CONSULTATION MEETING ON CROSS-BORDER INTERNET

Strasbourg
8 and 9 October 2009
Agora Building
Room G 05

Meeting report

Executive Summary

The experts participating in the meeting:

- discussed a number of issues concerning the protection of human rights in relation to the management of critical Internet resources and cross-border flow of Internet traffic;

- concluded with a set of recommendations for the work of the Ad hoc Advisory Group on Cross-border Internet (MC-S-CI).

Introduction

1. A consultation meeting on cross-border Internet issues was organised on 8 and 9 October in Strasbourg. Ms Elfa Ýr Gylfadóttir, Head of Division of Media at the Department of Cultural Affairs of the Ministry of Education, Science and Culture of Iceland and member of the Bureau of the Steering Committee on the Media and New Communication Services (CDMC) chaired the meeting. The agenda of the meeting and the list of working documents are reflected in Appendices 1 and 2 of this report.

2. Given the general acceptance of the multi-stakeholder approach as a principle for discussing Internet governance issues, participants came from governments, private sector and civil society. The list of participants appears in Appendix 3.

3. The main objective of the meeting was to prepare for the constitution and future work of the Ad Hoc Advisory Group on Cross-border Internet (MC-S-CI), which will be operating under the authority of the CDMC.

4. The Terms of Reference of the MC-S-CI, which flow from the Resolution on Internet governance and critical Internet resources adopted at the 1st Conference of Ministers responsible for Media and New Communication Services in May 2009, were adopted by the Committee of Ministers of the Council of Europe on 8 July 2009. The Terms of Reference are reflected in Appendix 4.

5. The consultation meeting aimed specifically at discussing issues related to the shared responsibilities of states in connection with the protection of cross-border flow of Internet traffic and management of critical Internet resources as well as at formulating preliminary findings concerning the feasibility of elaborating a legal framework on the subject matter. Possible involvement of the participants in the work of the future group was also discussed.

6. Debates were rich and constructive allowing for the fulfilment of the objectives mentioned above. A framework of the main questions that should be considered by the MC-S-CI regarding the focus of its work emerged from the discussions and was outlined in the conclusions of the meeting (see Appendix 5). They include recommendations for analysing the shared responsibilities of states in connection with Internet-related policy issues.

Summary of discussions

7. The meeting was opened by Mr Jan Malinowski, Head of the Media and Information Society Division. Mr Malinowski briefly presented the results of the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services that took place in Reykjavik, Iceland on 28 and 29 May 2009 and gave relevant information concerning the constitution of the MC-S-CI.

The human rights dimension

8. Participants discussed several technical dimensions of the Internet in connection with its operation, security, stability and resilience and their implications especially on freedom of expression and privacy. They underlined that, as a consequence, governments in conjunction with other stakeholders have a major role to play in making sure that the Internet functions properly and that it is reliable and safe.

9. It was reported that access to the Internet is not part of universal services in every country. In that regard the capacity of a country to ensure universal access was considered a key factor. Discussions on the positive obligation of states to guarantee access to information under Article 10 of the European Convention on Human Rights suggested that there is a related obligation of states to guarantee access to information networks and that the Internet is stable and operational. Furthermore, it is important to analyse how to make the public service value of the Internet, as well as the goals set forth in the Resolution on Internet governance and critical Internet resources operational, in a cross-border context.

10. Given the cross-disciplinary and transboundary nature of the Internet, the issues it gives rise to cannot be dealt with by one actor alone. As a consequence, the thinking of the Internet should not be based on national regulatory approaches but on a global approach. In that regard, it was suggested that the shared responsibilities of states and the fundamental principles of the Internet require definition. Participants agreed that human rights and fundamental freedoms constitute the legal basis for holding states accountable to deliver on the public service value of the Internet.

Management of critical Internet resources

11. Debates on critical Internet resources covered various relevant elements concerning different layers of the Internet architecture, including the ground/physical layer (e.g. root servers, cables, Internet exchange points and others), the code layer (e.g. the domain name system, Internet protocols), as well as the applications' layer and the related policy issues (e.g. privacy) and the content layer (e.g. multilingualism issues). In this context, it was underlined that the concept of criticality should be tested against two key factors respectively: the importance of these resources for vital societal functions and the significant loss that failure or disruption thereof would have for those functions.

12. The interdependence of critical Internet resources, as well as the existing legitimate expectation of international connectivity, were highlighted as two key issues that should be dealt with when considering action to ensure the functioning of the network. It was noted that it is important to avoid situations in which action taken in one country will have implications for neighbouring countries. Mention was made of existing requirements in the framework of European programs (e.g. ENISA) to maintain a degree of resilience that enables networks to function across borders.

13. Various aspects of cooperation between public authorities and the private sector were discussed and examples of public-private partnerships in specific countries were mentioned. It was underlined that management of critical Internet resources should not be based on a public-private bilateral relationship. All stakeholders, including governments, the industry, individual users and civil society should be involved.

Shared responsibilities of states

14. There was general acceptance of the public service value of the Internet and some of the participants argued that there is a right to access the Internet flowing from Article 10 of the European Convention on Human Rights. In that context, it was agreed that the examination of the shared responsibilities of states should focus particularly on the identification of the duty bearers and the nature of their duties.

15. Generally speaking, a typical model of governmental involvement in Internet governance matters includes contribution to the management of country code Top Level Domains, cooperation with Internet Service Providers, and participation in ICANN and other multi-stakeholder processes. It was argued that the responsibilities of governments should be understood more broadly than the framework outlined in the Report of the Working Group on Internet Governance (June 2005). In that respect, governments have a major role to play to enable and stimulate other stakeholders, for example by raising citizens' awareness and Internet users' education programmes.

16. The new commitment of ICANN involving an increased role for governments in its review processes led to a discussion of different possible ways and mechanisms for making sure that the public interest is adequately protected within ICANN. Some of the participants suggested that meetings between the Governmental Advisory Committee and the Council of Europe would be useful to raise awareness of human rights issues and that the Council of Europe should consider getting involved in external evaluation of ICANN processes.

Protection of cross-border flow of Internet traffic

17. Several participants emphasised that blocking, filtering and monitoring Internet traffic raises serious concerns about the exercise of fundamental freedoms, not only in the country where they take place, but under certain technical circumstances, also in other countries. The challenge of finding the right balance between privacy and freedom of expression on the one hand, and security and other conflicting interests on the other, was discussed extensively. In that regard, inspiration can be found by referring to the criteria used by the European Court of Human Rights when examining violations of Article 10 of the Convention, more specifically the necessity of a restrictive measure in a democratic society and the principle of proportionality.

18. The Internet of things was mentioned as having significant potential for interference with privacy. In addition, allocation of new Internet protocol addresses (IPv6) through a

mechanism (regional Internet registry) to be controlled by governments would increase the possibility for personal data retention. It was suggested that these two issues also deserve attention in the work of the MC-S-CI.

19. Analogies with the management of other global public and scarce resources could be considered when looking at issues related to the management of critical Internet resources. In addition, other fields of international law, for example international environmental law, could inform the work of the MC-S-CI. Principles of international law such as equitable treatment, solidarity and others can be brought into a framework of international cooperation on cross-border Internet issues.

20. It was suggested that different possibilities on the type of instrument to be developed for international cooperation on Internet issues should be explored. This may include, among others, an international law instrument that engages and allows other stakeholders to adhere to principles of international cooperation. In that regard, it was recommended that the MC-S-CI explore the extent to which instruments such as framework conventions, declarations of principles, guidelines or recommendations would be open to private sector stakeholders.

CROSS-BORDER INTERNET

CONSULTATION MEETING ORGANISED BY THE COUNCIL OF EUROPE

Strasbourg, 8-9 October 2009
Agora Building
Room G05

AGENDA

8 October

9:30   **Opening of the meeting**

Jan Malinowski, Head of Media and Information Society Division, Directorate General of Human Rights and Legal Affairs of the Council of Europe.

Elfa Ýr Gylfadóttir, Head of Division, Department of Cultural Affairs, Ministry of Education, Science and Culture of Iceland, CDMC Bureau Member, Chairperson of the meeting

General discussion – the human rights dimension of Internet governance

10:30   **Guaranteeing the ongoing functioning, universal nature and integrity of the Internet against risks and events with transnational effects**

- What are the risks that Internet faces and how do they affect security as well as the exercise of fundamental rights and freedoms in online environments within and across the borders?
- What responsibilities do states share with respect to the prevention and management of Internet disruptions or other events falling within their jurisdictions?

- How can adequate coordination and cooperation with the private sector be ensured?

11:30   **Coffee break**

12:00   **Managing critical Internet resources in the public interest and as a public asset and ensuring delivery of the public service value of the Internet to all persons**

- Which aspects of the technical management of critical Internet resources raise concerns in terms of public policy and have consequences for the exercise of fundamental freedoms and rights?
- Do current arrangements reflect adequately the public interest? Do they ensure full respect for fundamental freedoms and rights?
- Is there a need for action? What needs to be done?

13:00   **Lunch break**

14:30   **The role of states with respect to the management of critical Internet resources in a transnational community of actors**

- What roles do states currently have with respect to the management of critical Internet resources?
- What are the mutual or shared responsibilities of the states in ensuring delivery of the public service value of the Internet to everyone?
- Are new standards needed? If yes, of what nature should they be and what should they cover?

16:00   **Coffee break**

16:30   **The role of states with respect to the management of critical Internet resources in a transnational community of actors**

Continuation of the discussion

18:00   **Close of the first day**

9:30   **Preserving and reinforcing the protection of cross-border flow of Internet traffic openness and neutrality**

- What are the risks to access to and free and non-discriminatory flow of content across the borders? What are the implications for the exercise of fundamental rights and freedoms on the Internet?
- What initiatives are currently discussed or implemented at the national level that could ensure a free and non-discriminatory flow of content?

11:00   **Coffee break**

11:30   **Preserving and reinforcing the protection of cross-border flow of Internet traffic openness and neutrality**

Continuation of the discussion

- How can international coordination and co-operation among states be fostered in connection with access to content and free flow of information? Which principles should apply?
- What is the role of the private sector in ensuring openness and neutrality of the Internet at the international level?

13:00   **Lunch break**

14:30   **Exchange of ideas on the future work of the Ad-hoc Advisory Group on Cross-border Internet (MC-S-CI)**

- Discussion of and proposals for working methods to implement the Terms of Reference of the MC-S-CI.
- Discussion of concrete results to be achieved and possible outputs and deliverables under the Terms of Reference.
- Possible involvement of the participants in the meeting in the future work of the group.

- Discussion of possible involvement of other stakeholders in future work of the group.

16:00   **Conclusions**

General discussion – *tour de table.*

Conclusions by the Chair.

17:00   **Close of the meeting**

Strasbourg, 5 October 2009

Consultation meeting on Cross-border Internet

Strasbourg, 8-9 October 2009

Working documents

1.   Draft Agenda and draft Annotated Agenda.

2.   Political Declaration and Resolution on Internet governance and critical Internet resources adopted at the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services "A new notion of media?" (28 and 29 May 2009, Reykjavik, Iceland).

3.   Terms of Reference of the Ad hoc Advisory Group on Cross-border Internet (MC-S-CI).

Information documents

4.   Convention on Cybercrime.

5.   Recommendation 1882(2009) of the Parliamentary Assembly the promotion of Internet and online media services appropriate for minors.

6.   Recommendation CM/Rec(2009)5 of the Committee of Ministers to member states on measures to protect children against harmful content and behaviour and to promote their active participation in the new information and communications environment, adopted on 8 July 2009.

7.   Recommendation CM/Rec(2008)6 of the Committee of Ministers to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters, adopted on 26 March 2008.

8.   Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote public service value of the Internet.

9.   Declaration on protecting the dignity, security and privacy of children on the Internet, adopted by the Committee of Ministers on 20 February 2008.

10.   [Declaration](#) on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers on 2 March 2005.

11.   [Declaration](#) of the Committee of Ministers on human rights and the rule of law in the Information Society (CM(2005)56 final)

12.   [Declaration](#) on freedom of communication on the Internet, adopted by the Committee of Ministers on 28 May 2003.

13.   [Recommendation No. R (2001) 8](#) of the Committee of Ministers to member states on self-regulation concerning cyber content (self-regulation and user protection against illegal or harmful content on new communications and information services).

14.   [Recommendation No. R (99) 5](#) of the Committee of Ministers to member states for the protection of privacy on the Internet.

15.   Human Rights Guidelines for Internet Service Providers (H/Inf (2008)9).

16.   Human Rights Guidelines for Online Game Providers (H/Inf(2008)8).

17.   Internet governance and critical Internet resources, a report prepared by the Secretariat.

18.   World Summit on the Information Society, Declaration of principles Building the Information Society: a global challenge in the new Millennium.

19.   Report of the Working Group on Internet Governance, June 2005.

20.   Communication COM (2009)277 final from the Commission to the European Parliament and the Council - Internet governance: the next steps.

21.   Communication COM(2009)149 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee on the Regions on Critical Information Infrastructure Protection.

Strasbourg, 7 October 2009

Consultation meeting on Cross-border Internet

Strasbourg, 8-9 October 2009

List of participants

1. Yaman Akdeniz

Associate Professor in Law, Faculty of Law, Istanbul Bilgi University,
Director of Cyber-Rights.Org.

2. Erhan Bal

Assistant Expert, Department of International Relations
Radio and Television Supreme Council, Turkey.

3. Wolfgang Benedek

Professor at the Institute for International Law and International Relations, Karl-Franzens-Universität Graz; Director of European Training and research Centre for Human Rights and Democracy in Graz; President of the Media Appeals Board of Independent Media Commission, Prishtina, Kosovo.

4. Nihat Çaylak

Expert, Department of International Relations
Radio and Television Supreme Council, Turkey.

5. Bertrand de La Chapelle

Special Envoy for the Information Society, French Ministry of Foreign and European Affairs.

6. Elfa Ýr Gylfadóttir

Head of Division of Media, Department of Cultural Affairs, Ministry of Education, Science and Culture of Iceland, Member of the CDMC Bureau. CHAIR.

7. Mark Kelly

Director of the Irish Council for Civil Liberties.

8. Wolfgang Kleinwächter

Professor, University of Aarhus
International Association for Media and Communication Research (IAMCR).

9. Andrew Powell

Manager of advice delivery to the communications, emergency services and health sectors
Centre for the Protection of National Infrastructure – United Kingdom.

10. Michael Rotert

Vice President, the European Internet Service Providers Association (EuroISPA)
ECO (the German Internet Business Association).

11. Christian Singer

Director Department III/PT2 Telecommunications Law, Federal Ministry of Transport, Innovation and Technology of Austria.

12. Nelly Stoyanova

Director of Information Society and Information Technologies Directorate, State Agency for Information Technology and Communications of Bulgaria.

13. Michael V. Yakushev

Chairman of Board, Coordination Center for the ccTLD '.ru' .

14. Rolf Weber

Professor, Faculty of Law, University of Zurich.

Apologised:

Marco Gercke

Director of the Cybercrime Research Institute, Germany.

Jan Malinowski, Head of Media and Information Society Division, Directorate General of Human Rights and Legal Affairs of the Council of Europe.

Anita van de Kar-Bachelet, Administrator, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs.

Lee Hibbard, Administrator, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs.

Elvana Thaçi, Administrator, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs of the Council of Europe.

Franziska Klopfer, Media and Information Society Division, Directorate General of Human Rights and Legal Affairs.

Alexander Seger, Head of Department of Economic Crime and Information Society, Directorate General of Human Rights and Legal Affairs.

Albina Ovcearenco, Co-secretary of the CODEXTER, Directorate of Legal Advice and Public International Law (*on 9 october*).

Terms of reference of the Ad hoc Advisory Group on Cross-border Internet (MC-S-CI)

1.	**Name of Group:**	Ad hoc Advisory Group on Cross-border Internet (MC-S-CI)
2.	**Type of Group:**	Ad hoc Advisory Group
3.	**Source of terms of reference:**	Committee of Ministers, upon the proposal of the Steering Committee on the Media and New Communication Services (CDMC)
4.	**Terms of reference:**	

Having regard to:

– Resolution Res(2005)47 on committees and subordinate bodies, their terms of reference and working methods;

– the Declaration and the Action Plan adopted at the Third Summit of Heads of State and Government of the Council of Europe member states (Warsaw, 16-17 May 2005; CM(2005)80 final, 17 May 2005), in particular Chapter I.3. "Strengthening democracy, good governance and the rule of law in member states";

– Resolution on "Internet governance and critical Internet resources" adopted at the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (Reykjavik, 28-29 May 2009);

– Recommendation CM/Rec(2007)16 of the Committee of Ministers to member states on measures to promote the public service value of the Internet, adopted on 7 November 2007;

– the Convention for the Protection of Human Rights and Fundamental Freedoms (1950, ETS No. 5), its additional protocols and the case law of the European Court of Human Rights.

Under the authority of the Steering Committee on the Media and New Communication Services (CDMC) and in relation to the implementation of Project 2008/DGHL/1415 "Standard-setting and policy assistance on topical issues concerning the media and new communication services", the Group is instructed to:

i.   examine the shared or mutual responsibilities of states in ensuring that critical Internet resources are managed in the public interest and as a public asset, ensuring delivery of the public service value to which all persons under their jurisdiction are entitled. Make proposals, in particular, relating to the prevention and management of events, including malicious acts, falling within member states' jurisdictions or territories, which could block or significantly impede Internet access to or within fellow members of the international community with the objective of guaranteeing the ongoing functioning and universal nature and integrity of the Internet;

ii.   explore the feasibility of drafting an instrument designed to preserve or reinforce the protection of cross-border flow of Internet traffic openness and neutrality.

5.   Composition of the Group:

5.A   Members

The Group shall be composed of five specialists in international law and internet governance, to be appointed by the Secretary General. The Council of Europe budget will bear their travel and subsistence expenses incurred in connection with their participation in meetings of the Group.

6.   Working methods and structures:

In order to carry out its tasks, the Group may, where necessary, within the limits of available budgetary appropriations, seek advice of external experts, have recourse to consultants and consult with relevant governmental and/or non-governmental organisations and other members of civil society, as well as other pertinent bodies.

The MC-S-CI is entitled to invite other participants and/or observers to meetings of the Group, without the right to vote or defrayal of expenses. Member states may be able to designate representatives to attend and present their position at meetings, without the right to vote or defrayal of expenses. The MC-S-CI will have to request the necessary authorisation from the CDMC for the admission of observers.

7.   Duration:

These terms of reference will expire on 31 December 2010.

Appendix 5

Main policy issues discussed and
conclusions drawn at the consultation meeting on cross-border Internet

On 8 and 9 October 2009 the Council of Europe organised a consultation meeting with a panel of 13 experts from governments, civil society and the private sector in anticipation of work to be conducted by an Ad-hoc Advisory Group on Cross-border Internet (MC-S-CI).

Participants confirmed that cross-border Internet infrastructure protection and trans-boundary impact of national Internet-related policies were issues of common concern in the framework of protection of fundamental rights and freedoms in the Internet. The present note summarises briefly the main policy issues discussed and the reasons why these two issues deserve a particular attention in the work of the MC-S-CI.

1) The Internet is structured as a global, trans-national network. People rely on the Internet as an essential tool for their everyday activities and have a legitimate expectation that Internet services are accessible and affordable, secure, reliable and ongoing. Consequently the Internet has a public service value that requires interoperability between a variety of interconnected networks and free cross-border communication.

2) "Policy authority for Internet-related public policy issues is the sovereign right of States"[1]. In this context, states adopt, within their jurisdiction according to their national decision-making procedures, public policies to ensure connectivity and free flow of information as well as to prevent malicious use of the Internet.

3) Discussions during the consultation meeting emphasised that resources that are essential for the functioning of the Internet, such as root servers, domain names and Internet protocol addresses, do not fall solely under the authority of states, whether individually or jointly[2]. Nonetheless, other actors do operate under the jurisdiction of one or more states. Regardless of this, there is a legitimate expectation that connectivity of the Internet will be ensured or preserved across borders.

4) The routing of content on the Internet does not follow territorial national boundaries as communication between two neighbouring countries is often routed through one or several other states. Communications between two actors within the same country can also be routed through servers outside that country. Consequently, national policy

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[1] The Tunis Agenda for the Information Society, paragraph 35 a.
[2] Discussions emphasised that the criticality of the Internet resources has been adequately analysed in the report prepared by the Secretariat of the Council of Europe on Internet governance and critical Internet resources.

decisions regarding the Internet in one country can have a direct or indirect impact on another country. As a result, persons in the latter can see their access to content limited, even if the content is not subject to limitation within their own jurisdiction, Service providers may also be prevented from having access to the desired bandwidth or correct routing information. The exercise of one nation's sovereign right regarding Internet-related policies can thus impinge upon another country's sovereignty.

5) Exchanges during the consultation identified some concrete cases which may well arise in this context and therefore raise concerns for access to information across borders:

- a decision within a particular jurisdiction to cut, slow down, or limit backbone traffic towards another country will have a direct impact on the possibility to access the whole Internet from the latter if it depends exclusively or significantly on that connection;
- a decision whereby Internet Service Provider (ISPs) within a particular country are required to prevent access to all domain names corresponding to a specific country-code, will potentially prevent customers of those ISPs who are based elsewhere to access the content concerned;
- a decision to tamper with the cache DNS information regarding a specific address or domain – for example because it is forbidden or illegal within that jurisdiction – can percolate into other countries;
- arrangements to monitor traffic flowing across or transiting within a country's borders may imply surveillance of the Internet activities of actors in another country.

6) This *problématique* raises two fundamental questions that can help structure the work of the MC-S-CI:

i) the compatibility of action taken by states within their jurisdiction which have an impact beyond their borders with their commitments under international law, in particular under the Universal Declaration of Human Rights and the directly enforceable European Convention on Human Rights;

ii) the responsibility of each state to adopt policies that do not impinge on – or that prevent interference with - another country's sovereignty, in accordance with the Tunis Agenda, which affirms that "[States] have rights and responsibilities for international Internet-related public policy issues"[3];

with two consequential considerations:

iii) how can fundamental rights and freedoms, including freedom of expression and the right to respect for private and family life, as well as the public service value of the Internet be rendered effective in the global network, who are the duty bearers and what is the nature of their duties;

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[3] The Tunis Agenda for the Information Society paragraph 35 a.

iv) how to coordinate policies on the management of the Internet with due regard for the fundamental rights and freedoms of individuals and the public interest and in the framework of a multi-stakeholder dialogue that involves states, the private sector and Internet users.

7) Against this background, the experts who participated in the consultation meeting suggest that the MC-S-CI devote attention to:

- analysing state responsibility resulting from actions – or failure to take action – that have direct or indirect effects on the full enjoyment of fundamental rights and freedoms in the Internet;
- exploring analogies with the management of other global or scarce resources as well as the applicability of general principles and mechanisms contained in existing international instruments for cooperation and coordination;
- identifying additional instruments or regimes that might be developed to ensure the balance between sovereignty and responsibility of states in Internet-related policy issues .

8) Ongoing work of the MC-S-CI could involve, in addition to regular reporting to and feedback from the CDMC, reaching out to other actors and fora in a multi-stakeholder approach in order to raise awareness about and gather other views on this Council of Europe work.