



NIS2 Article 28: Implementation Guide for European Union Member States



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Executive Summary	2
About the i2Coalition	2
Introduction	2
Guiding principles	4
Bridging ICANN policy and NIS2 Legislation: Recommendations for national implementation	5
Introduction.....	5
Domain name data collection and maintenance.....	6
Background.....	6
Recommendation for national legislation.....	6
Essential information for domain name registration.....	6
Background.....	7
Recommendation for national legislation.....	7
Public availability of policies and procedures.....	7
Background.....	8
Recommendation for national legislation.....	8
Domain name registration data disclosure.....	8
Background.....	8
Recommendation for national legislation.....	9
Access to specific domain name registration data.....	9
Background.....	9
Recommendation for national legislation:.....	9
Avoiding data duplication.....	10
Background.....	10
Recommendation for national legislation:.....	10
Conclusion	10

Executive Summary

To avoid fragmentation and optimize global harmonization, the i2Coalition suggests four guiding principles: (1) reflect the minimum requirements of Article 28; (2) support flexible and diverse business solutions to achieve the goals outlined in NIS2; (3) recognize that different rules and obligations apply to gTLDs and ccTLDs; and (4) complement policies developed by ICANN's multistakeholder model. i2Coalition also offers further enhancement proposals for NIS2 implementation in the Member States, including national legislation recommendations addressing: domain name data collection and maintenance; essential information for domain name registration; public availability of policies and procedures; domain name registration data disclosure; access to specific domain name registration data; and avoiding data duplication.

About the i2Coalition

Founded in 2012 by a diverse group of Internet infrastructure companies, the Internet Infrastructure Coalition (i2Coalition) is a global organization that supports and represents the companies that build and maintain the Internet's infrastructure. Our members include cloud providers, data centers, web hosting companies, domain registries and registrars, IXPs, CDNs, network protection services, and other foundational Internet enterprises.

The i2Coalition is the voice for businesses that build and operate the Internet and has a decade-long track record of constructive engagement with decision-makers. Its driving objective is achieving a safe and stable Internet, supported by technically sound policies that enable businesses to operate globally. The i2Coalition has provided comments to the European Commission; to The Office of the United States Trade Representative; the United Kingdom Department of Science, Innovation, and Technology; and other regulatory and administrative agencies around the world.

Introduction

The Directive on measures for a high common level of cybersecurity across the Union (NIS2) entered into force on 16 January 2023, and Member States now have 21 months—until 17 October 2024—to transpose its measures into national law.

The transposition into national law is an opportunity to further improve the resilience of public and private entities against cybersecurity threats. It will have a profound impact on digital infrastructure as well as digital service providers. In particular, Article 28—pertaining to database(s) of domain name registration data—will affect the global domain name industry that serves hundreds of thousands of European businesses.

A crucial distinction permeates the entire conversation surrounding not just the transposition into national law, but also the structure of the global domain name industry itself: the distinction between ccTLDs and gTLDs.

The former stands for country code top-level domains, which are domains usually reserved for a specific country (or sovereign territory or geography), governed by the organizations responsible for administering them in each country or territory, and are generally subject to local laws and regulations.

Meanwhile, the latter stands for generic top-level domains, which are domains based around broad themes, whose administration is solely overseen by the multistakeholder institution ICANN, the Internet Corporation for Assigned Names and Numbers, which ensures their stability and security. Thus, ICANN's policies and contracts apply to all gTLDs consistently and globally, and already contain requirements that operationalize the goals of NIS2 for the domain space.

To avoid fragmentation at different levels across the internal market and ensure the highest level of harmonization globally and across the EU, we suggest:

- Reflecting only the minimum requirements set in Art. 28;
- Supporting flexible and diverse business solutions to the goals (outcomes) prescribed by NIS2;
- Recognizing that different rules and obligations apply to gTLDs and ccTLDs; and
- Complementing policies developed by ICANN's multistakeholder model.

Moreover, to support the development of national legislation implementing NIS2, with particular focus on Art. 28 of the Directive, and before offering specific implementation

recommendations, i2Coalition would like to offer a set of guiding principles for the Member States.

Recital 111 of the Directive, stating that the implementation of NIS2 should consider “standards developed by the multi-stakeholder governance structures at the international level,” provides a central theme to these guiding principles.

The EU and its Member States have consistently voiced their support for the multistakeholder model. For example, in the European Commission’s recent submission to the consultation on the Global Digital Compact, the EU and its Member States outlined their vision, commitment, and actions in support of the multistakeholder model of Internet governance. At the same time, the EU Member States Foreign Affairs Ministers adopted the Council Conclusions on Digital Diplomacy on June 26, 2023. The statement includes active support of the Internet Corporation for Assigned Names and Numbers (ICANN) on issues of strategic importance, such as ensuring Internet stability, security, and interoperability.

In their national transposition of obligations stemming from the NIS2 Directive, the EU Member States can continue that support by enacting legislation that complements the policies developed in ICANN through a bottom-up, consensus-based multistakeholder process.

The guiding principles outlined below intend to achieve the greatest possible harmonization across the EU, avoid conflict with ICANN’s bottom-up multistakeholder model policies, and safeguard the diversity and flexibility of business arrangements between different entities in the domain name industry.

The i2Coalition and its members urge Member States to take these considerations into account when drafting their national legislation.

Guiding principles

1. Ensuring recognition of the diversity of business practices and differentiating the rules applicable to various actors in the domain name space based on their roles and responsibilities.

Recommendation: National legislation should recognize that different rules and obligations may apply to gTLDs and ccTLDs. gTLDs must abide by the policies developed within ICANN’s multistakeholder model and their agreements with ICANN. It is also important to recognize that gTLDs are not a monolithic structure and vary in size, purpose, and nature (e.g., large open TLDs, reserved domains,

geographical TLDs). Additionally, it should be recognized that registrant identification data collection, validation, and verification practices differ across European ccTLDs as well as individual member-state objectives, requirements, and restrictions.

2. Reiterating support for (ICANN) ground-up multistakeholder process. Recitals 111 and 112 both reference support for the guidance and standards developed by the multistakeholder governance structures within their remit at the international level.

Recommendation: To the extent possible, national legislation should support and consider the existing ICANN-established requirements for gTLDs that address the stated desired outcomes of NIS2; for instance, the RAA requirements. For example, in establishing what constitutes access to (complete) registration data.

3. Ensuring recognition of registry/registrar separation. Registries and entities providing domain registration services, such as registrars, perform different functions. Registries do not have a direct relationship with the registrant in most cases, instead relying on registrars to meet some of the NIS2 obligations themselves (ensuring the accuracy of registration data, for example, via the Registrar Accreditation Agreement).

Recommendation: National legislation should provide flexibility for registries to continue to rely on registrars to manage and maintain the business relationship with registrants collecting registration data and ensuring its accuracy and taking into consideration any existing business practices and policies developed by the ICANN multistakeholder community.

4. Non-duplication and cooperation between registries and entities providing domain name registration services, such as registrars and data minimization where possible.

Recommendation: National legislation should follow the lead of multistakeholder policies already in place, like ICANN's policies, and be flexible enough for registries to rely on registrars for the performance of NIS2 obligations. Registrars should not be required to transfer registration data to registries where they do not otherwise have a purpose for processing that data. Data should be maintained closest to its source, and it should not be transferred or processed unnecessarily. National legislation should focus on coordinated access to registration **data** and the protection of registrant's data, and not on who possesses unnecessarily duplicated data sets.

Bridging ICANN Policy and NIS2 Legislation: Recommendations for National Implementation

Introduction

ICANN contracts and consensus policy, developed through its multistakeholder model, have much in common with Article 28 of NIS2. ICANN policies and contracts apply to all gTLDs (not ccTLDs) consistently and globally. i2Coalition would like to offer a set of recommendations for NIS2 implementation in the Member States broken down by paragraphs. The recommendations are relevant to transposition into national law of Article 28 of NIS2, as it applies specifically to gTLDs.

Domain name data collection and maintenance

NIS2 Article 28 Paragraph 1. To contribute 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(s) with due diligence in accordance with Union data protection law as regards data which are personal data.

Background

ICANN contracts and policy (applicable to all gTLDs globally) set obligations for what data registries and registrars (entities providing domain name registration services) must collect and process, such as the Registrar Accreditation Agreement and other ICANN policy. According to these documents, the complete set of domain name registration data is known as the minimum data set. It is maintained in part by the registry for each gTLD and the registrar of record for each domain registration. Accuracy obligations are **imposed** on registrars, requiring them to ensure that data collected from registrants is accurate and remains that way throughout the life of the domain registration. As registrars have the direct relationship with registrants (data subjects), they are authoritative for the data collected and any data provided to registries. Failure of a registrant to maintain complete and accurate registration data with the registrar is grounds for suspension and potential revocation of the domain registration.

Recommendation for national legislation

National legislation could accommodate NIS2 and ICANN policy requirements in the following way:

For the purpose of contributing to the security, stability, and resilience of the DNS, gTLD name registries and entities providing domain name registration services, such as registrars, collectively must collect and maintain accurate and complete domain name registration data in a dedicated database with due diligence as specified by ICANN contracts and Consensus Policy and in accordance with Union data protection law as regards data which are personal data.

Essential information for domain name registration

NIS2 Article 28 Paragraph 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:

- 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

Background

The minimum data set (as noted above) specifies data that must be collected and maintained by gTLD registries and registrars collectively. This sets the minimum and does not preclude the collection of additional information and the policies developed via the multistakeholder process provide that flexibility. ICANN contracts and policy (applicable to gTLDs globally) requires for each domain: Domain Name, Registrar Whois Server, Registrar URL, Registrar, Registrar IANA ID, Registrar Abuse Contact Email, Registrar Abuse Contact Phone, Domain Status(es), Registrant information (Name, Street, City, State/Province, Postal Code, Country, Phone, Email), Registrar Registration Expiration Date, and Creation Date (the date of registration). Registrars may also collect administrative and technical contact data (which may be duplicative of the registrar contact data). The data required to be collected and maintained is reviewed regularly and may be modified to account for changing circumstances and requirements.

Recommendation for national legislation

National legislation could accommodate NIS2 and ICANN policy requirements in the following way:

The data gTLD registries and entities providing domain name registration services, such as registrars collect shall include the domain name, date of registration, registrant name, email, and telephone number, and may include additional points of contact.

Public availability of policies and procedures

NIS2 Article 28 Paragraph 3. Member States shall require the TLD name registries and 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.

Background

For gTLDs, based on ICANN policies and contracts, registrars are authoritative and have obligations in their contracts to ensure domain registration data is complete and accurate. Those include requirements to verify that data is accurate and ensure it remains accurate for the life of the registration. Failure of a registrant to maintain complete and accurate registration data with the registrar is grounds for suspension and potential revocation of the domain registration. ICANN undertakes reviews of accuracy to ensure those obligations are meeting the goal of maintaining accurate and up-to-date gTLD registration data. One such review is currently being initiated with the goal of measuring the current state of accuracy to help inform future policy work on accuracy.

Recommendation for national legislation

National legislation could accommodate NIS2 and ICANN policy requirements in the following way:

gTLD registries and registrars collectively must, in accordance with ICANN policy and contracts, have policies and procedures in place, including verification procedures, to ensure that the databases referred to in paragraph 1 include accurate and complete information. Those policies and procedures must be made publicly available.

Domain name registration data disclosure

NIS2 Article 28 Paragraph 4. Member States shall require the TLD name registries and 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.

Background

ICANN-regulated gTLDs, registries, and registrars have obligations to make domain name registration data available publicly. ICANN contracts and policies specify that registries and registrars must operate a Registration Data Directory Service (RDDS). This is more commonly known as Whois. This service provides public access to domain registration data. ICANN policy has provisions in place for the protection of personal data with flexibility to account for differences across jurisdictions globally. ICANN policy also allows that registrants may consent (opt-in) to including their personal data in the RDDS. ICANN operates a centralized RDDS service where public data for ALL gTLDs can be accessed at: <https://lookup.icann.org/>

Recommendation for national legislation

National legislation could accommodate NIS2 and ICANN policy requirements in the following way:

gTLD name registries and registrars must collectively make publicly available, without undue delay after the registration of a domain name, the domain name registration data, which are not personal data, as specified by ICANN contracts and consensus policy and in accordance with Union data protection law.

Access to specific domain name registration data

NIS2 Article 28 Paragraph 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.

Background

ICANN policy requires gTLD registries and registrars to respond to lawful requests for non-public registration data. A separate timeline for responses is provided for urgent and non-urgent requests. ICANN policy requires registries and registrars to post information about their disclosure request procedures on their websites along with a direct link to the mechanism for submitting those requests. Registries and registrars are further required to specify the required format and content of disclosure requests. Responses to lawful disclosure requests are required to either contain the requested data or provide a rationale as to why the data cannot be provided. Additionally, ICANN is undertaking an effort to provide a single centralized portal for

requesting access to non-public registration data across all gTLD domain registrations. An initial pilot of that effort is expected to be available in late 2023.

Recommendation for national legislation:

National legislation could accommodate NIS2 and ICANN policy requirements in the following way:

In accordance with ICANN contracts and policy, gTLD registries and registrars must 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. Registries and registrars must reply without undue delay and, in any event, within 72 hours of receipt of any requests for access. In accordance with ICANN contracts and policies, gTLD registries and registrars must make publicly available the policies and procedures with regard to the disclosure of data.

Avoiding data duplication

NIS2 Article 28 Paragraph 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.

Background

ICANN policies related to the processing of gTLD registration data incorporate the principles of data minimization and privacy by design. Enshrined within ICANN policies and contracts is the separation of registry and registrar functions, even in cases where the same entity provides both services. The suggested language in the paragraphs above notes that registries and registrars must collectively meet the obligations of each requirement in Article 28.

Recommendation for national legislation:

National legislation could accommodate NIS2 and ICANN policy requirements in the following way:

gTLD registries and the entities providing domain registration services, such as registrars, must cooperate with each other to meet the requirements of Article 28 and to avoid the duplication of collecting, verifying and storing domain name registration data.

Conclusion

Transposing NIS2 regulation into national law in a manner that is complementary to existing ICANN policies achieves the objectives of the NIS2. Harmonization of NIS2 legislation with existing ICANN policies is both feasible and beneficial for the protection of domain name registration data. By aligning national laws with these recommendations, Member States can maintain global consistency; comply with privacy laws; as well as strengthen the security, stability, and resiliency of the Domain Name System. In addition, such alignment would eliminate unnecessary duplication of effort. As the digital landscape continues to evolve, it is increasingly important to ensure that our regulatory frameworks adapt accordingly to effectively serve both local and global Internet communities and continue to demonstrate support for consensus-based multistakeholder processes.