

I. INTRODUCTION

The General Data Protection Regulation 2016/679 (GDPR) took effect on 25 May 2018. A consequence of GDPR in many EU Member States was the redaction of previously freely accessible WHOIS data for ccTLD domain names, where such were available.

ECTA's Internet Committee (IC) conducted a survey among ECTA Members, to first assess the level of this redaction and how this varies across the Member States.

Secondly, where data has been redacted, the survey enquired as to how the interested parties may obtain WHOIS data and under what circumstances. Further, when data is disclosed and suspected as fake, how interested parties may report such concerns.

Finally, the survey enquired as to the nature of local domain name registries, be they private or public organisations, to see how far practices may be harmonized across the Member States, if possible.

II. EXECUTIVE SUMMARY

A. LEVEL OF WHOIS DATA REDACTION

The level of the redaction of WHOIS data across Member States is varied. There is no harmonized approach. For the purpose of this paper, ECTA has focused its comments on the availability of registrant data, although it notes from the results of the IC survey that the availability of administrative and technical contact data is also varied.

A distinction was drawn between the disclosure of data for natural persons and legal entities and a contrast provided with the availability of such data for natural persons and legal entities pre-GDPR. The responses to the questionnaire can be summarized as follows.

Territory	Availability pre-GDPR		Availability post-GDPR	
	Natural persons	Legal entities	Natural persons	Legal entities
Austria	Available	Available	Redacted	Redacted
Belgium	Limited disclosure	Available	Redacted	Available
Bulgaria	Available	Available	Limited disclosure	Available
Croatia	Limited disclosure	Available	Redacted	Available
Cyprus	Redacted	Limited disclosure	Redacted	Limited disclosure

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Czech Republic	Limited disclosure	Available	Limited disclosure	Available
Denmark	Available	Available	Available	Available
Estonia	Limited disclosure	Limited disclosure	Limited disclosure	Limited disclosure
Finland	Limited disclosure	Available	Limited disclosure	Available
France	Redacted	Available	Redacted	Available
Germany	Available	Available	Redacted	Redacted
Greece	Redacted	Redacted	Redacted	Redacted
Hungary	Available	Available	Redacted	Available
Ireland	Redacted	Redacted	Redacted	Redacted
Italy	Limited disclosure	Available	Redacted	Available
Latvia	Redacted	Available	Redacted	Available
Lithuania	Available	Available	Redacted	Available
Luxembourg	Redacted	Available	Redacted	Available
Malta	Available	Available	Available	Available
Netherlands	Redacted	Limited disclosure	Redacted	Limited disclosure
Poland	Redacted	Available	Redacted	Available
Portugal	Available	Available	Redacted	Available
Romania	Redacted	Available	Redacted	Available
Slovakia	Available	Available	Redacted	Redacted
Slovenia	Redacted	Available	Redacted	Available
Spain	Limited disclosure	Available	Limited disclosure	Available
Sweden	Available	Available	Redacted	Available
United Kingdom (UK)*	Available	Available	Redacted	Redacted
European Union	Redacted	Available	Redacted	Available

*The UK left the EU on 31 January 2020, but the relevant responses have been included within this paper given the UK's membership of the EU from 25 May 2018 to 31 January 2020 and the ongoing transition period set to expire on 31 December 2020.

Alongside the above, survey respondents were asked whether their ccTLD registry imposed local presence requirements on registrants. Only the French, Italian, Irish, Bulgarian and Croatian ccTLD registries require that registrants have a local presence, as well as the European ccTLD .eu. Therefore, where WHOIS data is redacted in these Member States it can, at least, be inferred that the registrant is a natural person located in that territory or a legal entity with a local presence.

Responses to the IC questionnaire were also provided by non-EU ECTA Members. Their responses are summarized in the same way below. Whilst GDPR is EU law, the responses from non-EU ECTA Members indicate that the trend for greater redaction is similarly present in some territories beyond the EU.

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Territory	Availability pre-GDPR		Availability post-GDPR	
	Natural persons	Legal entities	Natural persons	Legal entities
Switzerland	Available	Available	Available	Available
Turkey	Available	Available	Redacted	Available
Serbia	Limited disclosure	Available	Redacted	Available
Russia	Redacted	Limited disclosure	Redacted	Limited disclosure
China	Limited disclosure	Limited disclosure	Redacted	Redacted
Singapore	Available	Available	Limited disclosure	Limited disclosure
Mexico	Available	Available	Available	Available

B. DISCLOSURE AND DATA RELEASE

Where ccTLD registries have redacted WHOIS data post-GDPR, many have put in place mechanisms via which interested parties can request the disclosure of registrant data. In some Member States, requests should be made via an official form, in others no formal procedure has been implemented but, in both instances, in order for a data release request to be granted, the requesting party must provide reasoning for the release of the data. In others, data can be disclosed only through court order or during court proceedings, namely, Romania, Cyprus, Slovakia, Bulgaria, Ireland, and Latvia.

For the purpose of this paper, ECTA has focused on the ability of non-official interested parties to make such requests. Many ccTLD registries allow enhanced access to WHOIS data for law enforcement agencies, regulatory authorities and the courts. However, this paper focuses on the ability of non-official organisations or persons, such as trade mark right holders to request the disclosure of WHOIS data. The lack of availability of such data also affects, among others, anti-counterfeiting organisations, consumers and their protection, enforcement of other IP rights.

The below table summarises the availability of data release requests and the circumstances under which such requests should be met and data disclosed by ccTLD registries across the Member States.

Territory	Data release request available	Acceptable reasons for data release
Austria	Yes – informal request	Must demonstrate legitimate interest
Belgium	Yes – informal request	Must demonstrate legitimate interest
Bulgaria	No	Disclosure only within pending lawsuit
Croatia	Yes – submit official form	Must demonstrate legitimate interest

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Cyprus	No	Disclosure only via court order or ADR action
Czech Republic	Yes – informal request	Must demonstrate legitimate interest
Denmark	No	
Estonia	Yes – informal request	Must demonstrate legitimate interest
Finland	No	
France	Yes – submit official form	Must demonstrate legitimate interest
Germany	Yes – submit official form	Must demonstrate legitimate interest
Greece	No	
Hungary	Yes – informal request	Must demonstrate legitimate interest
Ireland	Yes	Require court order or warrant
Italy	Yes – submit official form	Must demonstrate legitimate interest
Latvia	No	Disclosure only within pending lawsuit
Lithuania	Yes – informal request	Must demonstrate legitimate interest
Luxembourg	Yes – submit official form	Must demonstrate legitimate interest
Malta	No	
Netherlands	Yes – submit official form	Must demonstrate legitimate interest
Poland	Yes – informal request	Must demonstrate legitimate interest
Portugal	Yes – informal request	Must demonstrate legitimate interest
Romania	No	Disclosure only via court order
Slovakia	Yes	Require court order
Slovenia	Yes	Require consent or court order
Spain	No	
Sweden	Yes – submit official form	Must demonstrate legitimate interest
United Kingdom (UK)*	Yes – submit official form	Must demonstrate legitimate interest
European Union	Yes – submit official form	Must demonstrate legitimate interest

C. FAKE DATA

Where registrant data is disclosed, either in publicly accessible WHOIS data or following a request submitted to the ccTLD registry, the IC survey next enquired as to the potential to report fake data.

In all of the Member States for which responses have been provided to the IC, interested parties are able to report fake data to the relevant ccTLD registry. Typically, the ccTLD registry will then seek to verify the registrant's data. If verification is not possible or the registrant details are not corrected by the registrant, this will typically result in the cancellation or suspension of the domain name, but not in all the countries. E.g. in Romania, only if the legal entity that holds the domain name cease to exist, then that domain name is cancelled.

D. NATURE OF CCTLD REGISTRIES

Finally, respondents to the survey were asked about the nature of their ccTLD registry, namely whether this is a private or public entity. Further, respondents were asked whether their registry is governed and controlled by its own private rules or national law.

The majority of ccTLD registries in the Member States are private companies or independent organisations. Notable exceptions are Italy, Romania, Estonia, Latvia, and Slovenia in which the registries are public organisations or state institutions.

The majority of the ccTLD registries also operate via their own private rules, with only Italy, Romania, Cyprus, Denmark and Sweden operating based on national law, alongside accompanying private rules.

Regarding supervision of the activities of the ccTLD registries, again the majority of the registries are controlled by their own private rules and not an external supervisory agency.

III. COMMENTS

The following comments are made by ECTA, based on the above responses to the IC survey:

- The level of the redaction of WHOIS data post-GDPR is not harmonised across the Member States. The availability of registrant data varies between ccTLD registries, each seemingly having interpreted the requirements of GDPR differently. However, in countries, like Denmark, there is a national legislation on domain names and for this reason the introduction of GDPR had no real impact on WHOIS data, which is generally still available.
- The varying level of redaction creates an uncertain environment for parties for whom WHOIS data had previously proven useful, notably IP right holders and their legal representatives.

- It is recognized that the trend for decreased disclosure of personal data is not limited to the EU. Responses from ECTA Members in non-EU territories suggest that there is increased redaction of WHOIS data outside of the EU as well.
- Many ccTLDs have taken reasonable steps to provide access to WHOIS data post-GDPR upon request to the registry, but not all of them, e.g. Romania, Cyprus, Slovakia, Bulgaria, Ireland, Latvia where data that are redacted can be obtained only through court order or during court proceedings. Some registries have provided official forms to be submitted, others accept requests in a less structured format, typically via email.
- The commonality between both approaches (official form or email), where available, is that the requesting party must detail a legitimate reason for being provided with the registrant's data. Legitimate interest being one of the acceptable reasons for data disclosure under GDPR.
- Still, the different procedural requirements create uncertainty for parties who legitimately require access to WHOIS data and their legal representatives. There is no harmonised approach to data release requests that may be followed by IP right holders.
- Fake data can be reported to ccTLD registries in the Member States who should take steps to verify registrant data for the domain at issue. If the registrant data cannot be verified or corrected, the domain name registration will typically be suspended and/or cancelled, but not in all territories.
- ECTA's concern, however, is that given the increased level of redaction and anonymity permissible for registrants, the number of domain names that have fake registrant data will increase. Further, it will not be possible for the false nature of such data to be determined without an interested party taking steps to uncover the registrant details, a request that may or may not be accepted by the ccTLD registry.
- The above position is again disadvantageous to IP right holders and their legal representatives as well as to consumers. In the latter case, such are not able to verify who is behind a website, aspect which can affect even their safety, image rights, etc.
- Given that the majority of the ccTLD registries in the EU Member States are private entities, the harmonization of the level of redaction to WHOIS data, procedure for data release requests and reports of fake data would appear more difficult to achieve.


IV. FINAL REMARKS

ECTA will continue to monitor and discuss the impact of GDPR on WHOIS data access and the impact on practice and procedure at ccTLD registries.

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In parallel to the steps being taken to permit access to ccTLD registrant data, ICANN is currently working towards a System for Standardised Access/Disclosure (SSAD) to non-public gTLD registration data. ECTA expects that if such a system is adopted in relation to the disclosure of gTLD registrant data, the ccTLD registries might consider replicating such an approach, although some may not.

However, the position and practice of ccTLD registries are likely to remain un-harmonised until then and even after, if ICANN reaches a SSAD to non-public gTLD registration data. This paper is intended to provide guidance to IP right holders and their representatives regarding the availability of WHOIS data and access options in the meantime.



ECTA, which was formed in 1980, is an organisation concerned primarily with trade marks and designs. ECTA has approximately 1,500 members, coming from all the Member States of the EU, with associate Members from more than 50 other countries throughout the world.

ECTA brings together those practicing in the field of IP, in particular, trade marks, designs, geographical indications, copyright and related matters. These professionals are lawyers, trade mark and patent attorneys, in-house lawyers concerned with IP matters, and other specialists in these fields. ECTA does not have any direct or indirect links to, and is not funded by, any section of the tobacco industry.

The extensive work carried out by the Association, following the above guidelines, combined with the high degree of professionalism and recognised technical capabilities of its members, has established ECTA at the highest level and has allowed the Association to achieve the status of a recognised expert spokesman on all questions related to the protection and use of trade marks, designs and domain names in and throughout the European Union, and for example, in the following areas:

- Harmonization of the national laws of the EU Member Countries;
- European Union Trade Mark Regulation and Directive;
- Community Design Regulation and Directive;
- Organisation and practice of the EUIPO.

In addition to having close links with the European Commission and the European Union Intellectual Property Office (EUIPO), ECTA is recognised by WIPO as a non-Government Organisation (NGO).

ECTA does also take into consideration all questions arising from the new framework affecting trade marks, including the globalization of markets, the explosion of the Internet and the changes in the world economy.