BRIEFING

Initial Appraisal of a European Commission Impact Assessment

European Parliament

Implementation and functioning of the '.eu' top level domain name

Impact assessment (SWD(2018) 120, SWD(2018) 121 (summary)) accompanying a Commission proposal for a regulation of the European Parliament and of the Council on the implementation and functioning of the .eu top level domain name and repealing Regulation (EC) No 733/2002 and Commission Regulation (EC) No 874/2004

This briefing provides an initial analysis of the strengths and weaknesses of the European Commission's impact assessment (IA) accompanying the above-mentioned proposal, submitted on 27 April 2018.

The '.eu' top-level domain (TLD) – the last part of a domain name that follows immediately after the 'dot' symbol – was launched by the Commission in 2006. The Commission considers the .eu TLD name provides its users (businesses and individuals across the EU Member States and the EEA countries) with a truly European address, rather than the country-specific (ccTLDs, e.g. '.be', '.fr', '.fi'), or generic (gTLDs, e.g. '.com', '.org', '.edu') domain names. At the end of March 2017, the .eu top-level domain was the seventh largest in the world with over 3.7 million registrations.

Under the existing Regulations 733/2002 and 874/2004[1] (the 'regulations') concerning the governance of the .eu domain name, administration, organisation and management of the .eu TLD is carried out within the '.eu Registry', which is in turn operated by the European Registry for Internet Domain Names, EURid, a Europe-wide private non-profit organisation. Since 2003, EURid has operated independently from the European Commission, but under the rules and procedures of the two regulations and within the contract signed with the Commission at the time and renewed in 2014.

The Commission considers that the rapid technological development and popular use of the internet since 2006, as well as the objectives of the EU digital single market,[2] have created the need to revise and modernise the existing legislative framework for the .eu domain name. In particular, in the Commission's view, the competitiveness of the .eu domain and its ability to respond to market and technology-driven challenges needs to be improved. The Commission conducted the evaluation of the two regulations and its impact assessment in a parallel process.[3] The proposal was part of the Commission annual programme for 2017.

Problem definition

The main problem of the existing regulatory framework identified in the impact assessment report is its incoherence with both the regulations that concern the country-specific ccTLDs within the EU and those rules and practices that apply to other ccTLDs and gTLDs in the world. As the IA puts it, 'neither the .eu regulations nor the operation of the .eu Registry are coherent with international best practices in relation to internet governance, which favours a multi-stakeholder approach rather than governmental regulation' (IA, p. 4). According to the Commission, the administrative and implementation costs that stem from the current legal framework need to be reviewed to ensure

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that they support the objectives of the .eu TLD effectively, namely facilitating online cross-border activities within the EU and promoting EU identity (IA, p. 5).

The report presents three main problem drivers:

1. 'Outdated and rigid legislation', which includes obsolete or rigid provisions that cannot be easily updated, including the eligibility criteria for registration;
2. 'Deficiencies in governance and accountability', namely the relationship between the Commission and the Registry which is deemed to be low in effectiveness;
3. Increasing difficulties for the .eu TLD with regard to a rapidly evolving market that includes a massive increase of generic TLDs, possible market saturation, and vertical integration of new generic TLDs , which is not allowed within the .eu domain name (IA, p. 7).

The description of the problem drivers presented in the IA, as well as the overall necessity for regulatory action would have been more convincing had the IA report provided more conclusive evidence and concrete examples. For instance, the report notes that the TLD market has become more competitive and aggressive in recent years. In particular, the report refers to the increasing popularity and use of ccTLD names and the rapid proliferation of gTLD both within the EU and worldwide (IA, pp. 11-13). However, it is unclear what makes the ccTLD names more popular in comparison to the .eu TLD and vice versa. At the same time, the IA mentions that market conditions and fluctuations as well as the rules applicable to gTLDs are outside EU control. The analysis would have benefited if, when analysing the deficiencies in governance and accountability, the IA had compared the .eu TLD framework to those 'best practices' used in managing ccTLD or gTLD names, at least within the EU. The examples that the report does mention seem to stem more from a lack of contingency planning by the .eu Registry than any deficiency of the overall regulatory framework.

Overall, it is not entirely clear from the analysis in the IA whether it is the problems pertaining to existing legislation or the changing priorities and fluctuations of the TLD market that prompt the need for a new regulatory action. Likewise, it is not clear why this action needs to be taken at this point in time, as the Commission talks about the need for 'precautionary action' as 'the problem currently is not dramatic' (IA, p. 5).

Objectives of the initiative

The general objectives of the initiative are 'to ensure the stability and sustainability of the .eu TLD, so as to better enable it to achieve its intended mission to encourage online cross-border activities in Europe and to support the digital single market as well as to enable/build an online European identity' (IA, p.17). The IA identifies the following four specific objectives:

- removal of outdated legal/administrative requirements;
- ensuring the rules are future-proof and allowing the .eu TLD to adapt to the rapid evolution of the TLD market and the dynamic digital landscape, while at the same time incorporating and promoting EU priorities in the online world;
- ensuring a governance structure that both reflects technical and governance best practices and serves EU public interest;
- promotion of the attractiveness of the .eu domain.

The IA includes operational objectives under the preferred option in accordance with the Better Regulation Guidelines, however they are formulated in a rather vague manner and do not appear to entirely meet the criteria laid out in the Better Regulation Guidelines.[4] The IA mentions that the link between the preferred option and the monitoring indicators was strengthened and revised after the recommendations of the Regulatory Scrutiny Board (RSB). It is therefore not clear to what extent the operational objectives (and monitoring indicators) were considered when the preferred option was first identified or whether they were added later to meet the recommendation of the RSB.

Range of options considered

The impact assessment formulated the options with a view to including two variables: the governance variable (hands-on to light governance); and the legal framework variable (from a rigid to a flexible framework). The report explains that this was formulation was made on the premise that the EU's space for manoeuvre (in terms of tackling the problem drivers through regulatory action) is limited to improving the governance mechanisms and technical management of its own .eu TLD name, rather than influencing the domain name market globally. The report mentions that the problem drivers pertaining to the technological development of the domain market are taken into account 'horizontally', although this does not become clear in the report. For example, the challenges relating to the ccTLD and the gTLD market (e.g. the increased popularity of gTLD names) could have been expected to be elaborated upon when formulating the status quo scenario. However, the report does not cover these aspects in any detail.

The options presented in the IA report are briefly summarised below:

Status quo (Baseline scenario)

Under this option, the current regulatory framework for .eu TLD (Regulation 733/2002 and Regulation 874/2004) is maintained. Although the current contract with the operator managing the .eu TLD registry – EURid – expires in October 2019, it seems that, under the status quo scenario, the contract would be extended (which the current framework allows). The Commission explains that the numbers in new registrations and renewals for the .eu TLD are likely to continue to fall, affecting the financial sustainability of the .eu TLD. A significant decrease in.eu TLD numbers is also expected due to the withdrawal of the United Kingdom (UK) from the EU, as registrations in the UK amount to 8 % of total .eu registrations. According to the current rules, organisations established in the UK and individuals residing in the UK and not in the EU will no longer be allowed to register .eu domain names, and those .eu domain names that were registered prior to the UK's withdrawal will need to be revoked from the .eu Registry.

Option 1 Commercialisation

This option would entail simplification of Regulation 733/2002 and the repeal of Regulation 874/2004. The Commission would not have direct oversight of the management and operation of the Registry. The .eu Registry would act on a commercial for-profit basis.

Option 2 Modernisation of the legal framework

This option would entail replacing the current legal framework with a new legal instrument establishing the main objectives of the .eu TLD and guaranteeing essential transparency and flexibility. It would also entail simplification and repeal of Regulation 733/2002 and of Regulation 874/2004 respectively. The principles of management of the .eu TLD will be laid down in primary legislation, to be further articulated throughout the contract between the Commission and the Registry operator. This option entails continuation of an external management system with enhanced control mechanisms, such as strengthened participation of European Commission representatives in the Registry's Board. This option places a lot of responsibility on the external contractor.

Option 3 Separate governance

This option combines elements of Option 2 (reform of the two regulations) with the creation of a separate body with an advisory role. The tasks of this new body would include advising the Commission on high-level priorities, strategies and activities of the .eu TLD. It would comprise experts in the EU's domain name business, the technical community, Member State governments, civil society and academia. The Commission would retain light-touch oversight on the .eu TLD while technical and operational aspects would be dealt with by the Registry operator.

Option 4 Institutionalisation

This option consists of two sub-options: (4a) internalisation, which means handing management of the .eu TLD to the Commission Directorate-General for Informatics (DG DIGIT); and (4b) creation of an EU agency for the management of the .eu TLD (or incorporation into an existing agency, such as the EU Intellectual Property Office (EUIPO) or the EU Agency for Network and Information Security (ENISA)).

Options 1 and 4 were discarded at an early stage of the IA, with the Commission explaining why this was the case. The commercialisation option was discarded due to a lack of stakeholder support, the internalisation sub-option (4a) appeared unfeasible technically, and the extension of the mandate of EUIPO/ENISA sub-option (4b) to include the management of the .eu domain name appeared to be costly and inefficient (IA, p.27). It is unclear why the Commission included these options in the assessment in spite of having decided to discard them early on in the analysis.

The IA considers Option 3 (separate governance) as the best option. According to the Commission, the introduction of a separate body would strengthen and widen good governance of the .eu Registry and increase its transparency. The amendment of Regulation 733/2002 and the repeal of Regulation 874/2004 would bring benefits to end users (removal of technical and administrative constraints). However, the Commission does not provide any further quantitative or qualitative evidence to support this assumption.

Overall, the range of options deemed realistic, essentially includes two options (Options 2 and 3). Strictly speaking, Option 3 might be considered as a sub-option of Option 2, as it extends the reform of the existing framework (already covered by Option 2) towards establishment of a new regulatory body. In this regard, a more detailed explanation of why the other options were discarded would have been even more desirable.

Scope of the impact assessment

Two main groups of impacts are identified in the impact assessment: impacts with respect to the functioning of the .eu market; and impacts with respect to regulatory costs for the .eu Registry and the Commission. Logically, a discussion on the attractiveness of the .eu TLD, which is also one of the specific objectives of this proposal, could have been expected.

As far as the impacts on the functioning of the .eu market are concerned, the IA looks into the competition and the size of the .eu market, access to the .eu domain name, oversight, and flexibility. For the second group of impacts, i.e. regulatory costs, the IA looks into compliance costs, administrative burden, delay costs, monitoring and enforcement costs.

The options are compared against the baseline and assessed with respect to the level at which they help achieve the specific objectives. According to the comparison in the impact assessment based on the criteria of efficiency, effectiveness and coherence, compliance costs remain the same for Options 2, 3 and 4, while the Registry and Commission costs are the lowest under Option 3 as compared to Option 4 (Registry €170 000 and €899 513 and Commission €57 200 and €150 150 respectively). All other costs are the same regardless of the option. The comparison of options is somewhat confusing, as the report earlier mentions that Option 4 was discarded. However, it appears that Option 4b was fully assessed and compared with the other options.

The Commission does not consider that the proposal has any environmental or social impacts. The explanatory memorandum states that the proposal would ensure strong protection of fundamental rights, in particular in the area of data protection, privacy, security, and multilingualism, as well as of intellectual property rights. However, none of this was considered as having being possibly impacted by the options.

Of particular significance is the issue of the UK leaving the EU in March 2019. According to the current eligibility criteria, UK registrants will no longer be eligible for a .eu TLD when the UK leaves the EU. More than 300 000 .eu TLD names are registered to UK-based registrants. It is not clear if and how the proposed regulation would fare in this regard.

Subsidiarity/proportionality

The legal basis for the proposal is Article 172 of the Treaty on the Functioning of the European Union (TFEU). The IA also mentions Articles 170 and 171 TFEU, which prescribe that the EU should contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures.

As regards subsidiarity, the Commission explains that the regulation of the .eu TLD cannot be sufficiently achieved by Member States because the .eu TLD was established as a country code TLD, and the appropriate authority to manage this TLD lies with the European Union. However, this does not affect how each Member State manages its own ccTLD. According to the Commission, if left to the Member States, the .eu TLD would not be able to promote the European idea on the internet and to deliver added value in addition to Member States' ccTLDs.

In the Commission's view, the choice of a regulation as the policy instrument is adequate, as this 'would ensure consistency and legal certainty for users and businesses alike' (explanatory memorandum, p. 4). The report does not delve into the issue of proportionality in more detail.

No national parliament issued a reasoned opinion by the deadline of 18 July 2018.

Budgetary or public finance implications

As the IA explains, public financing is only used by the Commission to perform its monitoring mission. No public funds have been used in the establishment or operation of the .eu TLD. Furthermore, the operator contributes to the EU budget as it transfers its annual surplus to the EU budget. According to the Commission, compliance costs for the Registry are expected to be reduced under the preferred option. Currently governance costs are estimated at €296 000 for 2018. The Commission states that no significant impacts are expected on national budgets and administrations.

SME Test/Competitiveness

According to the IA, the proposal is not expected to have significant direct impacts on end users, however indirect impacts on SMEs are to be expected. The modernisation of the legal framework is seen as having a positive impact for SMEs, as it would provide an attractive and relevant .eu TLD.

The Commission also states that the preferred option would have a positive impact on European businesses, SMEs and micro-enterprises by increasing product innovation, reducing prices and providing greater visibility for the .eu TLD. However, the IA contains little supporting evidence for these assertions.

The IA contains no information concerning competitiveness, which is rather surprising given that improving European enterprises' competitiveness is one of the objectives of establishing the digital single market. Furthermore, it would be reasonable to assume that the issues of competition between the .eu TLD and the Member State ccTLDs, as well as the proliferation of gTLDs would deserve special attention as far as SMEs (as end users) and their competitiveness are concerned. The report gives no particular consideration to these issues.

Simplification and other regulatory implications

According to the Commission, the proposal would lead to simplification, as it removes outdated legal/administrative requirements by means of creating a 'lightweight, principles-based framework'. In a footnote, the IA states that more detailed implementing provisions would be contained in a separate document directly incorporated into the contract between the European Commission and the appointed Registry operator. The IA provides figures on cost savings under the preferred option, with the highest savings coming from the reduced governance costs for the .eu Registry (€170 000).

Quality of data, research and analysis

The Commission explains that the IA relied mostly on the ex-post evaluation of the two regulations and a number of different data sources including external surveys commissioned by EURid and the Association of European Country Code Top-level Domain Name Registries (CENTR). The IA does not provide details of these surveys, except for the evaluation which can be found in Annex 3. It appears that the analysis was mostly carried out on the basis of stakeholder consultations.

Stakeholder consultation

For this impact assessment, the Commission conducted an open public consultation that ran for 12 weeks between May and August 2017. The consultation was also part of ex-post evaluation of the REFIT review of the two regulations.[5] The Commission points out that the consultation included collecting the stakeholders' input on the functioning of the .eu regulatory framework and possible future options for its development. The input was provided in the form of replies to an online questionnaire, which obtained 43 responses and one written contribution. The majority of responses came from private individuals (25), followed by business representatives (15). Contributions were received from respondents in 17 Member States. Overall, the level of participation was relatively low. Furthermore, the replies revealed a low level of awareness of the detail of the .eu Regulation. The Commission then conducted targeted consultations and workshops with the EURid registrars. The analysis of answers to the stakeholder consultation can be found in Annex 3 of the IA, in accordance with the Better Regulation Guidelines. According to the IA, less than 70 % of stakeholders participating in the consultation indicated that the .eu extension 'significantly or moderately affects their trust in a website', and 81 % of respondents agreed that the .eu has 'significantly or moderately promoted a clearly identifiable digital identity for citizens and businesses in the EU'. It appears that Member States were not involved in the public consultation. It would also appear that not all the four policy options were tested formally with all the stakeholders. For example, as the IA mentions, Option 4 was formulated at a later stage, after the closure of the consultation activities (which were aimed at the evaluation of the existing legislation and assisting the preparation of the impact assessment). Throughout the impact assessment report references to stakeholders' views are missing, which makes it difficult to understand how the stakeholders' input informed the IA.

Monitoring and evaluation

Under the current legal framework, the Commission has to submit a regular report to the European Parliament and Council on the implementation, effectiveness and functioning of the .eu TLD. This reporting is retained in the proposed regulation. The IA presents the core indicators linked to the operational objectives (IA, p. 55). The core indicators appear rather imprecise, such as 'lead time to introduce a technical update or a new policy, number of publications, robustness and resilience of the technical infrastructure'. It appears that the indicators were linked to the operational objectives and to the preferred option, following the recommendations of the Regulatory Scrutiny Board, and might have not been taken into account when the Commission initially formulated the preferred option.

Commission Regulatory Scrutiny Board

The Regulatory Scrutiny Board issued a positive opinion, with reservations, on 14 February 2018. The RSB flagged up the following four shortcomings in the draft IA report: a) importance and size of the problem insufficiently explained; b) baseline insufficiently elaborated and substantiated; c) reasons for discarding several options and the content and implementation of the retained options insufficiently developed; and d) insufficiently developed criteria for the success of the preferred option. The Commission states that it has improved its IA report 'to streamline the evaluation's findings in the problem definition section and clarified the magnitude of the problem, and stakeholder interest in the issue'. However, the revisions, particularly with regard to the content of the options, could have been more thorough. For example, the status quo scenario merely mentions various factors that may affect the future situation (increased competition from new gTLDs, changing paradigms in internet technological development, withdrawal of the UK from the EU), but does not elaborate further. Moreover, the impact assessment lacks the mandatory annex showing the changes made after the RSB comments.

Coherence between the Commission's legislative proposal and IA

The proposal appears to be coherent with the impact assessment insofar as the proposal takes Option 3 on board.

Conclusions

The Commission convincingly demonstrates the existing potential of the .eu top-level domain name. However, the argument for updating the current regulatory framework as the best way to tap that potential could have been further substantiated. In this regard, the scope of the problem could have been defined in more precise terms. Furthermore, it remains unclear how the proposed options could help achieve one of the two general objectives of the initiative, namely enabling or building an online European identity, as the options (including the preferred option) are mostly concerned with technical improvements to the regulatory framework.

Stakeholder views do not appear to be fully reflected in the report and it is unclear how they fed into the IA. The quality of the IA would have benefited from a more thorough integration of the recommendations of the Regulatory Scrutiny Board, which appear to have been only partially addressed.

ENDNOTES

[1] Regulation (EC) No 733/2002 of the European Parliament and of the Council of 22 April 2002 on the implementation of the .eu Top Level Domain and Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration.

[2] The digital single market denotes the European Commission strategy to ensure access to online activities for individuals and businesses under conditions of fair competition, consumer and data protection, removing geo-blocking and copyright issues, see European Commission, digital single market website.

[3] According to Annex 3 of the IA, the evaluation assessed the effectiveness, efficiency, relevance, coherence and EU added value of the .eu domain name legal framework. It also covered its implementation across the European Union since the adoption of the first regulation in 2002.

[4] According to Tool 16 of the Better Regulation Toolbox, objectives should be specific, measurable, achievable, relevant and time-bound (i.e. 'S.M.A.R.T').

[5] The details of the ex-post evaluation of the REFIT review of the regulations can be found in Annex 14 of the IA.

This briefing, prepared for the Industry, Research, and Energy (ITRE) Committee, analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal.

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