MEMORANDUM

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| **To:** | Internet Corporation for Assigned Names and Numbers, EPDP Team |
| **From:** | Ruth Boardman & Gabe Maldoff |
| **Date:** | 23rd January 2019 |
| **Subject:** | Advice on Interpretation of Article 6(1)(b) of the General Data Protection Regulation (Regulation (EU) 2016/679, "GDPR") |

**Background**

1. The EPDP Team has asked two questions about the application of Article 6(1)b:
   1. Does the reference '*to which the data subject is party*' limit the use of this lawful basis only to those entities that have a direct contractual relationship with the Registered Name Holder?
   2. Does "*necessary for the performance of a contract*" relate solely to the registration and activation of a domain, or, alternatively, could related activities such as fighting DNS abuse also be considered necessary for the performance of a contract?

**Question a)**

1. Article 6(1) of the GDPR provides that processing of personal data shall be lawful only if and to the extent that one of the lawful bases for processing listed in Article 6(1) applies. Article 6(1)(b) applies where:

"*processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract*".

1. The equivalent provision under Directive 95/46/EC (Article 7(b)) was identical in its terms. The Article 29 Working Party provided guidance on the interpretation of this (and other) lawful bases in its *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, adopted on 9 April 2014 under reference WP217 ("WP217").
2. Article 6(1)(b) is clear that the data subject has to be a party to the contract (or to make requests prior to a contract). Accordingly, Article 6(1)(b) would be relevant when an individual is the registered name holder and has provided his or her own contact details, but would not be relevant if the contact details relate to someone other than the particular data subject (either because the registered name holder is a different living individual, or because the registered name holder is not a natural person).
3. However, neither Directive 95/46/EC nor the GDPR state that the controller has to be the party to the contract with the data subject. There are no cases on this point from the CJEU, or under English, Belgium, French, or German law[[1]](#footnote-1). This issue is also not directly addressed in WP217 - although in all the examples of this lawful basis included in the Opinion, the controller is a party to the contract – which *may* suggest that WP29 thinks the condition should be restricted to a controller which is a contracting party. This is also the approach of the UK Information Commissioner, where the Commissioner's *Guide* *to Data Protection* states that this applies where "*you have a contract with the individual and you need to process their personal data to comply with your obligations under the contract*" (emphasis added). The Belgian data protection authority has similar guidance (<https://www.autoriteprotectiondonnees.be/marketing-direct/vous-souhaitez-envoyer/une-relation-pre-contractuelle-directe>. The headline of the guidance talks about performance of a contract which "you" have concluded with the individual). The opinion provided previously by the law firm Hamilton to ICANN in its memorandum dated 21st December 2017 (para.2.4.3) also stated that Article 6(1)(b) would not be an appropriate basis.
4. A number of commentators in Germany have argued that Article 6(1)(b) *can* apply where the controller is not a party to the contract[[2]](#footnote-2). Among these, Spiros Simitis et al. provide the most comprehensive explanation:

"*[*Article 6(1)(b)*] – unlike the similar provisions for contractual contexts in Art. 49 para. 1 subpara. 1 lit. b [*derogation for data transfers*] and Art. 22 para. 2 lit. b [*automated decision-making*] – makes no statement on the contractual partner of the data subject. This suggests that it does not have to be the controller. According to the wording, data processing by a third party whom the controller has entrusted with the fulfilment of his contractual obligations (e.g. a carrier who delivers goods sold by the controller to the data subject, or another group company) is also possible even if it is not data processing on behalf of that third party but is acting as an independent controller. However, it must first be examined whether the transfer to the third party is objectively necessary for the fulfilment of the contract. In addition, it will be necessary to require that the specific third party or at least the processing by the third party is, at least abstractly, already known to the data subject at the time the contract is concluded and that the controller, as the contractual partner, informs the data subject of this prior to the transfer to the third party (cf. Art. 13 para. 1 lit. e; Art. 14 para. 1 lit. f)*" Simitis/Hornung/Spiecker gen. Döhmann, Data Protection Law, GDPR, Art. 6 para. 1, Rn. 18.

1. In summary, the answer to question a) is unclear. We think Spiros Simitis' arguments are persuasive and that the better view is that that Article 6(1)(b) may, under certain circumstances, be relied on by parties that have not contracted directly with data subjects. However, the answer to question b) (below) makes this point academic.

**Question b)**

1. The second question has been addressed in WP217. The Article 29 Working Party notes that:

"*The provision must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract…*"  (p.16).

In particular, the Working Party notes that "*Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them 'necessary' for the performance of the contract*"*.* Instead, "*[i]t is important to determine the exact rationale of the contract, i.e. its substance and fundamental objective, as it is against this that it will be tested whether the data processing is necessary for its performance*"(p.17).

1. The Working Party also notes (again, p.17) that the Article

"*… only applies to what is necessary for the performance of a contract. It does not apply to all further actions triggered by non-compliance or to all other incidents in the execution of a contract. As long as processing covers the normal execution of a contract, it could fall within Article 7(1)(b) [*the equivalent basis under Directive 95/46/EC*]. If there is an incident in the performance, which gives rise to a conflict, the processing of data may take a different course. Processing of basic information of the data subject, such as name, address and reference to outstanding contractual obligations, to send formal reminders should still be considered as falling within the processing of data necessary for the performance of a contract. With regard to more elaborated processing of personal data, which may or may not involve third parties, such as external debt collection or taking a customer who has failed to pay for a service to court, it could be argued that such processing does not take place anymore under the 'normal' performance of the contract and would therefore not fall under Article 7(b)…*".

1. Applying this here, a registrar cannot make processing in order to prevent DNS abuse contractually necessary simply by including a reference to this in its contract with the registered name holder. A registrar could rely on Article 6(1)(b) as the lawful basis for processing other than simply registering and activating a domain if it can show that such processing is for one of the fundamental objectives of the contract. However, as the above quotations show, the Article 29 Working Party has interpreted this in a strict manner. Preventing DNS abuse seems closer to the example above of pursuing a data subject for breach of contract, which the Working Party considered could not be justified on this basis (but where legitimate interests would be an appropriate basis). On this basis, it would be difficult to argue that that processing to prevent DNS abuse is "*necessary for the performance of a contract to which the data subject is party*".

1. In the interests of time, we have only checked this point in limited countries. [↑](#footnote-ref-1)
2. *See, e.g.,* Plath, GDPR comment, 3rd edition 2018, Art. 6 GDPR, recitals 14-15; Kramer/vL, in: Auerhammer, GDPR comment, 5th Ed. 2017, Art. 6 recital 13; Albers/Veit, in: BeckOK DatenschutzR, 26. Ed. 1.5.2018, GDPR Art. 6 Rn. 30; Schulz, in Gola, GDPR comment, 2nd Ed. 2018, GDPR, Art. 6 Rn. 29; Reimer, in: Sydow, GDPR comment, 2nd Ed. 2018, GDPR Art. 6 Rn. 18; and Simitis/Hornung/Spiecker gen. Döhmann, Data Protection Law, GDPR, Art. 6 para. 1, Rn. 18. [↑](#footnote-ref-2)