

POSITION PAPER ON THE NIS2 DIRECTIVE PROPOSAL

ECCIA members welcomes the Commission's proposal for the NIS2 Directive, which will enhance the EU citizens' security in the digital environment. Article 23 which addresses the importance of maintaining the accuracy and accessibility of domain name registration data for the upholding and preservation of a reliable, resilient and secure domain name system, is particularly important in this context in order to allow consumers, rights owners and Member States to enforce their rights by taking legal actions against cybercriminals.

Indeed, the loss of access to publicly accessible domain name registration data since the application of the GDPR has been problematic for a number of cybersecurity, law-enforcement, and brand protection reasons. Since the GDPR came into force, private companies providing the infrastructure for domain names have been allowed to make elective decisions about the publication and access to domain name registrant (WHOIS) data, a phenomenon which has in effect blocked the transparency of WHOIS information. As a result, since May 2018, the vast majority of WHOIS data has been redacted without any harmonized or rapid disclosure procedure, even for legitimate purposes. Although existing ICANN policy requires registrars and registries to respond to requests for registrant information in a timely manner, recent data shows these providers are not responding to most requests nor are they providing the registration data as required. This makes it exceptionally difficult for law enforcement, brand owners and single users to identify the registrant behind a website, either to investigate, take legal action against or attempt to settle a case amicably. This plays a crucial role in allowing bad actors to proliferate online with total impunity, threatening the safety of the domain name system on which the digital economy depends.

Moreover, concerns about potential fines have resulted in an over-implementation of the GDPR, leading most of these domain name providers to make data pertaining to commercial domain name registrants just as inaccessible as that of private individuals, even though there is no protection given to legal persons under GDPR. In effect, this practice allows domain name registrants to conduct commercial activities online in total anonymity, which considerably increases the risk of fraud. Transparency and accountability measures are among the very few mechanisms that actually deter fraudsters in the domain name registration process.

Furthermore, much of the data in the current WHOIS is inaccurate or obsolete, despite Article 5 of the GDPR stipulating that personal data be "*accurate and, where necessary, kept up to date*". Without a system that ensures that accurate WHOIS information is maintained and disclosed to legitimate access seekers in a standardized and efficient way, we can expect to continue to witness an exponential rise in counterfeiting and fraud online, to the detriment of European consumers.

The wording in Article 23 of NIS2 partly addresses this problem, by requiring that entities providing domain name registration services "*collect and maintain accurate and complete domain name registration data*" and publish registration data "*which are not personal data*"

in order to “*identify and contact the holders of the domain names*”. These provisions will certainly help to ensure that non-personal domain name data is accurately maintained, transparent and accessible.

However, we would recommend that the Directive includes more details as to how these new provisions should be implemented and enforced.

First of all, we would recommend that intermediaries providing privacy/proxy services are explicitly mentioned in the directive, in order to make it clear that the same obligations apply to them and they do not become a safe haven for bad actors.

Secondly, we would encourage the wording in paragraph 5 of Article 23 to be revised in order to specifically and expressly define the notions of “*legitimate access seekers*” to whom domain name registration services would be obligated to “*reply*” (meaning provide access to specific domain name registration data upon lawful request), as well as “*without undue delay*”. For the past two years, these questions have been the heart of much debate within the ICANN community as well as between ICANN and the Commission, and a viable solution for access non-public registrant data under the GDPR has not yet been found. More specific language concerning the justified requests of legitimate access seekers (which should include trademark owners investigating possible intellectual property rights infringements or cybersquatting cases) is crucial to ensuring that Article 23 has a real impact on the cybersecurity threats described above.

Thirdly, we would appreciate clarification on the importance of verifying the data declared by registrants, as it is currently all too easy for bad actors to provide inaccurate information, or for those conducting an online business to hide their registration information by simply claiming that they are a private individual at the outset. To better prevent this, the obligation for domain name service providers to verify the information of their customers (both private and professional, provided they are operating a commercial website) should be underlined in the text.

Finally, we would recommend that the European lawmakers work closely and directly with ICANN and its community of stakeholders to together to develop uniform policies and procedures for complying with the Directive, including ensuring that these obligations apply to domain name service providers outside the EU as well.

We believe that these clarifications will help to underline the public interest of legitimate access to domain name registration data, in the spirit of existing EU regulation stating the importance of such measures including for “*high quality, transparency, security, stability, predictability, reliability, accessibility, efficiency, non-discrimination, fair conditions of competition and consumer protection*” (see [Regulation](#) on the implementation and functioning of the .EU top-level domain).

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