

JAMIE HEDLUND: All right. It's five after the hour, or a little bit past that, so we'll start. I thought for an agenda, and I apologize for not sending this around earlier, that we continue the last meeting's discussion on the trigger, focusing specifically on James [Gannon] and Steve Metalitz's drafts. And I think that, please correct me if I'm wrong, I think the key issue, the key issues are one, whether there is a way to allow for a legal opinion to be a trigger.

And then secondly, whether it makes sense to have a trigger that is centered an opinion from the DPA, or the equivalent. That was my thinking. Does anyone have any additions, or corrections, or any other feedback to provide for, you know, potential agenda for today?

Hearing none, depending on time, and where we get on those two issues, we could then talk about next steps. [Inaudible] typically a possible outline or structure for a report for this group. So, Michele, are you on? Or does anyone want to take up the, defending a trigger for, based on a legal opinion?

PATRICK CHARNLEY: I don't, but I'll just announce that I'm here. Patrick Charnley from…

JAMIE HEDLUND: Hey Patrick.

PATRICK CHARNLEY: Hi.

JAMIE HEDLUND: Okay. Somebody just joined, and we're looking to discuss the possibility of a legal opinion serving as a trigger, and looking for someone to discuss it. If not, I'll try to introduce it.

So, as everyone knows, in the procedure for data retention waivers, there is the possibility of relying on a legal opinion from a nationally recognized law firm, or reputable law firm, as justification for a waiver, assuming that it sets out it would, it conflicts with, the allegation conflicts with national law.

And so, you know, obviously that doesn't exist in the procedure for WHOIS conflicts. So the question remains whether it's possible to have a legal opinion serve as the trigger, and more specifically whether there are safeguards that could be put around that to ensure that it's reliable, and accurate. Safeguards such as putting it out for public comment, you know, dealing for the, you know, relying on input from the GAC, if there is a GAC member from that country.

Also, you know, allowing for conflicting legal opinion, or other evidence that undermine the legal opinions output. So, you know, the challenge that registrars face right now is that with notification requirement, you know, they have to wait until they are put on notice of potential liability of some sort. And if, obviously, if that potential can be avoided by getting a waiver before that happens, that would be ideal for a registrar.

The other issue, of course, is that not everyone is convinced that these laws are enforceable, or being enforced. So then the question is, is there a way that something less than a notice from civil or criminal, or you know, an enforcement organization that can suffice.

So the first one is an opinion from a legal firm, from a law firm. So does anyone have any suggestions as to why that should be allowed? Firstly those, and if so, under what circumstances. And then we'll go to the counter.

Michele, can I pick on you?

Michele can't dial in. Okay anyone, so no one wants to… Okay. So then, anyone want to take the other side where there, you know, there are basically no safeguards, sufficient to ensure reliability and accuracy of a legal opinion.

BRADLEY SILVER: This is Bradley from [inaudible]. I, yeah. I've been on the email chain as well. [Inaudible] are aware of my views on this, but I still haven't really heard of any response from those that are proposing, supporting the law firm part, that would show that it would be consistent with the underlying policies.

I think we've kind of gone round and round this several times, and we're trying to get as close to, you know, the most authoritative source of interpretation of what a national view, or national law actually prevents the registrar, registry from doing. And I don't believe that an opinion

from a law firm, nationally recognized or not, deciding what criteria one would apply.

Figure out which, you know, whether the law firm is such a thing, gets close enough to creditably demonstrating that there is a legal prevention. So my suggestion has also been that perhaps we should focus on how to make the possibility of an opinion or position from an authority charged with actually enforcing the law, which I think comes the closest to what the law actually means in terms of its link to a credible prevention, how they might [inaudible] so that it's most workable.

And one of the steps that Steve has proposed in his initial proposal was that, you know, aside from the agency in question actually certifying that there is a reason why the registrar can't comply with their WHOIS obligations, but that they also tend to enforce a more, or prepared to enforce, I guess, it would consider enforcing the law.

And understanding that may be perhaps, you know, from a purist perspective, is very close to what the policy demands. I think in reality one, you know, I think should concede that may not be something that enforcement are going to be inclined to do, and may in fact, inhibit them from issuing any opinions if, you know, they were obliged to actually say, we intend to enforce it because, they may not intend to enforce it.

And, you know, currently we know that sometimes that happens a lot. So, I would suggest we consider whether or not that is a realistic proposal, but that without that we can still come, perhaps, close enough

to a process that brings for an authoritative interpretation of national law. That comes, that is persistency of aligned policy.

JAMIE HEDULUND: Okay. Thanks Bradley. And we will talk about that option in more detail, or at least I propose that we talk about that option in more detail, following this initial discussion. Luke, do yu want to say anything? You've added something to the chat.

Okay. So I guess he can't join the audio. All right. Well, if no one has anything to add to the discussion about why this is, why a law firm letter could meet the requirements of the policy, let's move on then to Bradley, what you mentioned, is Steve, and Steve I think you're on, proposal for an opinion from an enforcement authority. Steve, are you able to describe your thinking there?

STEVE METALITZ: Yeah. Well I think we're referring to the draft I put forward, I believe it was on May 5th, and I don't know if you can put that on the screen.

JAMIE HEDULUND: Right. Yup. Maria, can you put that up?

STEVE METALITZ: Thanks. So this is the proposal for an alternative trigger. Obviously, if there were a WHOIS proceeding, as it's defined now, that could be the trigger, but this would be an alternative, in the case where there hasn't

actually been a proceeding brought, or doesn't qualify as a WHOIS proceeding under the existing feature.

But still I think, this would amount to, I think, the credible demonstration of legal prevention. So this sets out what a statement from the agency with responsibility for enforcing the law in question, what it would contain in order to serve as a trigger. I think what Bradley's suggesting is that our fourth point down here, be omitted so that if the statement sets out the facts, it analyzes the inconsistency, specifically and it certifies that the agency has the authority to enforce the law, and that it has jurisdiction over the contracted party.

Because again, this is only if it's applicable law. Then that would be sufficient for the trigger, and then as, I think you mentioned before, Jamie, if that trigger applies, there would be public consultation. There is already a provision and the procedure for consulting with the GAC representative, and I think it's optional now, but this would make it more mandatory.

JAMIE HEDLUND: So would this be… If I could just ask one quick question. Would this be available to a class of parties, as opposed to just one, specific registrar?

STEVE METALITZ: Yeah. I think if the statement that, under 1A that listed more than one contracted party, it could apply to that. And maybe we want to say, parties…

JAMIE HEDLUND: My question was brought in, that was, could it include all contracted parties with this, you know, language in their agreements?

STEVE METALITZ: Yeah. They're subject to the same ICANN contract, and if they're subject to the same terms of service or registrar agreements, in other words, those are more identical. I don't know that that, I mean, I don't know how often that would be the case, but, you know, I think as long as these points are covered, then it would, it could apply to anybody that is in the same position.

JAMIE HEDLUND: Okay…

STEVE METALITZ: What Bradley was suggesting is taking out number four, which is a statement that they intend to enforce it, or prepared to enforce it, and I think, while I think that would be very helpful in terms of showing that, you know, there is really a level of legal prevention, even though no proceeding has been started, it's obviously a clear danger, or threat, to the registrar or to the contracted party, that there will be such enforcement.

But I think, even without that, you could probably argue that this means the test, and the policy is credible demonstration of legal prevention.

JAMIE HEDLUND: Right. Okay. So this is, yeah, I mean this makes a lot of sense to me. I think there are some who have raised the question as to whether the enforcement body, or the DTA, or the equivalent, would actually issue an opinion like this. I mean, in the US, the context, it seems like this is sort of like an IRS letter, where the law firm on behalf an anonymous client asks whether a particular transaction or method would violate the IRS code.

Is that a fair analogy?

STEVE METALITZ: Well, I don't know. I mean, one point here is that it would require that the agency actually looked at the terms of service, that the contracted party uses, and the registration agreements that they use. I understand that these are relatively uniform, but not totally, so [inaudible] regard to a specific contracted party.

JAMIE HEDLUND: All right…

STEVE METALITZ: The ICANN contract in question, is you know, that's publically available, so is the law.

JAMIE HEDLUND: Right. Volker, you have your hand up? I think you're on mute. There you go.

Go ahead, Volker.

You're…

Yeah, you're breaking up a little bit, but go ahead.

Now we can't hear anything.

UNKNOWN SPEAKER: …dial in rather than talking through the computer.

JAMIE HEDLUND: Okay. Oh.

You're correct.

All right, Volker, are you there now?

Volker?

VOLKER A. GREIMANN: Hello. Apologies, I just logged in now. I wanted to say that I do agree with Steve at one point. It would be very helpful to have these opinions from, well, I would say law enforcement, the protection officials, essentially law enforcement over here. So have these opinions from the designated law firm enforcement agencies.

However, in about 90% of the cases in Europe, they don't do that. That's not their job. As Luke pointed out, their job is to look at actual goings on, and one day receive a complaint, and then issue fines. There

are neither staff nor equipped to provide legal expertise before, or on a theoretical basis.

So while this would be helpful, it's a rather theoretical case, because that's simply something that we will, in most cases, not get. Luxemburg may be different, I think. Luke obtains one, but that's because that's a very small country, with a very short distance pathways, where some things to work easier than, for example, in Germany.

I've tried to get an opinion from the German data protection official, and they simply say, "That's not our job. We don't have the manpower to do that. When there is a complaint, we'll look at it. And if the implementation violates German data protection law, then you are in violation and we will fine you accordingly."

So the lawyer option is currently the only one that we have realistically.

JAMIE HEDLUND: Okay. Ashley?

ASHLEY HEIMAN: Hi. Thanks. So, from the US government's perspective, it's not always completely clear, you know, who our enforcement agency is, but I think this is something that we will be willing to consider, and talk about when it comes to, you know, other countries and their agency that has the enforcement authority, and whether or not they're willing to engage in this sort of endeavor of providing opinions, I don't know if it will be helpful at all, but I do know that there is a new public safety working group that's being formed.

That if I understand correctly, within ICANN, that is intended to draw the likes of DPAs, and enforcement agent, law enforcement agencies. Perhaps this is a kind of discussion that we could ask them to engage with respect their ability and willingness to consider providing opinions, in this case.

I don't know if that's helpful at all.

JAMIE HEDLUND: That's very helpful and interesting idea. I believe that's being formed under the auspicious of the GAC. Is that your understanding?

ASHLEY HEIMAN: That's correct. And it's still, this will be their first meeting, I believe, and I think they're still in the process of bringing the right expertise to the table, but this could be something that perhaps triggers interest in the group as well.

JAMIE HEDLUND: And is NTIA going to be part of that working group? I know, the [FTC] says that they will.

ASHLEY HEIMAN: I don't know that NTIA specifically will be, other than, you know, their involvement in the GAC. I do know that the FTC and perhaps some of our law enforcement, will be participating in that group.

JAMIE HEDLUND: Okay. Thanks. Bradley.

BRADLEY SILVER: Yeah, I guess I had a question from Volka's input. That the DPA's equivalent organizations simply issue a fine, and don't provide any opinions. That could be the basis of the credible demonstration of prevention. I wanted to dig a little bit deep so I can understand it better, because this isn't something I'm completely familiar with. So there are those that can offer their experience that would be helpful, but I guess, you know, the question maybe isn't necessarily the detail or the complexity of opinion that needs to be provided.

If we come back to the underlying policy and the credible, you know, legal prevention, you know, it would seem to me that, you know, issuing a fine would probably, wouldn't that have gotten you to a, to a WHOIS proceeding anyway, under the current policy? I guess that's the first question.

And the second question is, isn't there any sort of warning, or communication between the agency and the registrar in question, that there is an inconsistency or non-compliance with law before a fine is issued? Or is the fine simply issued like a traffic ticket? You don't really get to explain or stop the practice?

JAMIE HEDLUND: Volker, can you respond?

VOLKER A. GREIMANN: This is not very easy to say because it really depends on the subject matter and how the data protection officials go about it. In some cases, you will get some form of warning. In some cases, you will not. Even the data protection officials aren't always right about it. I mean, some of them have lost in courts on various occasions.

Sometimes they go overboard as well. When they, for example, go off after Facebook, or a websites that implement Facebook buttons, then there will be pushback. And registrars are not probable, or not as able to pushback as some other bigger organizations, but we are in the position that we, financially and also from, based on our reputation we have to avoid being in that situation in the first place.

We cannot afford to engage in this legal battle with the data protection officials, on a matter of data protection law or not. That's simply something that we're not equipped to do. So we have to be in this position that we have to be certain, absolutely certain, that what we are doing, based on our contracts, is within the confines of what we are allowed to do.

And the only way that we can currently can do that is if we obtain a legal opinion, and then we can also say, to a data protection official, is if they go beyond that legal opinion, and say, even what you're doing now is too much, then we could say, at least we updated a legal opinion on that. And they said this and this, and then we have an argument.

But other than that, we're basically in a bad position. And that's something that we cannot afford to be in.

[CROSSTALK]

BRADLEY SILVER: So it sounds like what you're saying, that even, and since where you do get a legal opinion, that legal opinion may still not be any guarantee against action from a DPA. That it's good to have so that you can have some basis to argue that, what you were doing was compliant.

VOLKER A. GREIMANN: We could at least use that and say, we're not acting in bad faith. So it's helps a bit to have that legal opinion. But, like I said, it's no doubt a perfect guarantee, but if we have a legal opinion that says X, then that's already a strong indication that going beyond that would already be a violation. So basically, if we have a legal opinion that says, you're not allowed to do this and this and this, and we do it anyway, then that would also be bad faith.

And with the direct consequence, there will be a fine consequently, of course.

BRADLEY SILVER: I guess what I was getting at was that this one seems to be, you know, a guess of what the legal opinions are saying, and the DPA might, the position that they may as to take as to what the law says. I guess maybe, it comes back to the difference between the two approaches.

VOLKER A. GREIMANN: Of course. Law enforcement is not always right, and legal opinions may be flawed as well, but they are everything, all that we have to rely on in this case.

JAMIE HEDLUND: Okay. Steve?

STEVE METALITZ: Yeah, just to add to this. This draft doesn't specify what leads the agency to prepare this written statement. It could be based on a complaint. It could be based on being approached by the contracted party. Obviously, yes, there are going to be different procedures in different countries, and I'm not sure we can cater to all of them, so we don't know what all of them are.

But there are certainly multiple roots that you might get to this stage of notification. And I agree with Volker, even if an agency in law enforcement agents says, you know, we think you're violating the law in this certain way, that doesn't mean that a court isn't going to necessarily going to agree. But I think there is a qualitative difference between the agency that has the authority to enforce the law, making that conclusion, reaching that conclusion, and a law firm, that you hired, reaching that conclusion.

So that, to me, is the step that needs to be surmounted to meet the requirements of the policy. Thanks.

LUAREEN [CAPEN]: And this is Laureen [Capen] from the Federal Trade Commission. Apologies for joining the call late, but I did want to add my second and other comments to Steve's comments, about our concers with having just a legal opinion qualify for this trigger. Because, as we all know, lawyers, it's their job to advocate on behalf of their clients, and in a sense, the lawyers are, I don't want to put this in a pejorative way, but there are many lawyers available who will, for a fee, be able to give you the opinion you want, because that's what lawyers do.

They take the facts they have and they advocate for their client. That process doesn't have nearly the same reliability, in our view, integrity as a law enforcement agency with the ability to enforce the actual laws in question, giving an opinion on whether there is actually a conflict between national privacy or data protection law, and the requirements of the contract.

JAMIE HEDLUND: Thanks. I think, earlier in the call, I don't know if you were on it, but there was, I raised the question about whether there could be sufficient safeguards in place, or stress tests to use the current term, against which a law firm opinion would be measured. You are correct, obviously, that people can, anyone can get the opinion that they want, but perhaps by subjecting it to review by the GAC, by the community, by some other, you know, expert that you could have that integrity, or close to that integrity.

Because as others have mentioned on the call, while an opinion of an authority would be great, and I haven't heard any opposition to it, but if

anyone opposes this as an option, please speak up. But in a lot of cases, they simply won't do that. And so, rather than subject the… So if in a particular jurisdiction, a registrar is not able to get an opinion from a DTA, and there is a law on the books that clearly, you know, creates a conflict situation with the WHOIS obligations, then they're stuck waiting to be served, with notice from an authority.

So anyway, that's a very long way of saying, yeah, obviously a law firm doesn't have the same stature as a DPA, or the equivalent. But a law firm opinion that's subjected to the fire of, you know, public comment and input by the GAC, you know. Is that something that's, could provide a sufficiently adequate demonstration of legal prevention.

LAUREEN [CAPEN]: It's an interesting proposal, and I don't disagree with anything you just said. I certainly agree with you that there could certainly be DPAs who aren't going to be willing to take this on. And it is a very uncomfortable position to basically wait to be sued before you can raise this issue. I can see how that might be viewed as untenable.

On the other hand, I'm wondering with all of the work and different issues that are arising for the GAC, and the community, pragmatically it seems to me that, and I'm not speaking for the GAC, I'm speaking my personal capacity. Pragmatically it seems like, everyone is just treading water as it is, then adds this other layer of to it. I'm just not sure how realistic that is.

And I'm also, I'm certain about whether every GAC representative is, has the privacy authorities in a position where they are going to be able

to call on them, to inform them about this, to even give a reasoned opinion. So I think the conception of how do we hold this to a more reliable standard is the right impulse.

I'm just not sure practically that that is going to, that practically is going to be able to yield the results that we all would want.

JAMIE HEDLUND: Okay. I'm not going to dispute that there is a lot going on in ICANN. But, you know, we're tasked with looking at the procedure as it exists, and whether and how it could be modified from the original, in light of the time that's passed.

So, Steve?

STEVE METALITZ: Yeah, thank you. This is Steve. Just two points. One, it strikes me that if there are problems with this alternative trigger, it would be even less likely that the GAC, or GAC member, or DPA would be in the position to review a legal opinion that's been issued by a law firm, and say yes, that's right, we agree. Which is I think you were suggesting, your last comment, Jamie.

I mean, we've had some experience with this with the public comment side of this data retention area, where some very, we thought, extremely inadequate legal opinions were put forward. We commented publically. ICANN never responded in any way to our comments, and the data retention waivers were granted.

That's a separate process, and that had the legal opinion trigger built in. It's not subject to the consensus policy that we're dealing with now, that the community has adopted on WHOIS. So, I get that that is separate, but I think it's somewhat instructive that I think, in those cases, in many of those cases, they'll fall short of credible demonstration of legal prevention.

Now Volker is, I'm seeing in the chat, is referencing European gTLD and ccTLDs. Obviously the ccTLDs are a separate story because they are not subject to ICANN contractual obligations in this regard. But if you look at the gTLD, the most recent one, which was dot [GAT], that registry chose not to use this procedure, we think that was improper, but that's, you know, that's what happened.

And basically their submission was entirely based on legal opinion, or an opinion they received, from the Spanish data protection authority. And I think, went back and looked at that, and it would be pretty close to what's in this notification step. So they've got such an opinion, they put that forward. There were disagreements about what that opinion meant, or what it said, you know, the public comment process there, and IPC commented, but there at least, we had some enclosure to a credible demonstration of legal prevention, because we had this statement from, rather detailed statement from the Spanish data protection authority.

So that, I think, buttresses the case for this approach, rather than the law firm approach. Now, undoubtedly, I believe they had some materials from their law firm too, that they submitted, and that may

have been part of the process of getting the opinion from the Spanish data protection authority.

I don't recall, and I'm not sure that was spelled out. But the point is, that there was a very detailed opinion, pretty similar to what is in here, or what's proposed here, and that was the basis for relaxing the WHOIS requirements for the dot [GAT] registry. So I think that kind of buttresses our proposal for an alternative trigger, rather than the idea that a law firm opinion, by itself, would amount to a credible demonstration prevention.

JAMIE HEDLUND: Okay. So just to be clear, Steve. Yeah, I'm just trying to keep the conversation going. I'm not advocating, as staff, for one position or for another. Simply trying to, you know, flesh out all of the options that have been raised.

So, anyone else? So I guess, let me ask, let me ask this, which is, does anyone oppose including Steve's option as something that this group would recommend, as a change to the current procedure?

And just to be clear, this would be an option. It would not be the sole option, if you know, it would be in addition to the current language.

Okay. Does… I mean at this point, it does not seem to be consensus support for a legal opinion option as a trigger. So it would seem to me that at this point, that the report would include, you know, would make the, the recommendation in the report would be Steve's proposal, and the report would also mention that there is, and I'm moving to the last

agenda item, but the report would mention that there was no consensus for the law firm opinion, as a trigger.

Is there anything else that anyone thinks should be included in the report?

Okay. In that case, I would propose, you know, unless someone in the IAG wants to take the pen, that ICANN staff draft a report, and that, you know, as discussed earlier. And send that around for review and comment. And then that can be the subject of our next call, which won't be until after Buenos Aries.

Okay. All right. Well in that case, unless anyone has anything else to discuss, please look for the draft report, and provide any input by email before the next meeting, and then we can, hopefully, put it to bed on the next call.

All right. Thank you all.

[END OF TRANSCRIPTION]