

Our position

ICANN draft Interim model to comply with the General Data Protection Regulation (GDPR)

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €2 trillion in 2017, directly supports more than 4.7 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

The ICANN ‘Calzone Interim Model’

The American Chamber of Commerce to the European Union (AmCham EU) appreciates the effort of the Internet Corporation for Assigned Names and Numbers (ICANN) to come up with an interim model to guide WHOIS registries in complying with the General Data Protection Regulation (GDPR), entering into force in May 25, 2018. As ICANN, AmCham EU members attach high importance to balancing the respect for privacy and fundamental rights with access to critical information.

We thank ICANN for its efforts towards defining a possible compliance model, the so-called ‘Calzone Interim Model’. However, we think further discussion and refinement to the draft is needed on some essential elements, particularly as it falls short of the goal earlier states by ICANN, to preserve the existing WHOIS framework to the greatest extent possible:

- **Geographical scope:** Although ICANN is not mandating to apply this model globally, it suggests this would be the preferred solution. Considering the limitations of the GDPR, we would caution against over-compliance with the GDPR by permitting or promoting a global application of the draft ‘Calzone model’. Indeed, this would be contrary to public policy and may lead to conflicts of laws in other jurisdictions. By promoting a global application of the model, a much broader swathe of WHOIS data would be inaccessible than is necessary to comply with the GDPR and would unnecessarily raise risks for the security and stability of the internet, and the safety of users.
- **No distinction between legal and natural persons:** the ICANN Calzone Interim Model does not distinguish between natural and legal persons and applies to both. As the European Commission notes in its letter to ICANN of 7 February 2018 ‘GDPR only applies to natural persons and therefore does not regulate the processing of data of legal persons’. In its *communiqué* of Thursday 15 March in San Juan, the Government Advisory Group (GAC) in ICANN, called on ICANN to distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities which are not in the remit of the GDPR.
- **Publication of ‘Thin WHOIS’:** The ICANN Calzone Model would allow for publication of a ‘Thin WHOIS’¹ and not for publication of details such as e-mail, name, ID, address of the registrant and other crucial details that are the important for a number of legitimate purposes. Such details, particularly the registrant email address is used to address abusive activity through cross-referencing and ‘reverse WHOIS’ searches, which enable law enforcement and private parties to identify patterns of abuse perpetrated by the same party. As the GAC did in its advice consensus *communiqué* on 15 March in S. Juan, we would call on ICANN to reconsider the proposal to hide the registrant mail address as this may not be proportionate in view of the significant negative impact on law enforcement and cybersecurity and rights protection.

¹ ‘A thin registry only includes technical data sufficient to identify the sponsoring registrar, status of the registration, and creation and expiration dates for each registration in its WHOIS data store’. Source: <https://whois.icann.org/en/what-are-thick-and-thin-entries> (retrieved 23 March 2018)

The Importance of the WHOIS Directory

The utility of WHOIS is widely recognized and wide ranging. As the Commission has rightly pointed out in its letter to ICANN of 29 January 2018, ‘the WHOIS system is currently used by a variety of stakeholders [...] including for achieving public policy objectives as already established in the GAC2007 WHOIS principles’. WHOIS is indeed useful to consumers, security researchers and companies alike who rely on it to provide an accurate and dependable mechanism to contact domain registrants. Among its various uses, the WHOIS allows companies, consumers and others to:

- **Identify and address malicious online activity:** A domain record is generally an essential first step to identify websites which are harmful, and/or may be involved in any case(s) of cyber theft. For example, when malicious activity associated with a particular domain name is detected, it will be essential to identify the registrant, contact them and also understand what other domains are associated with that registrant (in many instances, the domain might have been hijacked and the registrant may not even know it). Cybersecurity professionals also utilise various other data points to assess risk of harmful activity, such as: a recent registration date of the domain; a close expiration date of the domain; registrant from a high-risk country; the registrant and company address being in different locations. The reverse WHOIS search would also allow companies and users to identify other sites and networks that are associated with the concerned fraudulent entity and could be targeted for further action or investigation, if needed.
- **Identify fraudulent entities/associations engaged in fraudulent activities or fraudulent domains with DNS and credit fraud:** A WHOIS search can reveal inaccuracies in registrant data which are associated with fraudulent activity as well as a breach of registrant and registrar contractual obligations. The reverse search can help cyber security professionals in finding domain records for a search term(s), such as common email addresses, which could enable nefarious activities to be better addressed and detected from a sole source.

Indeed, fraudulent activities on the internet can be quite dangerous for unwitting consumers. Counterfeited medicine, cosmetics or car parts pose clear risks for the health and safety of citizens, and fake goods are increasingly sold in a way that consumers are thinking they are getting a good deal on authentic products, exposing them to credit card and other types of fraud.

Companies’ researchers and/or security professionals use registration data to detect threats and new attacks as well as to analyse new trends. Law enforcement authorities rely as well on these data gathered by private sector researcher.

AmCham EU members hence support ICANN’s stated goal of preserving as much of the WHOIS directory as possible. It is essential that specific data fields are displayed in the public WHOIS to facilitate businesses’ ability to identify and address abusive online activity such as fraud, distribution

of malicious software and intellectual property theft, posing a threat to the businesses themselves as well as their customers. It is also important that the ability to perform searches for correlation analysis, to allow for more effective identification and mitigation of threats which, in turn, serves the public interest with better user protection worldwide and continued security, stability and resilience of the Domain Name Servers (DNS) as a global system.

Certain members of the ICANN community have proposed an accreditation model, called the 'Cannoli Model' that may not be ready by 25 May 2018. To avoid a possible blackout, it is essential to find a mechanism to preserve access to relevant WHOIS data until a proper solution is defined. If WHOIS were to 'go dark', there would be a cost to public safety, and the security and stability of the internet.

We hope that the European Data Protection Authorities will consider the impact that the ICANN 'Calzone Model' may have on law enforcement, researchers, security professional, companies and consumers and provide ICANN with appropriate direction to address the concerns outlined in this letter and allow further discussion and refinement on the draft proposed ICANN interim model.