

Powers in Relation to UK- Related Domain Registries

Please find below the consultation response on behalf of Nominet UK. Nominet UK is a private company, limited by guarantee, incorporated in 1996. We are a membership organisation with public benefit articles of association.

Firstly, we would like to make some general introductory comments which should be borne in mind when reading our answers to the questions specifically asked in the consultation.

- i) The UK already operates to high standards: As the .uk national country code Top Level Domain and registry operator for the generic Top Level Domains .cymru and .wales, Nominet is committed to high standards and a safe and trusted internet for all of our members and wider stakeholders. We do not tolerate abuse of our TLDs and are fully committed to preventing and mitigating the types of abuse that these proposed powers are intended to address.
- ii) Unintentional outcomes: Our primary concern is that these powers will not have their intended effect in that our TLDs, together with the other UK-related TLDs, already successfully address the misuses identified, but the introduction of these regulations will reflect negatively on the UK's reputation as a location for digital infrastructure, in the sense that the proposed powers appear disproportionate and smack of heavy-handed overregulation.
- iii) Domain Name Misuse: Specifically in relation to Domain Name Misuse as described in the consultation, according to the respected DNS Abuse Institute Compass reports, which provide a reliable measure of confirmed DNS Abuse across all country code and generic TLDs globally, .uk performs exceptionally well in relative terms when compared to its peers. For June 2023 (the most recent public report) our abuse score (measured by number of maliciously registered domains per 100,000 domains registered) was just 0.41, making us the second best performing large TLD globally in that month, out of 70. Both the .cymru and .wales generic TLDs continue to remain on the Compass Appendix of TLDs in which there is **zero** observable DNS Abuse. We respectfully submit that the existing non-statutory frameworks perform adequately and there is no need for these powers to be introduced.
- iv) CSAM: In relation to child sexual abuse material, according to our July 2023 monthly monitoring report from the Internet Watch Foundation, **zero** actionable reports were identified on Nominet domains. The IWF confirm that "all three domains can be readily described as 'healthy' and are not the subject of targeted abuse; hosting levels are negligible". Again we respectfully submit that the existing non-statutory frameworks perform adequately and there is no need for these powers to be introduced.
- v) Intervention at the DNS level: There are over 1,000 TLDs globally. When considering the Domain Name System (DNS) and TLDs, it is important to bear in mind that registries provide an addressing system, and are not the hosts of any content. Intervention at the DNS level therefore does not have any impact on the actual removal of problematic content from the global internet, which will remain unchanged at its hosting location. This is why we continually attempt to correct any terminology which suggests that an intervention at the DNS level will "take down" a website or that the DNS is some sort of hosting platform. A registry intervention can certainly effectively disrupt access to such content, and will stop all email associated with a domain name, but it is not a precise or targeted intervention. Hence law enforcement agencies and the IWF will usually initially approach the domain registrant or hosting company where they find problematic content.
- vi) Conflicting regulations and standards: All TLDs are part of an international framework of naming and addressing identifiers on the global internet. It is therefore important that international standards are aligned as closely as possible. In general terms therefore we see these proposed

powers as an anomaly in terms of the global internet governance framework, particularly insofar as they apply to generic TLDs, which are regulated under contract with ICANN. The generic TLDs are subject to ICANN community consensus policies (which are different from .uk country code policies). However both the country code and the UK specific generic TLDs will fall to be regulated under these powers. The potential for the creation of conflicting regulatory frameworks should be avoided as far as possible.

- vii) Existing complaints mechanisms: In terms of complaints processes, Nominet's Dispute Resolution Service for rights holders typically receives an average of around 50 complaints per month – in the context of around 200,000 new registrations per month. The vast majority of our registrations (99.98%) are therefore problem free. It is important that complaints procedures are therefore proportionate and do not negatively impact the vast majority of legitimate domain registrants. Once again, we respectfully submit that the existing non-statutory frameworks perform adequately and there is no need for these powers to be introduced.
- viii) Further engagement: We would reiterate our commitment to seek the best solutions possible in relation to the proposed powers, and would be available for further engagement once the consultation has been completed.

SPECIFIC CONSULTATION QUESTIONS:

1. Do you agree we should include all of the types of misuses of domain names set out under the 'Domain Name Misuse' heading, in our 'prescribed practices' ? If not, which ones should be omitted and why?

A: Subject to our overriding concern that these regulations are not needed, yes, we agree. The technical abuses match the five broad categories as identified by ICANN and are reasonably defined and understood internationally. The UK should not attempt to create its own different set of misuses which could lead to confusion and potentially conflicting compliance regimes. For us this is particularly relevant for the .cymru and .wales generic TLDs which are subject to California law and jurisdiction under contract with ICANN, and also subject to ICANN community consensus policy frameworks.

Nominet agrees that CSAM is abhorrent. It is criminalised in every mainstream jurisdiction globally. Whilst it falls within the content layer of the internet, we believe that any registry operator falling within the scope should have policies to prevent access to this sort of content.

2. Are the descriptions of the types of domain name misuses set out under the 'Domain Name Misuse' heading fair and appropriate for the purposes of including them in our 'prescribed practices'? If not, please explain why not and propose alternative descriptions.

A: As per Q1, we agree.

3. Are there any other types of domain name misuse that should be included in the 'prescribed practices' ? If so, please describe them and provide reasons as to why you think they should be included.

A: No. Further given the unprecedented nature of the proposed powers in respect of registry operators falling within scope, it is essential that these prescribed practices remain narrowly focussed on the technical abuses of the DNS, and avoid content issues as far as possible. Registry operators do not host or transmit content, they provide the technical DNS naming and addressing infrastructure for directing web browsing and email to the correct location on the global internet. It is completely inappropriate to require TLD registries to police the internet outside of very limited and narrow areas of technical operation.

4. Do you agree with the proposal to include 'cybersquatting' (including 'typosquatting') in the list of unfair uses of domain names in our 'prescribed practices'? If not, why?

A: We would like to note that it is impossible at the point of registration to determine whether that registration is made in bad faith or not. It is generally only after the event that bad faith can be inferred from the domain registrant's conduct post registration, and that is where appropriate complaints procedures come into play. (See 7 to 11 below).

Most complaints procedures which have been in operation for the past two decades (including Nominet's Dispute Resolution Service and ICANN's Uniform Domain-Name Dispute-Resolution Policy) have been developed with the full involvement of the intellectual property community. They therefore represent best practice in this rather technical area.

Both the DRS and the UDRP use alternative terminology to the narrow definitions of cybersquatting and typosquatting proposed. Nominet uses the term "Abusive Registration" and ICANN "Bad Faith Registration" but in both cases these policies provide quick and low cost remedies for rights holders against third parties who register domain names which take unfair advantage of those rights. Cybersquatting and typosquatting would certainly fall within these definitions, but Abusive/ Bad Faith registration extends further than those narrow categories. See section 5 of the Nominet DRS Policy and section 4b of the UDRP.

5. Is the description of 'cybersquatting' fair and appropriate for the purposes of including it in our 'prescribed practices'? If not, please explain why not and propose an alternative description.

A: N/A per question 4.

6. Are there any other examples of unfair use of domain names that should be included in the 'prescribed practices'? If so, please describe them and provide reasons as to why you think they should be included.

A: No, see answers to questions 3 and 4 above.

7. What would you consider to be too burdensome in the context of resolving disputes under our prescribed dispute resolution procedure?

A: Generic TLDs including .cymru and .wales are contractually required to provide the ICANN UDRP. The regulations should therefore ensure that the UDRP (including any future ICANN community consensus policy changes to the UDRP) will meet the prescribed dispute resolution procedure, as it would be excessively burdensome (and also very confusing to both rights holders and domain registrants and registrars) to have multiple dispute resolution policies in place. Similarly, Nominet's DRS has been successfully operating for over 20 years now, and has an excellent reputation and track record for resolving .uk domain name disputes efficiently and fairly. Neither the ICANN UDRP nor the Nominet DRS is a substitute for a court of competent jurisdiction which may be needed for complex cases which require evidence to be tested under oath and cross-examined. Rather both the UDRP and DRS are designed to handle straightforward cases of Bad Faith/Abusive registrations in a remote format, with online filing of submissions and evidence, followed by an independent adjudication in writing. This allows parties to avoid the cost, risk and expense of formal court proceedings for the majority of simple cases, but parties should always have the option of litigating their disputes in the courts.

8. What does 'expeditiously' mean to you in the context of resolving disputes under our prescribed dispute resolution procedure?

A: Simple cases should be concluded within two months of commencement.

9. What do you consider to be 'low cost' in the context of resolving disputes under our prescribed dispute resolution procedure?

A: Fees for the UDRP and DRS are modest. It currently costs 1500 Euro to file a UDRP with the World Intellectual Property Organisation. Whilst Nominet DRS complaints are free to file and include a free mediation stage, it can cost a complainant £750 plus VAT for a full decision. A very small number of DRS cases reach the appeal stage which comprises three independent adjudicators and costs £3000 plus VAT.

10. What would you consider a 'fair' and 'equitable' dispute resolution procedure design to be?

A: As per both the UDRP and DRS, the burden of proof should be on the complaining party, and a case should be determined on the balance of probabilities (ie the usual civil burden of proof). There should be an initial test for standing (to have the legal basis on which to bring a complaint), followed by a substantive assessment as to whether the domain name registration, in the hands of the domain registrant, is taking unfair advantage of the complainant's rights.

11. Do you have any further comments on best practice or about the overall design of our dispute resolution procedure?

A: No other than please do not prescribe the design of the dispute resolution procedure too precisely or too narrowly. Stick to high level principles in order to future proof the dispute resolution procedure requirements. Both the UDRP and DRS policies and procedures may change in line with the evolving standards and practices of the global internet.

12. To what extent do you agree or disagree with our assessment under the 'Summary of Business Impact' section? Please provide details for your answer.

A: We have concerns that the introduction of these proposed powers will result in the UK being viewed less positively as a favourable jurisdiction for the location of digital infrastructure.

13. Are there potential positive impacts (including costs or financial implications) that the proposals outlined in this consultation may have on businesses, consumers or the public sector? Please provide any evidence or comments on what you think these positive impacts would be.

A: Given the existing high standards and performance of all the UK-related TLDs, we see no benefits arising for business, consumers or the public sector.

14. Are there potential negative impacts (including costs or financial implications) that the proposals outlined in this consultation may have on businesses, consumers or the public sector? Please provide any evidence or comments on what you think these negative impacts would be.

A: Care should be taken with the introduction of powers which touch on the global internet. An outcome which leads to a perception that the UK over-regulates internet infrastructure may damage the nation's reputation as an attractive and reputationally stable jurisdiction from which to operate.

15. Please provide any other comments or evidence that relates to or is about the analysis under the 'Summary of Business Impact' section.

A: We have no view on this question.

16. Do you have any comments about the potential positive and/or negative impacts that the options on the broad purposes of the commencement of the DEA 2010 powers outlined in this consultation may have on

individuals with a protected characteristic under the Equality Act 2010? If so, please explain what you think these impacts (both positive and/or negative) would be.

A: We have no view on this question.

17. If you believe there may be negative impacts, what do you think could be done to mitigate them?

A: We have no view on this question.