

TLDCON 2021

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DOMAIN DISPUTES
EXCLUSIVE RIGHTS
PERSONAL DATA
SEARCHING FOR BALANCE
OF INTERESTS.

GORODISSKY

WHOIS DATABASE IN THE ERA OF GDPR

Personal data is the new oil of the internet and the new currency of the digital world .

Meglana Kuneva
European Consumer Commissioner



Created by Becris
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https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_09_156

GENERAL DATA PROTECTION REGULATION (GDPR)

- ✓ The GDPR was adopted on 14 April 2016 and became enforceable beginning **25 May 2018**.
- ✓ The goal of the GDPR is to protect the fundamental right of natural persons in relation to the processing of their personal data.
- ✓ GDPR is **the toughest privacy and security law in the world**, has become a model for many national laws outside the EU.



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GENERAL DATA PROTECTION REGULATION (GDPR)

- 1) **Has extraterritorial character** - imposes obligations onto organizations anywhere, so long as they target or collect data related to people in the EU.
- 2) **The fines for violating the GDPR are very high** . There are two tiers of penalties, which max out at €20 million or 4% of global revenue (whichever is higher).

The biggest GDPR fines of 2019, 2020, and 2021 (so far)

- ✓ Amazon — €746 million (\$877 million)
- ✓ Google – €50 million (\$56.6 million)
- ✓ H&M — €35 million (\$41 million)
- ✓ TIM – €27.8 million (\$31.5 million)
- ✓ British Airways – €22 million (\$26 million)

<https://www.tessian.com/blog/biggest-gdpr-fines-2020/>

PERSONAL DATA

Art. 4(1) GDPR:

‘Personal data’ means any information relating to an identified or identifiable natural person (‘data subject’).

Ex.: names, email addresses, location information, ethnicity, gender, biometric data, religious beliefs, web cookies, and political opinions can be personal data.



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⇒ **Processing of personal data is subject to data protection principles and may be performed only on the basis of the relevant legal grounds.**

LEGAL CONSEQUENCES

Информация о домене STAYATYOURHOME.RU

% By submitting a query to RIPN's Whois Service
% you agree to abide by the following terms of use:
% <http://www.ripn.net/about/servpol.html#3.2> (in Russian)
% <http://www.ripn.net/about/en/servpol.html#3.2> (in English).

domain: STAYATYOURHOME.RU
nserver: ns1.beget.com.
nserver: ns2.beget.com.
state: REGISTERED, DELEGATED, UNVERIFIED
person: Private Person
registrar: REGRU-RU
admin-contact: http://www.reg.ru/whois/admin_contact
created: 2020-07-23T08:11:15Z
paid-till: 2022-07-23T08:11:15Z
free-date: 2022-08-23
source: TCI

Last updated on 2021-09-13T12:31:30Z

Would it be possible to give free access to Registrant's data (in case he/she is a natural person) in the WHOIS database?

No, the WHOIS service had to change



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ICANN PROPOSALS / PUBLIC DISCUSSIONS

We are working to ensure compliance with this law [GDPR] while maintaining access to WHOIS to the greatest extent possible.

Göran Marby

President and CEO ICANN

Share

Data Protection and Privacy Update: Seeking Community Feedback on Proposed Compliance Models

12 January 2018

[Göran Marby](#), President and Chief Executive Officer (CEO)



Proposed Interim Model for GDPR Compliance-- Summary Description

(The "Calzone Model", 28 February 2018)
Prepared by: ICANN Org

PROPOSED INTERCOMPLIANCE MODELS (ICANN 12.01.2018)

Model 1	Model 2	Model 3
<p>Display all current Data, except do not display: (1) email and phone number of registrant, and (2) name and postal address of tech and admin contacts</p>	<p>Display only technical data + email address for Admin and Tech contacts (do not publish the name or any other data about any registrant)</p>	<p>Do not display any personal data in any registration</p>
<p>To gain access to these non-public data points, third parties would be required to self-certify their legitimate interests for accessing the data</p>	<p>To access the non-public information registries and registrars would be required to provide access only for a defined set of third-party requestors certified under a formal accreditation/certification program.</p>	<p>To access non-public information, a requestor would provide a subpoena or other order from a court or other judicial tribunal of competent jurisdiction</p>

“CALZONE MODEL” 28.02.2018

- ✓ The Proposed Interim Model maintains robust collection of registration data (including registrant, administrative, and technical contact information), but **restricts most personal data to layered access via an accreditation program**.
- ✓ **Certified user groups, such as law enforcement agencies and intellectual property lawyers, could access non-public WHOIS data** based on pre-defined criteria and limitations that would be established as **part of the formal accreditation program**.
- ✓ Users without accreditation for full WHOIS access would maintain the ability to **contact the registrant** or administrative and technical contacts, either **through an anonymized email, web form, or other technical means**.
- ✓ The model would apply to all registrations, without requiring registrars to differentiate between registrations of legal and natural persons.

Source: <https://www.icann.org/en/system/files/files/proposed-interim-model-gdpr-compliance-summary-description-28feb18-en.pdf>

TEMPORARY SPECIFICATION ON THE REGISTRATION DATA

Was adopted by the ICANN Board of Directors and took effect on **25 May 2018**.

- **maintains robust collection of registration data, but restricts access to registration data that may include personal data**. In general, it represents the proposals from the “Calzone Model”.

Access to Non - Public Registration Data => Registrar and Registry are required to:

- ✓ provide reasonable access to non - public data to 3rd parties with legitimate interests, except where overridden by interests or fundamental rights and freedoms of data subject;
- ✓ provide access where Article 29 Working Party/European Data Protection Board, relevant court, applicable legislation or regulation provides guidance that provision of data to specified classes of users is lawful.

Further community discussion will result in standardized unified access model to be implemented.

SYSTEM FOR STANDARDIZED ACCESS/DISCLOSURE (SSAD)

- ✓ The SSAD is a new system proposed to centrally handle requests for non - public registration data.
- ✓ Due to the resource investment and complexity that would likely be required to implement the SSAD-related policy recommendations in a timely and predictable manner, **the ICANN Board has requested an Operational Design Phase (ODP) Assessment to inform its deliberations**, including whether the recommendations are in the best interests of the ICANN community or ICANN.



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IMPACT ON UDRP

IMPACT OF CHANGES TO AVAILABILITY OF WHOIS DATA ON THE UDRP: WIPO CENTER INFORMAL Q&A

How can a trademark owner submit a UDRP complaint if the publicly available Whois data does not provide the domain name registrant's identity and contact details?

Brand owners' ability to file a UDRP case should not be foreclosed by the GDPR. (+ even before GDPR implementation, whoever wanted to register a domain name without making his/her data public, could easily do it through the so-called *privacy service providers*)

WIPO proposes to directly contact the registrar to request information about the registrant or use following procedure:

- 1) The trademark owner can lodge a complaint against the infringing domain, based on the information available in the Whois.
- 2) WIPO will request the registrar to provide complete Whois records, including information on the registrant (registrars are obliged to do that).
- 3) Whois complete record will be then forwarded to the complainant which will have the possibility to amend its complaint within a few days, in light of the new information on the domain name's ownership.

PROBLEMS THAT CONTINUE TO EXIST IN ~~GER~~PROST ERA:

1) The above described procedure extends the timing of the proceedings !

2) Consolidation of UDRP cases

The trademark owner may benefit from considerable costs reductions! WIPO applies USD 1500 from 1 to 5 domain names and USD 2000 from 6 to 10. => including more domain names registered by the same entity in one complaint is much more convenient than initiating different procedures for each one of them.

However, if the identity of the registrant is no longer available, it is not possible to know, in advance, if the same subject has registered more domains, which could be potentially included in one complaint!

WIPO: "...it is possible that in the absence of registrant contact information in the public WhoIs, Panels may increasingly focus on other indicia of common control".

3) Obstacles to perform complete searches in Whois records .

EUROSPORTBET.COM

Eurosport v. Domain Admin, Whois Privacy Corp. and Kindred France Case No. D2021- 1419

Eurosport filed a UDRP for EurosportBet.com:

Eurosport trademark has existed since 1994 and the domain was registered in 2016, and the registrant has nothing to do with Eurosport. The respondents were **the domain registrant** and the French company Kindred France.

! The registrant was a member of the Kindred France affiliate program and all his or her data in the Whois record **was hidden by the privacy settings** .

The Kindred France representatives denied having anything to do with the registration and use of EurosportBet.com and refused a request to disclose the registrant's identity, referring to the GDPR.

However, the GDPR did not affect the panelist's decision, and the rights to the domain were transferred to Eurosport .

RUSSIA

RUSSIAN PERSONAL DATA LAW

- ✓ The framework act on data protection and privacy in Russia is the Federal Law “On Personal Data” dated 27 July 2006 No.152 -Φ3, as amended (the “ **Personal Data Law** ”).
- ✓ The Personal Data Law establishes privacy principles, data subject rights, general data processing and protection requirements, data breach procedures, functions and powers of the data protection authority, and so on.
- ✓ **Personal data** means *any information relating to a directly or indirectly identified or identifiable natural person* (“data subject”) (art.3(1) of the Personal Data Law).

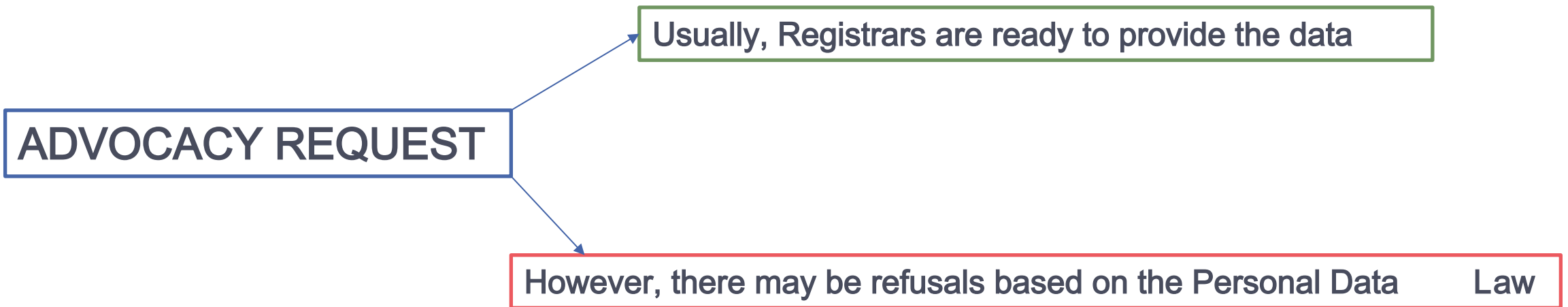


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REGISTRARS MAY, BUT ARE NOT OBLIGED TO PROVIDE DATA

Terms and Conditions of Domain Name Registration in .RU and .РФ

9.1.5. The Registrar may provide data about the full designation (name) of the Registrant and its location (domicile) under a substantiated written third party request featuring an obligation to use the received information for the purpose of bringing court action only.



RESPONSES TO ADVOCACY REQUESTS

Вами запрошена информация, относящаяся к определенному физическому лицу, раскрывающая факт того, что физическое лицо является владельцем (администратором) доменного имени. Следовательно, такая информация подпадает под определение персональных данных, сформулированное в п. 1 ст. 3 Федерального закона от 27.07.2006 № 152-ФЗ «О персональных данных» и подлежит регулированию указанным федеральным законом. Согласно ст. 7 Федерального закона от 27.07.2006 № 152-ФЗ «О персональных данных» операторы и иные лица, получившие доступ к персональным данным, обязаны не раскрывать третьим лицам и не распространять персональные данные без согласия субъекта персональных данных, если иное не предусмотрено федеральным законом. Запрашиваемая вами информация (персональные данные) не относится к числу общедоступных в смысле ст. 8 Федерального закона от 27.07.2006 № 152-ФЗ «О персональных данных». Следовательно, запрос выходит за пределы правовых предписаний, содержащихся ст. 7 Федерального закона от 27.07.2006 № 152-ФЗ «О персональных данных».

На основании вышеизложенного и согласно подп.3 п.4 ст.6.1. Федерального закона от 31.05.2002 № 63-ФЗ «Об адвокатской деятельности и адвокатуре в Российской Федерации» запрошенные сведения отнесены законом к информации с ограниченным доступом, по причине чего не могут быть раскрыты по предоставленному Вами запросу.

The information requested relates to personal data, therefore may not be disclosed ...

RESPONSES TO ADVOCACY REQUESTS

Наименование и местожительство администратора доменного имени ,ru указанные им на дату подготовки настоящего ответа:

ФИО:

Адрес:

Предоставить иную запрашиваемую вами информацию не представляется возможным в соответствии с п.п.3 п. 4 ст. 6.1. Федерального закона от 31.05.2002 N 63-ФЗ "Об адвокатской деятельности и адвокатуре в Российской Федерации", поскольку запрашиваемая Вами информация является информацией ограниченного доступа, в отношении которой в силу Федерального закона «О связи» № 126-ФЗ от 07.07.2003 г. (ст. 53), Федерального закона «О персональных данных» № 152-ФЗ от 27.07.2006 г. (ст.3, ст.7), Федерального закона «Об информации, информационных технологиях и о защите информации» № 149-ФЗ от 27.07.2006 г. (ст.2, ст.9, ст.16) ООО обязано соблюдать конфиденциальность.

Partial disclosure of information (only name and address)

THE REPUBLIC OF BELARUS

Decree of the President of the Republic of Belarus dated September 18, 2019 No. 350
“On special aspects of the use of the national segment of the Internet ”

Information on the domain names and on their owners (registrants) may be provided on a grant basis and without the consent of the registrant.

I. To state bodies, courts, notaries such information is provided in electronic form by means of nation-wide automated information system.

II. To other persons such information is provided by the technical administrator of the national domain zone on a basis of a written request for the purpose of protection of rights concerning the registered means of individualization.



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**ADDITIONAL
QUESTIONS TO
DISCUSS**

REGISTRAR'S OBLIGATION TO STOP DELEGATION OF A DISPUTED DOMAIN NAME

Is it possible to oblige Registrar to stop delegation of the domain name as a one of the possible means of enforcement of an exclusive right (request to suppress actions that infringe the right or create a threat of infringement)?

- One of the main questions raised in the Minutes No. 26 of the meeting of the Scientific Advisory Board of the Intellectual Rights Court.

One of the possible and effective measures to stop the functioning of an illegal web - site?



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REGISTRAR'S OBLIGATION TO STOP DELEGATION OF A DISPUTED DOMAIN NAME






Critical issues:

- ✓ Registrars may not be liable for actions of Registrants and **should not be treated as “information intermediaries”**.
- ✓ Terms and Conditions of Domain Name Registration in .RU and .PФ provide for an **exhaustive list of grounds to stop delegation** of a domain name.
- ✓ Termination of domain name delegation makes it much more difficult to access the site to which the domain name addresses, but **does not exclude the possibility to access this site**.
- ✓ Such measure may be **excessive and limit access** not only to illegal content, but also **to legal content**.
- ✓ It is possible to use **alternative measures** provided by Roscomnadzor in cases of violations of copyright ...

CONTACT DETAILS



Thank you for your attention!

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