Response by SIDN

Response by SIDN in the context of the internet consultation on the proposed amendment of the Consumer Protection (Enforcement) Act in line with the CPC Regulation (EU) 2017/2394

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Author
SIDN

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Contact
T +31 26 352 5500
support@sidn.nl
www.sidn.nl

Office
Meander 501
6825 MD Arnhem
The Netherlands

Postal address
Postbus 5022
6802 EA Arnhem
The Netherlands

SIDN, the Foundation for Internet Domain Registration in the Netherlands, is the administrator of the .nl domain name system. In the terms of the proposed amendment, SIDN is a beheerder van een domeinnaamregister (literally 'domain name register administrator'). In more common parlance, SIDN is a 'domain name registry'.

The proposed amendment will make it possible, subject to certain conditions, for the ACM and the AFM to order a domain name register administrator to block or delete a fully qualified domain name, or to allow the ACM/AFM to register such a domain name.

SIDN is therefore one of the parties that may be directly affected by the proposed amendment, and is responding primarily in that capacity.

Intervention against a domain name

1. Statutory power with adequate safeguards

The government does not currently have any statutory authority to 'take down' a domain name. When previous regulations were drafted, domain names were not given sufficient (if any) consideration; consequently, none of the regulations introduced have addressed domain names. That has been the case both with EU regulations and with Dutch regulations.

The regulatory omissions have not, in practice, had any untoward consequences in the twenty-two years that SIDN has operated the .nl domain. SIDN nevertheless believes that it is appropriate to correct the previous omissions. There are circumstances under which 'taking down' a domain name may be a desirable intervention of last resort. It therefore seems correct that the government should have the power to order a domain name to be 'taken down' under such circumstances. Indeed, SIDN would welcome the investment of such power in other public agencies as well, in particular the public prosecutor's office.

However, it is vital that the legislative instrument granting any such power defines the issue of a domain name takedown order as an intervention of last resort, and ensures that the intervention procedure provides adequate safeguards. We believe that such safeguards are provided by the proposed procedure, which involves the issue of an order after authorisation by an examining magistrate, to whom the registry or registrar concerned would have the opportunity to make a case.

2. Intervention of last resort, not a panacea

'Taking down' a domain name is necessarily a last-resort intervention, appropriate only when all other reasonable options have been pursued without success. It is not a panacea for resolving internet-related problems.

After all, the domain name system is merely a signposting system. A domain name points indirectly to a server, from which information (e.g. website content) is available. Within the domain name system, a registry or a registrar (referred to in the proposed amendment as, respectively, a beheerder van een domeinnaamregister ('domain name register administrator') and a registrerende instantie ('registering body') have the ability to remove the pointer for a domain name, or to make a domain name point elsewhere. Thus, after a short interval, an internet user cannot use the domain name to reach the content previously linked to it. An attempt to do so will result in the user receiving an error message or being directed to other content. However, the content itself remains available on the internet and can still be accessed by various alternative means (direct links, other domain names, etc). Hence, the effect of intervention at the domain-name level is somewhat limited.

Moreover, domain name-focused intervention affects the reachability of all the content associated with the name, even if only some of that content is problematic. Therefore, if a domain name is used by multiple parties (via subdomain names or various e-mail addresses), or if problematic content is made available without the registrant's direct involvement (e.g. if the domain name is linked to a platform such as marktplaats.nl, Facebook or Twitter, or if the registrant's website has been hacked), acting against the domain name may inconvenience innocent parties.

In light of those considerations, the generally accepted principle is that acting against a domain name is inappropriate unless attempts have already been made to persuade first the content provider and then parties such as the hosting service provider to take down the content, but such attempts have proved unsuccessful.

The proposed amendment lacks provision for a staged procedure reflecting that principle, such as that set out in the Notice and Take Down Code. That is in spite of the fact that the passage of the Regulation that defines the minimum powers of competent authorities in relation to domain names starts with the words 'where appropriate'. SIDN considers it very important that problematic content is tackled in a strictly sequential manner following amendment of the legislation. To that end, we wish to see the amended legislation aligned with the wording of the Regulation by the inclusion of the phrase 'where appropriate'.

3. Terminology

In most instances, the proposed amendment adopts the terminology used in the Dutch translation of the Regulation. However, the terms in question are not all consistent with general practice and are confusing. SIDN therefore considers it desirable to substitute 'domain name registry' for beheerder van a domeinnaamregister and 'registrar' for registrerende instantie, and/or to define the relevant terms in the Act.

The proposed amendment subsequently departs from the wording of the Regulation in a way that is hard to understand. The Regulation specifies two things that a registry or registrar can be ordered to do: delete a domain name and allow the competent authority to register a domain name. The proposed amendment adds a third: to block a domain name. It is unclear what is meant by that. As indicated above, a registry or registrar can intervene in two ways: the pointer for a domain name can be removed from the register (which may be interpreted as deletion in the sense of the amendment) or a domain name can be made to point to different servers (which the competent authority could determine after ordering the domain name's registration to be transferred to its control). Neither a registry nor a registrar has the ability to block a domain name. We therefore believe that the proposed amendment should be aligned with the Regulation, or, if the legislature intends to provide for a third form of intervention, the nature of that intervention should be clarified.

Internet performance

SIDN is not concerned solely with the performance of the .nl domain. As an independent actor within the internet infrastructure, we seek to contribute to an internet that works well for everyone. In that context, we make the following observations regarding the proposed amendment:

1. Filtering of internet traffic

Neither the Regulation nor the proposed amendment makes any explicit reference to the possibility of an internet access provider being ordered to filter traffic to and from its customers (internet users), which might have the effect of, for example, blocking those users' access to a website or directing users to a warning site controlled by a competent authority. However, the explanatory memorandum accompanying the proposed amendment does make explicit reference to that possibility. SIDN is strongly opposed to filtering by access providers. Filtering involves intervention in the technical working of the internet, introduces a significant risk of error and may be characterised as an easily circumvented sham solution. A filtering provision was originally envisaged for the new gaming legislation, but parliament rightly and reasonably decided that the provision should be removed from the final version of the relevant act. The arguments for and against filtering have not changed in the interim. Hence there is no justification for introducing a filtering provision by means of the amendment now proposed. On the contrary, the possibility of filtering should be explicitly excluded.

2. Government notice-and-take-down procedure

The explanatory memorandum accompanying the proposed amendment states that the competent authority will, before issuing an order, be able to issue an informal warning or notice to an access provider. Reference is then made to the Notice and Take Down Code or an equivalent. We consider the current wording to be confusing. SIDN was involved in establishing the code and is an advocate

of its use. We accordingly believe that the code should be followed in cases of the kind to which it applies (cases involving clearly criminal or unlawful content). In other circumstances, SIDN regards an informal warning or notice procedure as a source of risk. We believe that good coordination and collaboration between the authorities and access providers is very important. However, it is necessary to avoid the risk that, in response to pressure or due to their own eagerness, access providers intervene in ways that are unjustified and inconsistent with their role in the internet ecosystem.