



NIS2 –

The Impact on the Domain Industry

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Caveats

- The proposals in this presentation are subject to change as we get more information on the transposition
- It is not legal advice
- I am happy to provide legal advice with my team at rickert.law

NIS-2 Directive

- Transposition underway
- Deadline October 2024
- Registrars, Resellers and Privacy & Proxy service providers – Art. 28 and supply chain issues
- Registries and DNS Service providers – need to do more



Article 28 - Database of domain name registration data

Para. 1

For the purpose of contributing to the security, stability and resilience of the DNS, Member States shall require TLD name registries and entities providing domain name registration services to **collect and maintain accurate and complete domain name registration data in a dedicated database** with due diligence in accordance with Union data protection law as regards data which are personal data.

Para. 2

For the purposes of paragraph 1, Member States shall require the database of domain name registration data to contain the necessary information to identify and contact the holders of the domain names and the points of contact administering the domain names under the TLDs. Such information shall include:

Para. 2

- (a) the domain name;
- (b) the date of registration;
- (c) the registrant's name, contact email address and telephone number;
- (d) the contact email address and telephone number of the point of contact administering the domain name in the event that they are different from those of the registrant.

Para. 3

Member States shall require the TLD name registries and the entities providing domain name registration services to have **policies and procedures, including verification procedures, in place** to ensure that the databases referred to in paragraph 1 include accurate and complete information. Member States shall require such policies and procedures to be **made publicly** available.

Para. 4

Member States shall require the TLD name registries and the entities providing domain name registration services to **make publicly available**, without undue delay after the registration of a domain name, the **domain name registration data which are not personal data**.

Para. 5

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. 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. Member States shall require policies and procedures with regard to the disclosure of such data to be made publicly available.

Para. 6

Compliance with the obligations laid down in paragraphs 1 to 5 shall not result in a duplication of collecting domain name registration data. To that end, Member States shall require TLD name registries and entities providing domain name registration services to cooperate with each other.

Tasks in a Nutshell

- Maintain a database of registration data
- Validation and verification
- Public Whois
- Disclosure to legitimate access seekers

Risk

- of fragmentation by law-makers
- of fragmentation caused by the industry
- of additional cost
- of losing user confidence

Who shall perform the tasks?

- No duplication of *collection* – What does that mean?
- Only reaching out to the registrant once?
- Will everyone in the chain have to perform all the other tasks?
- What does co-operation mean in Art. 28 (6)

My take

- No duplication means that none of the tasks in Art. 28 shall be duplicated
- NIS2 is not at odds with ICANN policies
- gTLD registries can go to the new minimum data set
- Flexibility is possible

Issues for Registrars

- Registrars may be required to implement a plethora of different registry requirements.
- How to avoid that?

Different Scenarios

- ccTLDs
- gTLDs
 - some go to the MDS
 - some have eligibility requirements or otherwise have a legal basis for obtaining registration data
- Clustering registry requirements is key!

Not based in the EU?

- Note that entities falling under NIS that do not have an establishment in the EU need to appoint a representative (Art. 26 (3)).
- This is important as it allows for some forum shopping.

Let's talk about extraterritoriality

- There needs to be a sufficiently strong link to the EU for NIS2 to kick in
- Ry in the EU, Rr in the EU – NIS2 applicable
- Ry not addressing the EU, Rr not addressing the EU – NIS2 not applicable
- Ry addressing the EU, Rr not addressing the EU – DUMs for that registrar not covered by NIS2
- Huge grey area otherwise

Let's talk about extraterritoriality

- Registries can make a distinction between EU business and non-EU business – will they?
- What about registrars with resellers that do not offer any services to the EU?
- Rrs in the EU are on the hook anyway
- Rrs outside the EU are best placed (much better placed than the Rys) to make that determination

GDPR issues

- If a co-operation takes place, does a registrar perform the tasks on behalf of itself AND the registry or just for itself?
- If the registrar is tasked with verification e.g. is the registry then off the hook?
- DPA required? Independent controllers?
- Implications are huge, namely responsibility vs non-responsibility for the registration data
- ccTLDs likely DPA / gTLDs likely independent controllers

The proposal:

- gTLD registries should use an RRA-Exhibit as the home for a cooperation agreement
- Rrs should perform all the tasks (yes, that's more work, but less work if many Rys use the same Exhibit)
- Rys mostly get redacted data and they would put themselves under pressure to request the data and many registrants (maybe for EU-based Rys they should still share registration data with registries so they can also respond to disclosure requests)

The proposal:

- Rr needs to share the place where policies and procedures are published
- Registrar will respond to requests sent by legitimate access seekers by responding to the requestor or providing the Ry with the information
- Resellers and P&P service providers can be processors on behalf of the accredited Rrs, but the Rrs are still responsible

The proposal:

- Parties should inform each other of claims raised against them
- Parties agree to update the Exhibit as required by law or court decisions



Thank you! Any questions?

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