

Wednesday, November 7, 2018

EU Commission  
EU Parliament  
EU Council  
Working Party on Telecommunications and Information Society

Cc:

Vice President Andrus Ansip, European Commission (Digital Single Market)  
European Commissioner Mariya Gabriel (Digital Economy and Society)  
Directorate-General for Communications Networks, Content and Technology (CONNECT)

Vice President Jyrki Katainen, European Commission (Jobs, Growth, Investment and Competitiveness)  
Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (GROWTH)

Head of Unit Mr. Bruno Gencarelli (Data Protection)  
Directorate-General for Justice and Consumers (JUST)

**Re: Projected changes to the .eu TLD Regulations: Impact of a redacted WHOIS database on law enforcement, IP rights, cybersecurity and consumer protection**

Dear Madam,  
Dear Sir,

I am writing you to address certain important issues related to the recent proposals of both the EU Commission and the EU Council to amend the existing legislative framework on the implementation and functioning of the .eu Top Level Domain (TLD) and repealing Regulation (EC) No 733/2002 and Commission Regulation (EC) No 874/2004.

Specifically, the proposed amendments to the provisions concerning the 'WHOIS database' threaten to unduly restrict the available information in this database, with potential detrimental effects on various legitimate public and third party interests, such as law enforcement, IP rights, cybersecurity and consumer protection.

The unbridled adoption of the proposed amendments to the WHOIS database in the .eu TLD risks impairing crucial principles and considerations laying at the basis of EU law, such as proportionality with other fundamental rights, transparency, and accountability. Therefore, I encourage the European

authorities to (i) adopt a text which pursues compliance with the applicable data protection legislation while maintaining the existing regulatory frameworks to the greatest extent possible and (ii) further define the purpose of the .eu WHOIS database to account for its public interest purposes of ensuring transparency, accountability and trust in the digital single market.

## 1. The .eu WHOIS database and its importance

The .eu WHOIS database allows Internet users to obtain information related to a specific domain name registered in the .eu TLD. Currently, if the domain name holder is a legal entity, this information includes the name of that entity, its language of registration, and its postal and e-mail address. If the domain name holder is a natural person, only the registration language and e-mail address is publicly accessible. This limitation serves to protect the privacy and personal data of individuals.

The publicly available identity and contact information of domain name holders in the .eu WHOIS database is not only important to verify whether and by whom a specific .eu domain name is, or was, registered, but also serves a number of other vital legitimate interest purposes. Expedient access to accurate WHOIS data is vital to law enforcement authorities, consumers, intellectual property owners and cybersecurity service providers. For example, law enforcement authorities depend on accurate and available WHOIS information to investigate and tackle cybercrime, fraud, child abuse, etc. Consumer protection organisations and intellectual property rights owners depend on identity and contact information of a specific domain name holder related to websites selling counterfeit goods or other infringing products.<sup>1</sup>

## 2. The Proposed Amendments

The new legislative proposal<sup>2</sup> of the EU Commission on the .eu TLD is part of the Regulatory Fitness and Performance Programme (REFIT) review of the current .eu Regulations. With the proposal, the EU Commission aims to (i) modernise the .eu legal framework, (ii) create a new governance structure with a separate multi-stakeholder body and (iii) create new eligibility criteria to enable EU/EEA citizens to register a .eu domain, regardless of where they live.<sup>3</sup>

However, these considerations do not warrant further limitations to the existing WHOIS database for .eu domain names.

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<sup>1</sup> For more information on the importance of WHOIS information and its legitimate public interest purposes, please refer to a previous letter sent to the EU Commission, the Article 29 Working Party and all heads of DPAs of 11 May 2018, "GDPR and WHOIS: Impact on law enforcement, IP rights and consumer protection – Digital economy", available on <https://www.icann.org/en/system/files/files/gdpr-attachment-1-ipc-icann-proposed-compliance-models-11may18-en.pdf>.

<sup>2</sup> Proposal for a Regulation of the European Parliament and of the Council on the implementation and functioning of the .eu Top Level Domain name and repealing Regulation (EC) No 733/2002 and Commission Regulation (EC) No 874/2004, COM(2018) 231 final, Brussels 27 April 2018, 2018/0110 (COD).

<sup>3</sup> See The Regulatory Fitness and Performance Programme (REFIT) review of the .eu Regulations, *European Commission modernisation of the regulations establishing a .eu top level domain name*, available at <https://ec.europa.eu/digital-single-market/en/the-top-level-domain-eu> and [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2402460\\_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-2402460_en).

**a. The current provisions on the .eu WHOIS database**

The current article 16 of Regulation (EC) 874/2004<sup>4</sup> on the .eu WHOIS database provides:

*1. The purpose of the WHOIS database shall be to provide reasonably accurate and up to date information about the technical and administrative points of contact administering the domain names under the .eu TLD.*

*2. The WHOIS database shall contain information about the holder of a domain name that is relevant and not excessive in relation to the purpose of the database. In as far as the information is not strictly necessary in relation to the purpose of the database, and if the domain name holder is a natural person, the information that is to be made publicly available shall be subject to the unambiguous consent of the domain name holder. The deliberate submission of inaccurate information shall constitute grounds for considering the domain name registration to have been in breach of the terms of registration.*

**b. The EU Commission's proposal**

Article 12 of the EU Commission's proposal aims to amend the current provisions on the .eu WHOIS database to:

*1. The Registry shall set up and manage a WHOIS database facility for the purpose of providing accurate and up to date registration information about the domain names under the .eu TLD.*

*2. The WHOIS database shall contain relevant information, which is not excessive in relation to the purpose of the database, about the points of contact administering the domain names under the .eu TLD and the holders of the domain names. **Where the domain name holder is a natural person, the information that is to be made publicly available shall be subject to the domain name holder's consent within the meaning of Regulation 2016/679.***

These amendments would effectively result in the full redaction of all identification and contact information of domain name holders who are natural persons, unless they give their explicit consent. And even if a potential infringer would consent to publishing certain personal information when registering the domain name, the General Data Protection Regulation 2016/679 (GDPR) provides that this consent can be easily withdrawn at all times.<sup>5</sup>

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<sup>4</sup> Commission Regulation (EC) No 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration, *OJ L 162*, 30 April 2004, 40.

<sup>5</sup> Article 7(3), Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L 119*, 4 May 2016, 1.

### **c. Amendments by the Telecommunication Working Party (EU Council)**

On 18 October 2018, the Working Party on Telecommunications and Information Society (Telecommunication Working Party) within the EU Council has proposed additional, even more far-going amendments to this article.<sup>6</sup> The proposal reads as follows:

1. The Registry shall set up and manage a WHOIS database facility for the purpose of **ensuring transparency by** providing accurate and up to date registration information about the domain names under the .eu TLD.

2. The WHOIS database shall contain relevant information, which is not excessive in relation to the purpose of the database, about the points of contact administering the domain names under the .eu TLD and the holders of the domain names. Where ~~the domain name holder is a natural person~~ **such information relates to an identified or identifiable natural person**, the information that is to be made publicly available shall be subject to the ~~domain name holder's~~ **data subject's** consent within the meaning of Regulation 2016/679.

While I strongly support the further refinement of the purpose of the .eu WHOIS database, the amendments in the second paragraph risk abolishing the current distinction between natural and legal persons entirely, resulting in the redaction of more (if not all) important information from the .eu WHOIS database. The current distinction on the basis of whether or not the domain name holder is a natural person has the advantage of being clear and easy to implement. Uncertainty related to assessing whether information potentially relates to an identified or identifiable natural person entails a risk of overcompliance, and undermines the central aim of GDPR, which is to protect European citizen's personal data. Information to which the GDPR does not apply – and which is vital for purposes related to law enforcement, e-commerce, consumer protection, intellectual property, etc. – risks being rendered inaccessible. In essence, the projected approach would provide further opportunities for malicious entities to hide behind the redacted personal data of a natural person.

### **3. No reason to amend the current provisions concerning the .eu WHOIS database**

#### **a. The GDPR did not substantially change the applicable data protection rules**

In essence, there is no objective reason for the European authorities to amend the current provision on the .eu WHOIS database to conform with the GDPR, as this provision was and still is in compliance with applicable rules on data protection. The introduction of the GDPR did not alter the material scope for data protection (which applies to the processing of information relating to an identified or identifiable natural person), nor did it change the relevant data processing principles and lawful bases

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<sup>6</sup> Proposal for a Regulation of the European Parliament and of the Council on the implementation and functioning of the .eu Top Level Domain name and repealing Regulation (EC) No 733/2002 and Commission Regulation (EC) No 874/2004 – Preparation for the informal trilogue, Council of the European Union: Working Party on Telecommunications and Information Society, Interinstitutional file 2018/0110(COD), Brussels 18 October 2018, 13158/18.

existing under the previous data protection framework of Directive 95/46/EC.<sup>7</sup> Article 16 of Regulation (EC) 874/2004 provides for a legitimate legal basis for disclosing WHOIS information in conformity with the GDPR.

**b. Similar legal bases exist for comparable public registers**

The requirement to publish WHOIS data is comparable and serves a similar purpose to other European public registers publishing important personal information. For example, Member States are required to disclose the particulars of company officers in central national company registers. Similarly, the name and address of an EU trademark applicant and his/her representative is disclosed in the EU trademark register. This personal data is considered to be of public interest and may be accessed by any third party.<sup>8</sup> The introduction of the GDPR had no impact on the publication of personal information in these registers.

**c. The need for a balanced approach**

The GDPR calls for a balanced approach with existing regulatory frameworks also implemented by the EU, such as those meant to enhance trust and security, to protect consumers, to prevent fraud and money laundering, to enforce intellectual property rights, etc.<sup>9</sup> For example, the omission of important information online is hard to reconcile with the transparency requirements of the E-Commerce Directive.<sup>10</sup> The proposed amendments to the .eu Regulation would unduly restrict the exercise of those other rights and damage the interests of third-parties. For example, the omission of certain identification and contact information from the public .eu WHOIS database, notably the registrant's name and email address, critically impairs the ability to expeditiously identify and contact the registrant in case of infringements.

**4. Conclusion**

There is a need for transparent WHOIS data to preserve and enhance trust in the digital single market. Without such transparency, the identity of malicious entities will remain concealed, allowing them to

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<sup>7</sup> See articles 2(a), 3(1), 6 and 7, Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *OJ L 281*, 23 November 1995, 31.

<sup>8</sup> See Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, *OJ L 169*, 30 June 2017, 46; Articles 44 and 111 Regulation 2017/1001 Of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, *OJ L 154*, 16 June 2017, 1.

<sup>9</sup> Recital 4 of the General Data Protection Regulation, which provides: “*The right to the protection of personal data is not an absolute right; it must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality*”.

<sup>10</sup> Article 5 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), *OJ L 178*, 17 July 2000, 1. Article 5 provides: “*In addition to other information requirements established by Community law, Member States shall ensure that the service provider shall render easily, directly and permanently accessible to the recipients of the service and competent authorities, at least the following information: (a) the name of the service provider; (b) the geographic address at which the service provider is established; (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; (...)*”

defraud Internet users more easily. As a result, compliance with the GDPR should be pursued while maintaining the existing regulatory framework to the greatest extent possible. Putting too much emphasis on “complying with” the GDPR may be detrimental to existing regulatory frameworks that were specifically designed to protect vital public and third party interests.

Seeing that the .eu TLD serves as a principal example for compatibility with the EU data protection framework, the adoption of the proposed amendments could set a dangerous precedent for other TLDs looking for guidance.

In consideration of the above, I therefore strongly encourage the European authorities to:

1. Adopt a text which maintains (i) the current condition to disclose important personal information, such as the domain name holder’s e-mail address, in the .eu WHOIS database irrespective of the domain name holder’s consent and (ii) the distinction between natural and legal persons; and
2. Further define the purpose of the .eu WHOIS database to account for its public interest purposes of ensuring transparency, accountability and trust in the digital single market.

Thank you for your attention in this important matter. I remain at the disposal of the institutions to provide further input if that were considered useful.

Yours sincerely,

Flip Petillion