
ICANN org Submission on the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence (Draft Protocol Version 2, (T-CY(2020)07), April 12, 2021) issued by the Cybercrime Convention Committee.

Executive Summary

The Internet Corporation for Assigned Names and Numbers (“ICANN”) is a not-for-profit public-benefit corporation that, on behalf of the Internet community, among other functions, oversees the technical coordination of the top-most level of the Internet’s Domain Name System (“DNS”), and especially its security, stability, and resiliency.

ICANN, through its multi-stakeholder governance model, brings together governments, non-commercial and commercial stakeholder groups, civil society, and individuals. Each group represents a different interest on the Internet. Collectively, they make up the ICANN community, which develops policies for the DNS through a consensus-driven bottom-up process.

The ICANN organization (“ICANN org”) submits this comment on the “Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence” (Draft Protocol Version 2, (T-CY(2020)07), April 12, 2021) (the “Second Draft Protocol”), with the aim to highlight legal challenges and uncertainties for DNS service providers and the need to match the obligations of DNS service providers to their roles, taking into account the technical conditions and the impact on the DNS ecosystem. Providers of DNS services, in their capacity as providers of underlying Internet infrastructure, should be enabled to provide these services without suffering from chilling effects caused by uncertain cooperation obligations, which could even be impeded by applicable data protection law.

Generic top-level domain (“gTLD”) registries and registrars are required, pursuant to their agreements with ICANN, to collect and maintain certain contact information (“registration data”) concerning registrants in their public Registration Data Directory Services (commonly referred to as “WHOIS”). Prior to the effective date of the General Data Protection (“GDPR”) regulation, gTLD registration data were publicly available. This publicly available registration data was a valuable tool for parties with legitimate interests in accessing that data, such as law enforcement and intellectual property holders. Today, as a result of efforts to enable gTLD registries and registrars to comply with ICANN agreements and policies as well as the GDPR, much of the registrant contact data is now redacted from public view in WHOIS. Parties who wish to access this redacted registrant contact data must request the data from the applicable registry operator or registrar, who will determine whether to disclose the data, assessing the specifics of the request and any applicable laws that might require or prohibit such disclosure.

ICANN org welcomes the publication of the Second Draft Protocol in this challenging regulatory environment of rapidly developing information and communication technology, to tackle increasing cybercrime and associated problems posing a threat to democracy, the rule of law, and human rights. In this context, ICANN org recognizes the need for increased and more efficient cooperation between States and the private sector. In this context, greater legal clarity and certainty is needed for the collection of evidence in electronic form.

1. **Need for Clarification of the Application of the Second Draft Protocol for Entities Providing Domain Name Services**

a. **Entities Providing Domain Name Services**

Pursuant to Recital 78 of the Explanatory Report of the Second Draft Protocol, “*entities providing domain name services*” in Article 6 of the Second Draft Protocol refers to “*registrars*” and “*registries*.” The Second Draft Protocol uses the more generic term, an “*entity providing domain name services*,” to acknowledge the present situation and at the same time permit adaptation as business models and the architecture of the Internet may change over time.

ICANN org would welcome clarification regarding whether “*entities providing domain name services*” pursuant to Article 6 of the Second Draft Protocol should be interpreted as being limited to registries and registrars, or whether this group is intended to include further providers of DNS services, such as resellers and privacy proxy providers.

ICANN org would also like to suggest further clarification of the term “*entities providing domain name services*.” There should be a distinction made between domain name registration services (i.e., registries and registrars) and domain name resolution services (i.e., running authoritative servers or resolvers). In some cases the same parties may provide both services, but they are logically and practically quite distinct. Against the background of Article 6, which concerns “*requests for identifying or contacting the registrant of a domain name*,” it seems only entities “*providing domain name **registration** services*” should be in scope.

b. **Interplay of Article 6 and Article 7 of the Second Draft Protocol**

Article 6 of the Second Draft Protocol applies to “*entities providing domain name services*.”¹ The parties to the Second Draft Protocol shall adopt legislative measures to **permit** “*entities providing domain name services*” to disclose information for identifying or contacting the registrant of a domain name, but not necessarily **require** “*entities providing domain name*

¹ As noted in para. 1(a) above, the use of the term “*entities providing domain name services*” needs to be reconsidered. Unless they are the same entity, a domain name resolution service provider will, in general, not have any information related to the registrant of a domain name. That information is rather held by the domain name registration provider.

services” to disclose such information.² Recital 76 of the Explanatory Report of the Second Draft Protocol stipulates:

*“The form of the request or the effects it produces under the domestic law of the requesting Party would therefore not affect the **voluntary nature** of international cooperation under this Article and, if the entity does not disclose the information sought, paragraph 5 would be applicable.”* (Emphasis added).

Pursuant to Article 6 (5) of the Second Draft Protocol, the requesting party may then request that the entity provide a reason why it is not disclosing the information sought and may seek consultation with the party in which the entity is located to determine available measures to obtain the information.

In addition, Recital 82 of the Explanatory Report of the Second Draft Protocol states that Article 6 (2) of the Second Draft Protocol *“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 services may need to determine whether to disclose the information sought.”*

On the other hand, pursuant to Article 7 (1) of the Second Draft Protocol, each party to the Second Draft Protocol shall adopt legislative and other measures to empower its competent authorities to issue **an order**³ to be submitted directly to a “service provider” in the territory of another party, to obtain the disclosure of specified, stored “subscriber information” in that service provider’s possession or control.

Pursuant to Recital 80 of the Explanatory Report of the Second Draft Protocol, parties to the Second Draft Protocol may consider “information for identifying or contacting the registrant of a domain name” a subset of “subscriber information.”⁴

A “service provider” includes (i) any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and (ii) any other entity that processes or stores computer data on behalf of such communication service or users of such service. A “computer system” is defined as any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data. “Computer data” is defined as any representation of facts, information, or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function. These broad definitions seem to include registries and

² Cf. Article 6 (2) of the Second Draft Protocol and Recital 76 and 82 of the Explanatory Report of the Second Draft Protocol.

³ Cf. also Article 7 (7) of the Second Draft Protocol, which permits enforcement of the order via Article 8 of the Second Draft Protocol or other forms of mutual assistance and is stricter worded than its counterpart in Article 6 (5) of the Second Draft Protocol.

⁴ Cf. Article 3 (1) in connection with Article 7 (1) of the Second Draft Protocol and Recitals 91 and 92 of the Explanatory Report of the Second Draft Protocol.

registrars as service providers in the broader context of providing services to registrants. Therefore, the term “*entity providing domain name services*,” which directly addresses DNS service providers, seems to be a subset of the term “*service provider*.”

Consequently, “*entities providing domain name services*” as “*service providers*” can be ordered by an authority of the requesting party to disclose “*information for identifying or contacting the registrant of a domain name*” as “*subscriber information*,” although the disclosure of “*information for identifying or contacting the registrant of a domain name*” is *voluntary* under Article 6 of the Second Draft Protocol for “*entities providing domain name services*.”

Therefore, ICANN org would welcome clarification on the interplay between Article 6 and 7 of the Second Draft Protocol. Is Article 6 of the Second Draft Protocol *lex specialis* to Article 7 of the Second Draft Protocol and blocks recourse to Article 7 of the Second Draft Protocol for requesting “*information for identifying or contacting the registrant of a domain name*” from “*entities providing domain name services*”?

If Article 6 of the Second Draft Protocol does not block recourse to Article 7 of the Second Draft Protocol and an “*entity providing domain name services*” qualifies as “*a service provider*,” Article 7 of the Second Draft Protocol would undermine the independent purpose of application of Article 6 of the Second Draft Protocol besides Article 7 of the Second Draft Protocol.

Such considerations should also take into account applicable data protection law, and in particular, requirements under the GDPR as described in the next section. The “*entities providing domain name services*” which *voluntarily* disclose “*information for identifying or contacting the registrant of a domain name*” and transfer such data internationally from the European Economic Area (“EEA”) to countries outside the EEA must ensure both a legal basis for the processing (which is usually legitimate interest pursuant to Article 6(1)f GDPR) and compliance with international transfer requirements under Chapter V of the GDPR. The required weighing of interests for disclosing and transferring such information *voluntarily* on the basis of legitimate interest pursuant to Article 6(1)(f) GDPR would very likely significantly slow down the disclosure process and therefore interfere with the intended purpose of Article 6 of the Second Draft Protocol to speed up cross-border access to electronic evidence in specific criminal investigations or proceedings. In connection with the requirements for international data transfers, the *voluntary* provision of such information by “*entities providing domain name services*” could even be excluded, assuming that transfer safeguards such as EU Standard Contractual Clauses can hardly be used in these cases and transfer derogations under Article 49 GDPR will only be available in exceptional circumstances.

2. Requirements for Entities Providing Domain Name Services to Voluntarily Disclose and Transfer Registrant Data Under the GDPR

According to Recital 80 and 82 of the Explanatory Report of the Second Draft Protocol, domain name registration information is basic information that would not permit precise conclusions to be drawn concerning the private lives of individuals. Therefore, its disclosure is considered less intrusive by the Second Draft Protocol than the disclosure of other categories of data. However, “*information for identifying or contacting the registrant of a domain name*” includes in many cases personal data as the EDPB advised ICANN org.⁵

Therefore, “*entities providing domain name services*” must comply with the requirements of applicable data protection laws and in particular the GDPR in the EEA when disclosing and transferring personal data for identifying or contacting the registrant of a domain name.

For example, pursuant to Article 6 (1) (f) GDPR, the disclosure and transfer of personal data by “*entities providing domain name services*” requires a weighing of interests between the legitimate interest of an authority as a requesting party and the interests or fundamental rights and freedoms of the individuals concerned by the disclosure and transfer of the personal data, if such disclosure is made on a *voluntary* basis and not because of a legal obligation under EU or EU Member State to which the “*entity providing domain name services*” is subject.

This requires an assessment on a case-by-case basis for every disclosure request. This must also take into account that adequate safeguards are put in place,⁶ that the requirements and procedures of such law for the disclosure request are met, that the disclosure of the requested information meets an objective of public interest and is proportionate to the legitimate aim pursued, and that the legitimacy and proportionality of the disclosure is not questionable with regard to the fundamental rights framework of the EU (e.g. death penalty).⁷

Although ICANN org explicitly welcomes the intention of Article 6 (1) of the Second Draft Protocol to assist with this determination by providing safeguards to facilitate the ability of “*entities providing domain name services*” to respond to a request,⁸ such assessment on an individual case-by-case may not only slow down the disclosure process. In addition, “*entities providing domain name services*” may refrain from providing personal data for identifying or contacting the registrant of a domain name on a *voluntary* basis, given the legal hurdles, uncertainties and liability risks under applicable data protection law.

Therefore, with regard to the GDPR, legal clarity for “*entities providing domain name services*” primarily exists where they are legally obliged under EU or EU Member State law

⁵ See EDPB Letter to ICANN of July 5, 2018, available at: https://edpb.europa.eu/sites/default/files/files/news/icann_letter_en.pdf.

⁶ Cf. Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 19.

⁷ Cf. Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 66 et seq.

⁸ Cf. Recital 82 of the Explanatory Report of the Second Draft Protocol.

to disclose “*information for identifying or contacting the registrant of a domain name*” to an authority of a requesting party and can rely on Article 6 (1) (c) GDPR.

3. Requirements for Service Providers to Comply With an Order to Disclose and Transfer Registrant Data Under the GDPR

In order for the “*service provider*” to justify the disclosure and transfer personal data contained in “*subscriber information*” under Article 6 (1) (c) GDPR (compliance with a legal obligation), the “*service provider*” must not have a choice whether or not to fulfil the obligation.⁹ This appears questionable with regard to Article 7 (7) of the Second Draft Protocol, which could be construed that “*service providers*” may opt not to disclose information in response to an order pursuant to Article 7 (7) of the Second Draft Protocol, unless the legislative measures pursuant to Article 7 (2) (a) of the Second Draft Protocol by the parties in the EU oblige the “*service provider*” to comply with an order pursuant to Article 7 (1) of the Second Draft Protocol.

Therefore, the legislative measures adopted pursuant to Article 7 (2) (a) of the Second Draft Protocol by the parties would have to require a “*service provider*” to follow an order under Article 7 (1) of the Second Draft Protocol if the parties want to effectuate such provisions and provide for legal clarity with regard to applicable data protection regimes, in particular the GDPR.

4. Requirements for Service Providers or Entities Providing Domain Name Services to Comply With a Request or Order to Transfer Registrant Data to Countries Outside the EEA Under the GDPR

Furthermore, to enable “*service providers*” or “*entities providing domain name services*” to which the GDPR applies to respond to a request or order of an authority of a party outside the EEA under Article 6 (1) or 7 (1) of the Second Draft Protocol, the legislative measures pursuant to Article 6 (2) or 7 (2) (a) of the Second Draft Protocol must clarify that the international transfer of the personal data for identifying or contacting the registrant of a domain name **is necessary for important reasons of public interest** pursuant to Article 49 (1) (d) GDPR, in order to enable the “*service providers*” or “*entities providing domain name services*” to meet the requirements for international data transfers under the GDPR when transferring personal data to an authority of a party outside the EEA.

Therefore, ICANN org advocates for Article 6 (2) and 7 (2) (a) of the Second Draft Protocol to clarify that the legislative measures adopted by the parties in the EU/EEA must include that the transfer of the personal data is necessary for important reasons of public interest. Otherwise “*service providers*” or “*entities providing domain name services*” to which the GDPR applies may only be able to follow such request or order under the circumstances of

⁹ Cf. Art. 29 WP, Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC, p. 19.

Article 7 (7) of the Second Draft Protocol (i.e. when the authorities seek to enforce the order pursuant to Article 8 of the Second Draft Protocol or other forms of mutual assistance).

5. Automated Decisions

Except for Article 14 (6) of the Second Draft Protocol, every paragraph of Article 14 of the Second Draft Protocol is addressed to the parties.

To avoid any misunderstanding in interpretation, ICANN org would welcome clarification that the addressees of Article 14 (6) of the Second Draft Protocol are the parties and more specifically the authorities of the parties (to which personal data for identifying or contacting the registrant of a domain name is disclosed).

Furthermore, in order to foster the pursued purpose of speeding up disclosure requests for criminal investigations and proceedings, ICANN org advocates to clarify that the decision to disclose personal data to an authority of a requesting party by the “*service provider*” or “*entity providing domain name services*” following a request or order does not produce a significant adverse effect concerning the relevant interests of the individual and may therefore be automated. Instead, it is the (automated) decision taken by the authority of a party that may eventually produce significant adverse effects concerning the relevant interests of the individual following the disclosure of “*information for identifying or contacting the registrant of a domain name*” or “*subscriber information.*”

6. Concluding Remarks

The Second Draft Protocol repeatedly acknowledges the importance of the consensus driven multi-stakeholder process.¹⁰ ICANN org appreciates this recognition of the consensus-based multi-stakeholder model of Internet governance. ICANN org welcomes the publication of the Second Draft Protocol and recommends that the points raised in this comment be taken into account as work continues on the Second Draft Protocol with the aim to tackle increasing cybercrime and associated problems posing a threat to democracy, the rule of law, and human rights.

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¹⁰ Cf. for example Recital 72 and 82 of the Explanatory Report of the Second Draft Protocol.