ICANN 71
VIRTUAL POLICY FORUM
14–17 June 2021

Impact of Regulatory Developments on ICANN Policy Topics

Monday, 14 June 2021
12:30-14:00 CEST

Program

Part 1	Part 2	Part 3
Overviews	Panel Discussion	Community Discussion

Participants

Joanna Kulesza	Moderator

Part 1

⊙ Olivier Bringer	European Commission
⊙ Alexander Seger	Council of Europe

Part 2

⊙ Fred Baker	Root Server System Advisory Committee Chair
⊙ Philippe Fouquart	Generic Names Supporting Organization Council Chair
⊙ Matthias Hudobnik	At-Large Advisory Committee Member
⊙ Alejandra Reynoso	Country Code Names Supporting Organization Council Chair

Part 1

Overviews

EU Regulatory Developments and the DNS

14 June 2021

EU Regulatory Developments

1. **Proposal for a Directive on measures for a high common level of cybersecurity across the Union (NIS2)**

2. **Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act)**

European Commission

Three main pillars of the proposal for NIS 2

MEMBER STATE CAPABILITIES

National authorities

National strategies

CVD frameworks

Crisis management frameworks

RISK MANAGEMENT

Accountability for top management for non-compliance

Essential and important companies are required to take security measures

Companies are required to notify incidents

COOPERATION AND INFO EXCHANGE

Cooperation Group

CSIRTs network

CyCLONe

CVD and European vulnerability registry

Peer-reviews

Biennial ENISA cybersecurity report

NIS2 and the DNS

Critical role of the DNS recognised: a reliable, resilient and secure DNS is a key factor in maintaining the integrity of the Internet

Scope - all providers of DNS services along the DNS resolution chain, including operators of root name servers, top-level-domain (TLD) name servers, authoritative name servers for domain names and recursive resolvers.

DNS service providers and TLDs are **automatically in scope**, no identification from Member States.

Single jurisdiction regime: main establishment; **non-EU entities** to designate a representative in the Union

Security measures horizontally identified in NIS2 but **sector-specific** implementing acts will be possible

Responsibility anchored at the level of the management bodies of the essential and important entities

NIS2 and domain name registration data

Importance of domain name registration data: “Maintaining accurate and complete databases of domain names and registration data (so called ‘WHOIS data’) and providing lawful access to such data is essential to ensure the security, stability and resilience of the DNS, which in turn contributes to a high common level of cybersecurity within the Union.”

Availability and accessibility of the data: “The availability and timely accessibility of these data […] is essential to prevent and combat Domain Name System abuse, in particular to prevent, detect and respond to cybersecurity incidents. ”

NIS2 and domain name registration data: Article 23

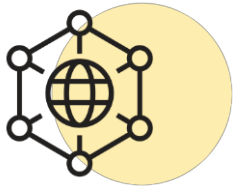
- Obligations concern TLD registries and entity providing registration services for the TLD
  - Collect and maintain accurate and complete domain name registration data.
  - Contain relevant information to identify/contact holders and contact points.
  - Publish non-personal data without undue delay.
  - Ensure all requests to access domain name registration data receive a reply without undue delay.
  - Provide access to specific personal data upon duly justified requests by legitimate access seekers
- EC can adopt guidelines

The Digital Services Act in a nutshell

Ambitious reform for the EU to **re-structure its own informational space & set global standards**

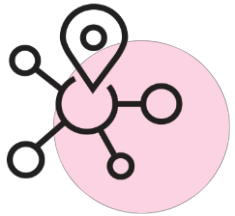
M**odernise** the rules to **more effectively address illegal content and systemic risks in the online space**

Ground rules for a **truly competitive Single Market for digital services**, with **legal clarity** and **effective supervision** of digital services



Clarify the **rules on liability**, giving companies legal certainty to take voluntary action **in a diligent and proportionate manner under clear terms of service**

Ensuring **trust** across EU MS, supporting **cross-border cooperation** among national authorities



Increase transparency, accountability, facilitate **better oversight**

European Commission

Intermediary services

- **offering** network infrastructure: **Internet access providers**, **domain name registries, wifi hotspots…**

Hosting services

- such as **cloud infrastructure & webhosting** services

Online platforms

- **E.g. online marketplaces**, **app stores**, or **collaborative economy platforms** or **social media platforms**

Very large online platforms

- Specific rules **for platforms reaching 45 million users**

(10% EU population)

DSA - Due diligence obligations

OBLIGATIONS	VERY LARGE PLATFORMS	ONLINE PLATFORMS	HOSTING SERVICES	ALL INTERMEDIARIES
Points of contact	•	•	•	•
Legal representatives	•	•	•	•
Terms and conditions	•	•	•	•
Transparency reporting	•	•	•	•
Notice & Action	•	•	•	
Statement of reasons	•	•	•	
Complaint handling	•	•		
Out of Court Dispute Settlement	•	•		
Trusted flaggers	•	•		
Abusive behaviour	•	•		
Know Your Business Customer (KYBC)	•	•		
Reporting criminal offences	•	•		
Advertising transparency	•	•		
Additional transparency reporting	•	•		
Risk assessment and mitigation	•			
Independent audits	•			
Recommender systems	•			
Enhanced advertising transparency	•			
Data access and scrutiny	•			
Compliance officer	•			
Enhanced Transparency reporting	•			

Cumulative obligations

What does the DSA bring for the DNS?

- **Certainty** of being covered by the **EU legal framework** (recital 27)
- **Proportionality** when tackling illegal content online: number of mitigation measures + subsidiarity (recital 26)
- **Harmonised framework**: clarification how the Member State can request to act against illegal content (art. 8)
- Overall **balanced solution** as far as infrastructural services providers are concerned

European Commission

More information

https://digital-strategy.ec.europa.eu/en/library/proposal-directive-measures-high-common-level-cybersecurity-across-union

https://ec.europa.eu/info/strategy/priorities-2019-2024/europe-fit-digital-age/digital-services-act-ensuring-safe-and-accountable-online-environment_en

European Commission

2nd Additional Protocol to the Budapest Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence: Update

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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Budapest Convention: a global framework for cooperation on cybercrime

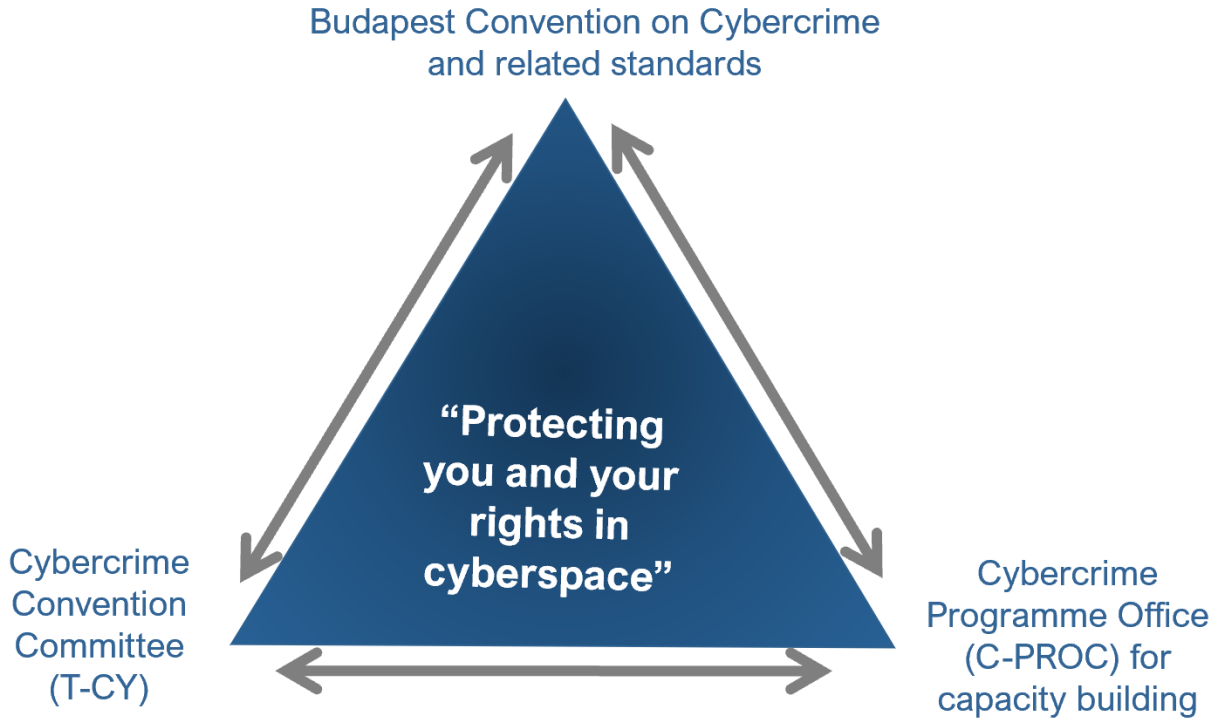
Budapest Convention on Cybercrime:

1. Specific offences against and by means of computer systems
2. Procedural powers with safeguards to investigate cybercrime and collect electronic evidence in relation to any crime
3. International cooperation on cybercrime and e-evidence

+ Guidance Notes

+ Protocol on enhanced cooperation on cybercrime and electronic evidence in preparation

By June 2021: 66 Parties and 11 Observer States



Why a new Protocol?

- The scale and quantity of cybercrime, devices, users and victims
- Cloud computing, territoriality and jurisdiction
  - Where is the crime?
  - Where is the data, where is the evidence?
  - Who has the evidence?
  - What legal regime applies to order / disclose data?
- The challenge of mutual legal assistance
- The “<1% problem”

- How to obtain subscriber information more efficiently?
- How to cooperate directly with a service provider in another Party?
- How to obtain WHOIS data (domain name registration information) from registrars? What legal basis?
- How to obtain stored data, including content, in an emergency situation?
- How to make mutual assistance more effective?
- How to reconcile efficient and effective measures with rule of law and data protection requirements?

2nd Additional Protocol: the process

- Preparatory work of the Cybercrime Convention Committee (T-CY):
  - Transborder Group (2012-2014)
  - Assessment of MLA provisions (2014)
  - Cloud Evidence Group (2014- 2017)
  - Need for Protocol identified

- T-CY 17 (June 2017): Terms of reference adopted

- 10 Drafting Plenaries + 16 Drafting Group meeting + 65 virtual subgroup meetings + 6 rounds of consultations + numerous bi/trilateral meetings + domestic meetings

- Approved by the T-CY on 28 May 2021

- Formal adoption expected November 2021 & opening for signature Spring 2022

Content of the (draft) Protocol

Preamble

Chapter I: Common provisions

Article 1 Purpose
Article 2 Scope of application
Article 3 Definitions
Article 4 Language

Chapter II: Measures for enhanced cooperation

Article 5 General principles applicable to Chapter II
Article 6 Request for domain name registration information
Article 7 Disclosure of subscriber information
Article 8 Giving effect to orders from another party for expedited production of subscriber information and traffic data
Article 9 Expedited disclosure of stored computer data in an emergency
Article 10 Emergency mutual assistance
Article 11 Video conferencing
Article 12 Joint investigation teams and joint investigations

Chapter III – Conditions and safeguards

Article 13 Conditions and safeguards
Article 14 Protection of personal data

Chapter IV: Final provisions

Article 15 Effects of this Protocol
Article 16 Signature and entry into force
Article 17 Federal clause
Article 18 Territorial application
Article 19 Reservations and declarations
Article 20 Status and withdrawal of reservations
Article 21 Amendments
Article 22 Settlement of disputes
Article 23 Consultations of the Parties and assessment of implementation
Article 24 Denunciation
Article 25 Notification

Article 6 – Request for domain name registration information

6.1 Each Party shall empower its authorities to issue a request to a "registrar"* for information to identify or contact the registrant of a domain name … subject to reasonable conditions provided by domestic law

6.2 Each Party shall permit a "registrar" in its territory to disclose information in response to a request issued by another Party

6.3 The request shall include:

- Identity/contact information of authority issuing the request
- The domain name about which information is sought
- What information is sought
- name, address, telephone, email
- Fact that request is issued pursuant to the Protocol
- Fact that request is related to specific criminal investigation
- Only to be used for that investigation
- How/when to disclose the information

6.5 Consultation in case of non-cooperation

ER paragraph 76:

- The objective of Article 6 is to provide an effective and efficient framework to obtain information for identifying or contacting the registrant of a domain name.
- The form of implementation depends on the Parties' respective legal and policy considerations.
- This article is intended to complement current and future internet governance policies and practices.

* An "entity providing domain name registration services"

Article 6 – Request for domain name registration information

ER 83:
This article does not require Parties to enact legislation obligating these entities to respond to a request from an authority of another Party. Thus, the entity offering domain name registration services may need to determine whether to disclose the information sought. This Protocol assists with this determination by providing safeguards that should facilitate the ability of entities to respond to requests under this article without difficulty, such as:

- this Protocol provides or requires Parties to provide a legal basis for requests;
- this article requires that the request emanate from a competent authority;
- this Protocol provides that a request is made for the purposes of specific criminal investigations or proceedings;
- this article requires that the request contain a statement that the need for the information arises because of its relevance to a specific criminal investigation or proceeding and that the information will only be used for that specific criminal investigation or proceeding;
- this Protocol provides for safeguards for the processing of personal data disclosed and transferred pursuant to such requests through Article 14;
- the information to be disclosed is limited and would not permit precise conclusions to be drawn concerning the private lives of individuals;
- entities may be expected or required to co-operate under contractual arrangements with ICANN.

Article 6 – Request for domain name registration information

Interplay with System of Standardized Access/Disclosure model:

- Hope is that this Article will work with ICANN SSAD
- Not clear (yet) how the interplay will work
- T-CY may have to work with ICANN going forward

Benefits:

- Complements ICANN multi-stakeholder policy for criminal investigations
- Provides safeguards that should facilitate the ability of registrars to respond
- Hopefully provides an effective and efficient framework to obtain information for identifying or contacting the registrant of a domain name

2nd Additional Protocol to the Convention on Cybercrime: benefits

Operational value:

- Basis for direct cooperation with service providers for subscriber information ("direct disclosure")
- Effective means to obtain subscriber information and traffic data ("giving effect")
- Legal basis for disclosure of WHOIS information
- Cooperation in emergencies ("expedited disclosure" + "emergency MLA")
- Mutual assistance tools ("video-conferencing", "JITs")
- Data protection safeguards to permit the flow of personal data under the Protocol

Policy value:

- Convention on Cybercrime will remain relevant and effective
- Efficient cooperation with rule of law and data protection safeguards is feasible
- Respect for free Internet with limited restrictions in case of criminal misuse (specific criminal investigations, specified data)

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Part 2

Panel Discussion

Questions

- Is there an expectation that ICANN (both community and organization) should respond to these developments?
  - How should the ICANN community respond?
  - What are alternative paths?
- How should the ICANN multistakeholder model take into account legislative and regulatory proposals that could have an impact on ICANN policies and the DNS, such as the examples highlighted in this session?
- What lessons have we learned from experience, and how can we be better prepared in the future?

Part 3

Community Discussion

ICANN

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