The ICANN GNSO "Business Constituency"

Comments and proposed amendments of the ICANN Business Constituency on provisions of the draft NIS2 Directive related to domain name registration data

May 2021

The comments and proposed amendments below are provided on behalf of ICANN's Business Constituency (BC)[i], the voice of commercial Internet users within ICANN, and representing the interests of small, medium, large and multinational enterprises as users of the domain name system (DNS).

These build on an initial position paper[ii] that explained the importance of access to domain name registration data (WHOIS data) for law enforcement, cybersecurity and consumer protection, and why the inclusion of Article 23 in the draft NIS2 Directive is so valuable. The ITRE Committee's NIS2 Rapporteur captures this very well in the draft Report's Explanatory Statement:

> ***WHOIS data**, the authoritative record of domain ownership, is the only viable means to obtain the information necessary to identify criminal actors, track threat actors, prevent harms and protect the online ecosystem. The cybersecurity community relies on it, and it enables threat researchers to hunt adversaries, so that citizens and entities can protect themselves against upcoming threats. It is the only reliable accountability mechanism in an otherwise anonymous internet. However, over the past three years, following the entry into force of the GDPR, WHOIS data is regarded by some as a liability issue. The standing practise of WHOIS data has been halted, unfortunately and unjustified. The Rapporteur therefore reiterates in his report the lawfulness of processing data for cybersecurity reasons under the GDPR, in the explicit legislative wish for WHOIS data to be shared again.*

Article 23 provides important clarifications on the critical value of WHOIS data, and when, how, and to what extent that data should be made available. Nevertheless, we believe that amendments are needed to the initial draft proposal to clarify and strengthen the text in order to achieve the stated aims.

A number of our initial concerns have been met by amendments proposed in the initial draft ITRE Report[iii] and the initial draft IMCO Opinion[iv]. However, there remain some areas where we still see the need for improvements to the text, for which we provide below proposed amendments with accompanying justifications.

Clarify the scope of DNS providers considered under Article 23

Article 23 applies the obligations for processing and publication of WHOIS data to registrars and registries, rightfully recognizing the critical parts both entities can play in enabling access to WHOIS data. However, it is important that Article 23 be clarified so that the obligations explicitly apply also to other entities responsible for collecting, verifying the accuracy, and providing access to WHOIS data, such as domain name resellers and privacy/proxy registration services.

We therefore **support Amendment 33 of the draft ITRE Report,** which creates a new definition in Article 4 that defines domain name registration services as "*services provided by domain name registries and registrars, privacy or proxy registration service providers, domain brokers or resellers, and any other services which are related to the registration of domain names*".

Define the elements that comprise "complete domain name registration" data

Each individual element of a WHOIS record is valuable for investigatory purposes. Accordingly, the Directive would benefit from a minimum definition of 'complete domain name registration data' (which is referred to in Article 23(1)) in order to ensure a baseline for uniformity and consistency. We therefore **support Amendment 73 of the draft ITRE Report,** which specifies that domain registration data "*shall include at least the registrants' name, their physical and email address as well as their telephone number*" and explains that *"the ability to communicate in writing is essential for the enforcement of criminal and civil legal claims that require written records and substantiation of communication attempts for investigative purposes.*"

Ensuring accuracy of WHOIS data

To ensure the utility of WHOIS data for cybersecurity investigations it is obviously important that the data be accurate. We therefore support the requirement in Article 23(1) for entities providing domain name registration services to *"collect and maintain accurate"* data. However, in order to meet this accuracy obligation, it should be clarified those entities in scope are required to verify the registration data. We therefore **support the addition of the word "*verified*" in Amendment 72 of the draft ITRE Report**, with the explanation that this *"reference to "verified" strengthens the language and provides clarity; entities should have internal processes to confirm that the data submitted is correct and contactable".* Likewise, we **support Amendment 62 of the draft IMCO Report** which adds the word *"verify"* under the obligations for entities under Art 23(1).

To reinforce the importance of data accuracy, Article 23(3) should also include an obligation for service providers to refuse or terminate services upon discovering that a registrant has provided inaccurate data and the registrant does not remedy the inaccuracy in a reasonable amount of time. **We propose an amendment to Article 23** which would achieve this:

Text proposed by the Commission	*Groothuis draft ITRE Report, Amendment 74*	*ICANN BC proposed amendment*
3. Member States shall ensure that the TLD registries and the entities providing domain name registration services for the TLD have policies and procedures in place to ensure that the databases include accurate and complete information. Member States shall ensure that such policies and procedures are made publicly available.	3. Member States shall ensure that ~~***the***~~ TLD registries and ~~***the***~~ entities providing domain name registration services ~~***for the TLD***~~ have policies and procedures in place to ensure that the database~~***s infrastructure*** include~~***s***~~ accurate***, verified*** and complete information. Member States shall ensure that such policies and procedures are made publicly available.	3. Member States shall ensure that ~~***the***~~ TLD registries and ~~***the***~~ entities providing domain name registration services ~~***for the TLD***~~ have policies and procedures in place to ensure that the database~~***s infrastructure*** include~~***s*** accurate***, verified*** and complete information***, and that services will be refused or terminated in the event the entity finds inaccurate or incomplete data which is not corrected by the registrant within a reasonable period of time***. Member States shall ensure that such policies and procedures are made publicly available.

Ensure timely access to WHOIS data

Many of the legitimate purposes for accessing WHOIS data, such as for law enforcement or cybersecurity, are extremely time-critical and rely on swift access to data to respond to fast-moving situations and mitigate, as

quickly as possible, harm being caused by cyberattacks or criminal or terrorist activities. Registrars and registries often "rate-limit" (control the rate of) queries for such data, impeding critical investigations. Article 23 has the important intention of calling for publication of non-personal data (paragraph 4) and provision of any WHOIS data in response to a justified request (paragraph 5) of data without undue delay. However, the wording should be strengthened to specify that the data should be published and provided within 24 hours, and without delay or impediment, and that a response to a lawful and justified request for data should not simply be a "reply" (which might be understood as simply an acknowledgement of the request) but entail a provision of the requested data.

Regarding Article 23(4), we therefore **support Amendment 63 of the draft IMCO Opinion** which adds wording to require publication of "*all*" non-personal WHOIS data "*within 24 hours".*

Regarding Article 23(5), we **largely support the strengthened wording in Amendment 76 of the draft ITRE Report**, although the time limit for providing the data should be reduced from 72 to 24 hours, and it should be clarified that this time limit relates to the actual provision of the data and not just an acknowledgement of the request for data. **We propose an amendment to Article 23** which would achieve this:

Article 23 – paragraph 5		
Text proposed by the Commission	*Groothuis draft ITRE Report, Amendment 76*	*ICANN BC proposed amendment*
5. Member States shall ensure that the TLD registries and the entities providing domain name registration services for the TLD provide access to specific domain name registration data upon lawful and duly justified requests of legitimate access seekers, in compliance with Union data protection law. Member States shall ensure that the TLD registries and the entities providing domain name registration services for the TLD reply without undue delay to all requests for access. Member States shall ensure that policies and procedures to disclose such data are made publicly available.	5. Member States shall ensure that ~~***the***~~ TLD registries and ~~***the***~~ entities providing domain name registration services ~~***for the TLD***~~ ***are required to*** provide access to specific domain name registration data***, including personal data,*** upon ~~***lawful and***~~ duly justified requests of legitimate access seekers, in compliance with Union data protection law. Member States shall ensure that ~~***the***~~ TLD registries and ~~***the***~~ entities providing domain name registration services ~~***for the TLD***~~ reply without undue delay ***and in any event within 72 hours*** to all requests for access. Member States shall ensure that policies and procedures to disclose such data are made publicly available.	5. Member States shall ensure that ~~***the***~~ TLD registries and ~~***the***~~ entities providing domain name registration services ~~***for the TLD***~~ ***are required to*** provide access to specific domain name registration data***, including personal data,*** upon ~~***lawful and***~~ duly justified requests of legitimate access seekers, in compliance with Union data protection law. Member States shall ensure that ~~***the***~~ TLD registries and ~~***the***~~ entities providing domain name registration services ~~***for the TLD reply without undue delay***~~ ***acknowledge*** ~~***to***~~ all requests for access ***immediately and provide access within 24 hours.*** Member States shall ensure that policies and procedures to disclose such data are made publicly available.

<u>Recognise that legitimate access to domain name registration data serves the public interest</u>

The Commission's July 2020 Communication on the EU Security Union Strategy[v] stated that access to WHOIS data "is important for criminal investigations, cybersecurity and consumer protection. However, access to this information is becoming more difficult." References to "lawful and duly justified requests of legitimate access seekers" in Article 23(5) go a long way to addressing this gap.

However, it is important to clarify that access to domain name registration data serves the public interest and contributes to the security and stability of the Internet. This would be in line with existing EU regulation; for example, the .eu registry is required to "organise, administer and manage the .eu TLD in the general public interest and ensure in all aspects of the administration and management of the .eu TLD"[vi], including for "high quality, transparency, security, stability, predictability, reliability, accessibility, efficiency, non-discrimination, fair conditions of competition and consumer protection". This fact is evidenced by certain Member States' more practical policies with regard to registration data access (e.g., Denmark), where the Danish Domain Names Act requires that data be accessed for legitimate purposes without violation of GDPR provisions[vii].

We therefore support several amendments that would clarify the lawful and legitimate purposes for accessing WHOIS data:

- We support **Amendment 18 of the draft ITRE Report** which specifies a number of legitimate purposes for accessing WHOIS data – *"protecting the online ecosystem and preventing DNS abuse, as well as for detecting and preventing crime, protecting minors, protecting intellectual property and protecting against hate speech and fraud".*

- We support **Amendment 28 of the draft ITRE Report** which, as explained in the amendment's justification, *"creates a clear legal basis under GDPR Articles 6(1)(c) in cases where there is an obligation to comply with a requirement of this Directive, while allowing for a legitimate interest legal basis where the Directive gives entities optional choices that benefit cybersecurity but necessitate the processing of personal data".*

- We support **Amendment 12 of the draft IMCO Opinion** which expands the subject matter of the Directive by stating that the NIS2 measures serve to "*achieve a trusted digital environment for citizens and economic operators".*

Do not limit DNS entities to managing WHOIS data in their own dedicated database facilities

We are concerned that the requirement for DNS entities to manage WHOIS data via a "*dedicated database facility*" implies that controllers of the data must manage their own data centres, which would be unduly restrictive, and not well-suited to smaller data controllers of WHOIS data with less expertise in online security, high performance computing and modern data protection technologies. We therefore **support Amendment 71 of the draft ITRE Report**, which changes the title of Article 23 to reflect that "*Domain name registration data is stored across a variety of actors making use of different technologies, which not necessarily have to be 'dedicated' databases."*

[i] This document was approved in accord with the Charter of the ICANN Business Constituency, https://www.bizconst.org/charter

[ii] https://cbu.memberclicks.net/assets/docs/positions-statements/2021/2021_03March_15%20ICANN%20Business%20Constituency%20contribution%20on%20NIS2%20Article%2023%20and%20related%20provisions.pdf

[iii] https://www.europarl.europa.eu/doceo/document/ITRE-PR-692602_EN.pdf

[iv] https://www.europarl.europa.eu/doceo/document/IMCO-PA-691156_EN.pdf

[v] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0605&rid=9

[vi] https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=58847

[vii] See explanation of Section 18 in correspondence between Denmark and ICANN: https://www.icann.org/en/system/files/correspondence/vignal-schjoth-to-plexida-28may20-en.pdf