Mitteilung 201

Mitteilung der Kommission - TRIS/(2024) 2605

Richtlinie (EU) 2015/1535

Notifizierung: 2024/0420/DE

Weiterverbreitung der Antwort des notifizierenden Mitgliedstaates (Germany) auf eine Bitte um zusätzliche Informationen (INFOSUP) von European Commission.

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1. MSG 201 IND 2024 0420 DE DE 24-10-2024 26-09-2024 DE ANSWER 24-10-2024

2. Germany

3A. Bundesministerium für Wirtschaft und Klimaschutz, Referat EB3

3B. Bundesministerium des Innern, Referat CI 1

4. 2024/0420/DE - SERV60 - Internetservices

5.

6. Response by the German Federal Government to the European Commission’s request for supplementary information 2024/420/DE of 17 September 2024
– 24 September 2024 –

1) How are products with digital elements designated as critical components? Do designations only relate to a narrow set of operators or do they cover wider parts of the national market of those products?
Answer:
Critical components within the meaning of German law are IT products, (1) that are used in a critical installation (kritische Anlage), (2) where disruptions to availability, integrity, authenticity and confidentiality can lead to a failure or a significant impairment of the functionality of critical installations or to threats to public safety and (3) that (a) are designated as a critical component on the basis of a law or (b) implement a function designated as critical on the basis of a law.
That means, products with digital elements are designated as critical components due to national lex-specialis regulations. If no critical components and no critical functions from which critical components can be derived are determined for the sector in question, there are no critical components in this sector within the meaning of this law. Currently, under the identically worded version of § 9b of the BSI-Act which is currently in force, there is a definition of critical components e.g. in the sector of radio telecommunication in derivation from the Telecommunications Act (Telekommunikationsgesetz).

2) To which extent does a prohibition to deploy a product with digital elements as critical component affect the ability of the manufacturer to place that product on the German market? How does § 41 (2) interact with Article 4 (“Free movement”) of the CRA, which prevents Member States from impeding the making available on the market of products with digital elements which comply with the CRA?
Answer:
A prohibition according to § 41 para.2 of the draft BSI Act does not affect the ability of the manufacturer to place that product on the German market. There is no restriction for the manufacturer to place his product on the market as long it

complies with the CRA, once the CRA enters into force.
§ 41 para. 2 of the draft BSI Act addresses only the operator of a critical installation (Betreiber kritischer Anlage) after a product was already made available on the market by a manufacturer. By doing so, it can prohibit the use of critical components for the operator. However, the operator can still purchase the product but is not allowed to deploy it within the critical installation.

3) What types of minimum requirements can be imposed by the Ministry of the Interior in relation to the declaration of trustworthiness? Can these requirements exceed the obligations and essential cybersecurity requirements laid down in the agreed Cyber Resilience Act?
Answer:
Those mentioned requirements are part of an individual case review and therefore not explicitly definable. There is an examination on a case by case basis whether the deployment of such a component could harm the public security or is in conflict with national security interests. Article 5 (“Procurement or use of products with digital elements”) of the CRA allows that Member states can subject products with digital elements to additional cybersecurity requirements for the use of those products for specific purposes.

4) Article 6(29) of the NIS2 Directive contains a definition of Domain Name System (DNS). While the implementation in § 2 of the draft BSI Act takes up all DNS-related definitions, this definition seems to be missing. What is the reasoning behind? Is it defined in any other legislation that is quoted in the text?
Answer:
In the German legal tradition, in order to ensure that lay people do not misunderstand or even fail to understand a legislative text, attention must be paid to the idiosyncrasies of the particular jargon used when writing laws and statutory instruments. Definitions can be included when words have a different meaning than when they are used in everyday language or when they have been coined by the legislature. Since the term „Domain Name System (DNS)“ is used in everyday language, it was determined that a legal definition was not needed for the purposes of the draft BSI Act. Furthermore, the term is not used as a standalone in the draft BSI Act and, therefore, did not merit a definition by itself.

5) Article 28(5) of the NIS2 Directive requires that a response to all access requests is given in all cases and within 72 hours; it further specifies that access to data shall be granted to legitimate access seekers. Article 50 (1) of the draft DE law imposes replies within 72 hours to legitimate access seekers. How would the replies to other requestors who are not listed as legitimate access seekers be covered under this obligation?
Answer:
Requests by requestors who are not listed as legitimate access seekers are not covered under the obligation contained in § 50 para. 1 of the draft BSI Act, since the NIS 2 Directive does not contain a respective provision for Member States to create such an obligation. In further detail:
Sentence 1 of Article 28 para. 5 of the NIS 2 Directive forsees that Member States shall require the TLD name registries and the entities providing domain name registration services to provide access to specific domain name registration data upon lawful and duly substantiated requests by legitimate access seekers, in accordance with Union data protection law. Sentence 2 of said provision stipulates further details for the handling of such requests, wherein Member States shall require the TLD name registries and the entities providing domain name registration services to reply without undue delay and in any event within 72 hours of receipt of any requests for access. Therefore, Member States are not obligated by the NIS 2 Directive to require TLD name registries and the entities providing domain name registration services to reply to requests for access not made by legitimate access seekers. This interpretation is shared by the NIS Cooperation Group as evidenced by the recently finalized recommendation document on Article 28 of the NIS 2 Directive, cf. NIS Cooperation Group, Recommendations for the implementation of NIS2 Directive Article 28 (Database of domain name registration data), Final Version, September 2024.

6) Article 50 (1) of the draft DE law specifies that “if the requested information is not available, this shall be notified within 24 hours of receipt of the request for access.” How would the obligation to provide access to legitimate access seekers be fulfilled in these cases?

Answer:
In case the requested information is not available, the obligation to provide access is impossible to be fulfilled. In these cases, the obligor is required to render the notification under § 50 para. 1 draft BSI Act.

7) In the “explanatory note” Re Section 51 (Obligation to cooperate) implementing the Article 28(6) of the NIS 2 Directive it is stated: “ Registration data shall not be collected, verified and stored twice. The obligation to cooperate ensures the fulfilment of the obligations without duplication of databases. An obligation to run double databases would lead to a significant outflow of registration data to non-EU countries, as a large number of registries and registrars are based there”. While it is clear that there is no obligation for TLD registries and entities providing registration services to have separate databases, is it the intent to forbid ex ante the possibility to have separate databases? Under this circumstance, would the entity that does not have a database be allowed to access the database for the purpose of addressing access requests?
Answer:
No, it is not the intent to forbid ex ante the possibility to have separate databases.

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