Lawful Basis Memo

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# Example of 6(1)(b) from UK Information Commissioner’s Office

After working through the data elements workbooks on F2F Day 1, Thomas Rickert created a tool to aid the group in deliberating on the appropriate lawful basis, e.g., 6(1)(b), 6(1)(f), 6(1)(a), etc., for a processing activity. In applying the test to the data elements workbooks, some members continued to express confusion over 6(1)(b); specifically, how does one determine if processing is necessary for performance of a contract?

Staff undertook some further research to assist the EPDP Team in its deliberations, and we found an example, detailed below, from the UK Information Commissioner’s Office web-site, which may provide some further insight into what is considered a 6(1)(b) legal basis.

## You have a lawful basis for processing if: you have a contract with the individual and you need to process their personal data to comply with your obligations under the contract. you haven’t yet got a contract with the individual, but they have asked you to do something as a first step (eg provide a quote) and you need to process their personal data to do what they ask. It does not apply if you need to process one person’s details but the contract is with someone else. It does not apply if you take pre-contractual steps on your own initiative or at the request of a third party.

## [emphasis added]

## When is processing ‘necessary’ for a contract?

*‘Necessary’ does not mean that the processing must be essential for the purposes of performing a contract or taking relevant pre- contractual steps. However, it must be a targeted and proportionate way of achieving that purpose. This lawful basis does not apply if there are other reasonable and less intrusive ways to meet your contractual obligations or take the steps requested.*

*The processing must be necessary to deliver your side of the contract with this particular person. If the processing is only necessary to maintain your business model more generally, this lawful basis will not apply and you should consider another lawful basis, such as legitimate interests.*

## Example

*When a data subject makes an online purchase, a data controller processes the address of the individual in order to deliver the goods. This is necessary in order to perform the contract, so the legal basis is Article 6(1)b.*

*However, the profiling of an individual’s interests and preferences based on items purchased is not necessary for the performance of the contract and the controller cannot rely on Article 6(1)(b) as the lawful basis for this processing. Even if this type of targeted advertising is a useful part of your customer relationship and is a necessary part of your business model, it is not necessary to perform the contract itself and so the legal basis for such collection and use might be Article 6(1)(f).*

# Explanatory Lawful Basis Table, including rationale

Applying this rationale to the processing activities identified as well as the lawful basis proposed by the small team, would result in the following (note, the blue tables were agreed to by the small group, while the orange tables were not):

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| **PURPOSE A** | | |
| Establish the rights of a Registered Name Holder in a Registered Name and ensuring that the Registered Name Holder may exercise its rights in respect of the Registered Name (Workbook A) | | |
| **Processing Activity** | **Responsible Party** | **Lawful Basis** |
| Collecting registrant data to allocate a string to a registrant | Registrar: joint controller / Processor | 6(1)(b)  This is a 6(1)(b) purpose because it is necessary to collect registrant data to allocate a string to a registrant. Without collecting minimal registrant data, the contracted party has no way of tracing the string back to registrant and is not able to deliver its side of the contract. |
| Collecting registrant data to allocate a string to a registrant | ICANN: joint controller  Registry: joint controller | 6 (1)(f)  ICANN or the Registry do not have a contractual relationship with the Data subject. ICANN and Registry have a contract with the registrar, however this is not a valid basis for these two parties to process the data subject’s data.  Registries, at the behest of ICANN (per the RAs) must gather data in order to enter a domain name, as per a registrar request (not a data subject request),  ICANN requires the elements to register domains, and passes on the requirements in the RAA and RA. [NOTE: this does not automatically that all data elements that ICANN requires are considered to be legally sound and a DPIA is necessary to test the necessity, and legal basis for the requirement to process each data element in order to satisfy this question] |
| Transmission of registration data from registrar to registry | Registrar – joint controller / Processor | 6(1)(b)  This is a 6(1)(b) purpose because transmission of the minimal registration data from the registrar to the registry is necessary to allocate the string to the registrant. |
|  |  | 6(1)(f) |
|  |  | For additional registration data which is not necessary to technically allocate a string to a registrant, there could be a 6(1)(f) because while it is not necessary to allocate the string to a registrant, there may be a legitimate interest in enabling registries to perform checks on patterns of abusive behavior. |
| Transmission of registration data from registrar to registry | ICANN – joint controller  Registry – joint controller | 6(1)(f)  The transfer of data is as a result of a contract, but not the one with the data subject. Therefore we must rely on 6(1)(f) as the transfer of data is necessary for the legitimate business purpose, i.e. for the registrar to obtain the registration at the Registry (again note: the data set is required as per the ICANN contracts - which must be tested for legitimacy, necessity, minimization etc) |

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| **PURPOSE B** | | |
| Provide for lawful disclosure of registration data to third parties with legitimate interests to data that is already collected (Workbook B) | | |
| **Processing Activity** | **Responsible Party** | **Lawful Basis** |
| Disclosure of non- public, already collected, RDDS/WHOIS to  third parties (Data Processing Workbook B) | ICANN - sole controller  Registries - processor  Registrars - processor | 6(1)(f)  This is a 6(1)(f) purpose because although there may be a legitimate interest in disclosing non-public RDDS/WHOIS to third parties (such as law enforcement, IP interests, etc.), this disclosure is not technically necessary to perform the registration contract between the registrant and registrar. (Note: the requisite balancing test must be performed for each third-party type of disclosure.) |

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| **PURPOSE C** | | |
| Enable communication or notification to the Registered Name Holder and/or their delegated agents of technical and/or administrative issues with a Registered Name (Workbook C) | | |
| **Processing Activity** | **Responsible Party** | **Lawful Basis** |
| Collection of registration data for contactability purposes | registrars (joint controllers) | 6(1)(b)  This is a 6(1)(b) purpose because it is necessary to collect registrant data so that the registrar can contact the registrant in the event a communication is necessary to maintain the domain operation. |
| Collection of registration data for contactability purposes | ICANN (joint controller)  Registries (joint controller) | 6(1)(f)  ICANN or Registries only have contractual obligations with the registrar. This is not sufficient to ground the processing on 6(1)(b). In order to give effect to the Registrar / Data subject contract however, ICANN has mandated the collection of data to allow for the purpose as noted (again requires DPIA). Registries, in enforcing their own registration terms, as passed on by the registrar (but as a registrar contractual term, not a registry contractual term), must be able to process the registrant data to enforce. This is a shared purpose, but the manner and frequency of the processing is decided by the Registry, thus a controller.  ICANN sets the main purpose for such data processing, but does not actually process the data physically. Their control/influence in this processing however cannot be overlooked, as they are parties to the contract which sets down the basic rules. They are also a controller. (joint) |

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| **PURPOSE E** | | |
| Provide mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator (Workbook E) | | |
| **Processing Activity** | **Responsible Party** | **Lawful Basis** |
| Collection of registration data for escrow | ICANN – sole controller; Registries and Registrars - processors | 6(1)(f)  This is a 6(1)(f) purpose because although there is likely a legitimate interest in providing mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator, it is not technically necessary to collect data for an escrow agent in order to allocate a string to a registered name holder, and is therefore not necessary to perform the registration contract. |
| Transmission of registration data to escrow agent | ICANN – sole controller; Registries and Registrars - processors  Escrow Agent (Processor) | 6(1)(f)  This is a 6(1)(f) purpose because although there is likely a legitimate interest in providing mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator, it is not technically necessary to transmit data to an escrow agent in order to allocate a string to a registered name holder, and is therefore not necessary to perform the registration contract. |

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| **PURPOSE F** | | |
| Handle contractual compliance monitoring requests, audits, and complaints submitted by Registry Operators, Registrars, Registered Name Holders, and other Internet users. (Workbook F) | | |
| **Processing Activity** | **Responsible Party** | **Lawful Basis** |
| Collection of registration data for compliance with ICANN contracts | ICANN – controller Registries - processor Registrars - processor | 6(1)(f)  This is a 6(1)(f) purpose because although there may be a legitimate interest in collecting registration data for ICANN org compliance to confirm compliance with the RAA/RA, this collection is not technically necessary to perform the  registration contract. |
| Transmission of registration data to ICANN org compliance  (Data Processing Workbook F) | ICANN – controller Registries - processor Registrars - processor | 6(1)(f)  This is a 6(1)(f) purpose because although there may be a legitimate interest in transmitting registration data to ICANN org compliance to confirm compliance with the RAA/RA, this transmission is not technically necessary to perform the registration contract. |

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| **PURPOSE M** | | |
| Coordinate the development and implementation of policies for resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names). (ICANN bylaws Annex G and 1(1) section I(a) (Workbook M) | | |
| **Processing Activity** | **Responsible Party** | **Lawful Basis** |
| Collection of registration data to implement the (UDRP, URS, PICCDRP, RDDRP, PDDRP) | Registrars - Processor | 6(1)(b)  This is a 6(1)(b) purpose because it is necessary to collect registration data in order to facilitate/implement a UDRP or URS decision. For example, in the case of a UDRP/URS proceeding, the registrant must agree to be bound by the UDRP/URS in order to register a domain name, so the collection of data for this purpose is necessary to fulfill the registration agreement. |
| Collection of registration data to implement the (UDRP, URS, PICCDRP, RDDRP, PDDRP) | ICANN – Controller Registries – Processor | 6(1)(f)  ICANN and Registries do not have a direct contract with the registrant.  Registries: in order to give effect to agreed to and contractually bound RPMs, the registry must process data to play it’s part in the implementation of the RPMs (A DPIA must be carried out regarding each of the RPMs and the data required) |
| Transmission of registration data from registrar to registry | Registrar –Processor Processor | 6(1)(b)  This is a 6(1)(b) purpose because transmission of (at least minimal) registration data from the registrar to the registry is necessary to identify the registrant for purposes of dispute resolution. |
| Transmission of registration data from registrar to registry | ICANN – Controller  Registry – Processor | 6(1)(f)  ICANN and Registries do not have a direct contract with the registrant.  Registries: in order to give effect to agreed to and contractually bound RPMs, the registry must process data to play it’s part in the implementation of the RPMs (A DPIA must be carried out regarding each of the RPMs and the data required) |
| Transmission of registration data to dispute resolution provider (UDRP, URS, PICCDRP, RDDRP, PDDRP)  (Data Processing Workbook M) | ICANN- controller Registries – processor Registrars - processor  Dispute Resolution Provider (where not ICANN themselves) - Processor | 6(1)(f)  This is a 6(1)(f) purpose because although there may be a legitimate interest in transmitting registration data to dispute resolution providers, this transmission is not technically necessary to perform the registration contract. |

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| **PURPOSE N** | | |
| Enabling validation of Registered Name Holder satisfaction (fulfillment) of registration policy eligibility criteria. (Workbook N) | | |
| **Processing Activity** | **Responsible Party** | **Lawful Basis** |
| Collecting specific data for eligibility requirements (Data Processing Workbook N) | **ICANN – joint controller** (only with special RA mandated eligibility requirements)  **Registry – joint controller** (only with special RA eligibility requirements)  **Registrar - processor**  **ICANN – Not involved** (only with Registry mandated eligibility requirements)  **Registry – Sole Controller** (only with Registry mandated eligibility requirements)  **Registrar - processor** | 6(1)(b) (for registrars with special eligibility requirements ICANN ior Registry mandated) because it is necessary to collect specific registrant data to confirm the registrant meets the specific requirements of the registration agreement, i.e., registrar needs to verify the registrant is a licensed attorney to register a .abogado string.  6(1)(f) for registries because they are not parties to the Registration Agreement, but insofar as they process the data in order to give rise to their obligations under the RRA, whereby they agree to register a domain on behalf of the registrar’s client (i.e. the registrant), |

# Thomas’ Lawful Basis Test (used by small group to deliberate on some processing activities)

LAWFUL BASIS TEST

Briefly describe the processing activity

What purpose does it relate to?

Is the processing necessary to perform the registration agreement?

From a technical perspective?

Based on a lawful ICANN requirement?

- If yes, stop here.\*

- if no, continue to 5+

Is a legitimate interest pursued? By the controller? By a third party?

legitimate interest? To be construed broadly.

Is the processing necessary?

What are the interests of the data subject?

Balance!\*\*

6. Who is responsible for the processing activity?

- List the parties!

\*If “yes” to questions 3(a) and 3(b), the legal basis would be 6(1)(b).

\*\*If the processing is necessary and passes the balancing test, the legal basis would be 6(1)(f).

1. **Consolidated Lawful Basis Table (no rationale)**

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| **Purpose** | **Processing Activity** | **Responsible Parties** | **Legal Basis** |
| A: Establish the rights of a Registered Name Holder in a Registered Name and ensuring that the Registered Name Holder may exercise its rights in respect of the Registered Name | * Collecting registrant data to allocate a string to a registrant | ICANN = joint cont. Registrar = joint cont. Registry = joint cont. | 6(1)(b) |
|  | * Transmission of registration data from registrar to registry | ICANN = joint cont. Registrar = joint cont. Registry = joint cont. | 6(1)(b) |
| B: Provide for lawful disclosure of registration data to third parties with legitimate interests to data that is already collected | * Disclosure of non-public, already collected, RDDS/WHOIS to third parties | [ICANN]  Registry = controller Registrar = controller | 6(1)(f) |
| C: Enable communication or notification to the Registered Name Holder and/or their delegated parties of technical and/or administrative issues with a Registered Name | * Collection of registration data for contactability purposes | ICANN = joint cont. Registrar = joint cont. Registry = joint cont. | 6(1)(b) |
| E: Provide mechanisms for safeguarding Registered Name Holders' Registration Data in the event of a business or technical failure, or other unavailability of a Registrar or Registry Operator | * Collection of registration data for escrow | ICANN – sole cont. Registrar = processor Registry = processor | 6(1)(f) |
|  | * Transmission of registration data to escrow agent | ICANN – sole cont. Registrar = processor Registry = processor | 6(1)(f) |
| F: Handle contractual compliance monitoring requests, audits, and complaints submitted by Registry Operators, Registrars, Registered Name Holders, and other Internet users. | * Collection of registration data for compliance with ICANN contracts      * Transmission of registration data to ICANN Org | ICANN – sole cont. Registrar = processor Registry = processor | 6(1)(f) |
|  | ICANN – sole cont. Registrar = processor Registry = processor | 6(1)(f) |
| M: Coordinate the development and implementation of policies for resolution of | * Collection of registration data to implement the (UDRP, URS, PICCDRP, RDDRP, PDDRP)      * Transmission of registration data to registry operator * Transmission of registration data to dispute resolution provider | ICANN – Controller | 6(1)(b) |
| disputes2 regarding the registration of domain names (as opposed to the use of | Registries – Processor |  |
| such domain names). (ICANN bylaws Annex G and 1(1) section I(a) | Registrars – Processor |  |
|  | ICANN – Controller | 6(1)(b) |
|  | Registries – Processor |  |
|  | Registrars – Processor |  |
|  | ICANN – Controller | 6(1)(f) |
|  | Registries – Processor |  |
|  | Registrars – Processor |  |
| N: Enabling validation of Registered Name Holder satisfaction (fulfillment) of registration policy eligibility criteria | * Collecting specific data for eligibility requirements | ICANN – joint controller Registry – joint controller Registrar - processor | 6(1)(b) for registries with eligibility requirements / 6(1)(f) for registries with no eligibility  requirements |