

EPDP Phase 2: Clarifying Legal Questions Table

The below table seeks to categorize the clarifying questions received to date by aligning them with the Phase 1 legal memos from Bird & Bird and identifying their relevance for the EPDP Team's work in Phase 2.

EPDP Support Staff has endeavored to assign an explanation of the Phase 2 relevance, noting that the EPDP Team will have a finite resource allotted for external legal counsel in Phase 2. Accordingly, it will be important for the EPDP Team, or a subset thereof, to prioritize necessary questions to be posed to outside counsel. When reviewing the below questions, the Team should consider if additional information would assist in moving its work forward by either (1) addressing the charter questions identified for Phase 2 or (2) addressing specifically-identified questions or areas noted in the Phase 1 Final Report that were to be further considered in Phase 2.

Please note some of the questions have been rephrased to ensure consistency in style; however, the submitting group is noted and the original questions have been included and referenced at the end of the document. The submitting group is, of course, welcome to review the questions and note where the intent or essence of the question was not captured correctly.

Memo Topic	Questions Received	Phase 2 Relevance	EPDP Questions to Consider
-------------------	---------------------------	--------------------------	-----------------------------------

<p>A. 6(1)(b) Memo.docx</p>	<ol style="list-style-type: none"> 1. Does the EDPB's "Guidelines 2/2019 on the processing of personal data under Art. 6(1)(b) GDPR in the context of the provision of online services to data subjects" (adopted 9 Apr. 2019) affect your analysis and, if so, how? (CPH) 2. Does the 17 April 2019 communication from the European Commission with respect to ICANN's purposes affect the previous analysis regarding DNS abuse being the only purpose for provision of WHOIS services and, if so, how? (BC) 3. The European Commission recently referred to "ICANN's central role and responsibility for ensuring the security, stability and resilience of the Internet Domain Name System and that in doing so it acts in the public interest". In light of this statement, would Article 6(1)(e) of the GDPR be a lawful basis for ICANN's processing of registration data? (BC) 	<p>Phase 2 includes the Charter Questions:</p> <p>a1) Under applicable law, what are legitimate purposes for third parties to access registration data?</p> <p>a2) What legal bases exist to support this access?</p>	<p>Is the distinction re: ICANN's legal basis of 6(1)(b) vs. 6(1)(f) relevant for the purposes of these Phase 2 charter questions?</p> <p>Is further analysis of 6(1)(e) as a lawful basis necessary to answer the above-referenced charter questions?</p>
---	---	---	--

B. [Natural vs. Legal Memo.docx](#)

1. Paragraph 14 references how “important it is that the personal data is accurate.” Whose perspective determines this importance (e.g., data subject, controller, processor, 3P)? (CPH)
2. Paragraph 17 references a “risk of liability.” How do you characterize the level of risk of liability - low, medium, or high? What threshold (e.g., how likely) of registrant incorrect self-identification triggers this risk of liability? (CPH)
3. Could the risk of liability be mitigated if the registrant is asked if the email is “role based” or identifies an actual individual? (BC)
4. Is the level of risk of liability identified in response to #2 above the same for the liability referenced in paragraph 23? If not, how and why is it different? (CPH)
5. Are there any decisions, proceedings, or other guidance in which sending a confirmation email was found to decrease the risk of liability? (CPH)
6. Did this analysis consider how ccTLDs currently distinguish between natural and legal persons? (BC)

Further to Recommendation 17 from the EPDP Team’s Final Report, the EPDP Team is expected to resolve the natural vs. legal issue in Phase 2.

Specifically, the EPDP Team will be looking to confirm (1) the feasibility and risks associated with differentiation of registrant status as legal or natural persons across multiple jurisdictions; (2) whether contracted parties should be allowed or required to treat legal and natural persons differently and; if the answer to (2) is ‘must be required’ (3) what mechanism is needed to ensure a reliable determination of legal vs. natural status.

Will these questions assist the EPDP Team in its further analysis of differentiation based on natural vs. legal persons?

Is Question 6 a question for the EPDP to consider or is it more appropriate to forward to ICANN org for flagging in the study to be conducted?

<p>C. Technical Contact Memo.docx</p>	<ol style="list-style-type: none">1. Is it correct that the best way to eliminate liability is to prohibit the Registered Name Holder (RNH) from submitting personal data for a Technical Contact where the RNH is not the Technical Contact? If not, why not? (CPH)2. What impact, if any, does requiring the RNH to certify that it provided notice to the Technical Contact have on potential liability? On the risk of an enforcement action? (CPH)	<p>The issue of implementing the updated requirements for the provision of technical contact information are not part of the Phase 2 Charter questions; instead, these questions may be relevant for the implementation of Recommendation 5 from the EPDP's Phase 1 Final Report.</p> <p>This should be referred to the IRT for review and possibly working on it</p>	
---	--	--	--

<p>D. Accuracy.docx</p>	<ol style="list-style-type: none"> 1. Would you please provide any specific guidance about or examples of the “serious consequences” referenced in paragraph 8? (CPH) 2. Would you please identify the “relevant parties” referenced in paragraph 21? (CPH) 3. Did this analysis consider statistics from the WHOIS ARS on accuracy levels and/or the findings of the 1st and 2nd WHOIS Review Team with regard to accuracy? (BC) 	<p>For reference, recommendation 4 of the EPDP’s Phase 1 Final Report provides:</p> <p>The EPDP Team recommends that requirements related to the accuracy of registration data under the current ICANN contracts and consensus policies shall not be affected by this policy.</p> <p>FN: The topic of accuracy as related to GDPR compliance is expected to be considered further as well as the WHOIS Accuracy Reporting System.</p>	<p>WHOIS accuracy is noted as an area to be further considered in Phase 2, and as such, further legal guidance may be necessary. Will the clarifying questions assist in the Team’s analysis?</p>
---	--	---	---

<p>E. City field.docx</p>	<ol style="list-style-type: none"> 1. Would you please identify the specific types of “further information” and “more information” (as referenced in paragraph 3.16) that are needed/required? (CPH) 2. Is it correct to conclude that the lawfulness of publication of the “City” field is highly factually and contextually dependent? (CPH) 	<p>Further to recommendation 11 of the EPDP Team’s Phase 1 Final Report, the EPDP Team recommends that redaction must be applied as follows to this data element: City. The EPDP Team expects to receive further legal advice on this topic which it will analyze in phase 2.</p>	<p>In Phase 2, the EPDP Team is expected to confirm whether there needs to be a change to the phase 1 recommendation that the city field should be redacted in the public RDDs.</p> <p>As such, clarifying legal questions regarding the redaction of City Field seem apposite to the EPDP Team’s work in Phase 2. Does the EPDP Team believe these questions are appropriate to put forward in this context?</p>
---	--	---	---

<p>F. Territorial Scope.docx</p>	<p>1. Given the narrow question posed in paragraph 1.1, the analysis leading to the conclusion in the last sentence of paragraph 6.9 is unclear. Would you please clarify? (CPH)</p>	<p>This question is not part of the Charter questions for Phase 2. Agreed; this should be removed entirely</p>	
<p>G. Thick WHOIS.docx</p>	<p>1. Did this analysis consider GNSO's Final Report and analysis in support of the Thick WHOIS policy recommendations? (BC)</p>	<p>Note: The Thick WHOIS Final Report was referenced multiple times within Bird & Bird's memo; accordingly, it may be helpful to clarify the specific issue and note why this question is specifically relevant to EPDP Team's work in Phase 2. This question should be removed or reworded</p>	

Questions Submitted to Date:

CPH

6(1)(b) Memo

1. Does the EDPB's "Guidelines 2/2019 on the processing of personal data under Art. 6(1)(b) GDPR in the context of the provision of online services to data subjects" (adopted 9 Apr. 2019) affect your analysis and, if so, how? (A1)

Natural v. Legal Persons Memo

1. Paragraph 14 references how "important it is that the personal data is accurate." Whose perspective determines this importance (e.g., data subject, controller, processor, 3P)? (B1)
2. Paragraph 17 references a "risk of liability." How do you characterize the level of risk of liability - low, medium, or high? What threshold (e.g., how likely) of registrant incorrect self-identification triggers this risk of liability? (B2)
3. Is the level of risk of liability identified in response to #2 above the same for the liability referenced in paragraph 23? If not, how and why is it different? (B4)
4. Are there any decisions, proceedings, or other guidance in which sending a confirmation email was found to decrease the risk of liability? (B5)

Technical Contact Memo

1. Is it correct that the best way to eliminate liability is to prohibit the Registered Name Holder (RNH) from submitting personal data for a Technical Contact where the RNH is not the Technical Contact? If not, why not? (C1)
2. What impact, if any, does requiring the RNH to certify that it provided notice to the Technical Contact have on potential liability? On the risk of an enforcement action? (C2)

Accuracy

1. Would you please provide any specific guidance about or examples of the "serious consequences" referenced in paragraph 8? (D1)
2. Would you please identify the "relevant parties" referenced in paragraph 21? (D2)

City Field

1. Would you please identify the specific types of “further information” and “more information” (as referenced in paragraph 3.16) that are needed/required? (E1)
2. Is it correct to conclude that the lawfulness of publication of the “City” field is highly factually and contextually dependent? (E2)

Territorial Scope

1. Given the narrow question posed in paragraph 1.1, the analysis leading to the conclusion in the last sentence of paragraph 6.9 is unclear. Would you please clarify? (F1)

BC

6(1)(b) Memo

Our comments on the legal bases topic have been influenced by both the 6(1)(f) memo and the recent EC communication, so we’ve broken our clarifying questions into 2 groupings, one for 6(1)(b) and one for 6(1)(e).

- **Performance of Contract** – B&B should revisit its analysis **(This is not a clarifying question but a request to redo the work and so not appropriate.)** in light of the recent EC Letter where it notes:

“As explained in our comments, Art. 6(1)f GDPR (legitimate interest) is one of the six possible legal bases provided under Art. 6(1) GDPR. For instance, disclosure of nonpublic gTLD registration data could be necessary for compliance with a legal obligation to which the contracted parties are subject (see Art. 6(1)c GDPR).”

This is consistent with the B&B memo that recognizes that a direct contract with the data subject is not necessary.

- To identify 6(1)(b) as purpose for processing registration data, we should follow up on the B & B advice **(This is not a clarifying question but a recommendation for further work that may lead to further questions. It is not appropriate at this stage.)** that-
“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”

- B&B should clarify why it believes that the only basis for providing WHOIS is for the prevention of DNS abuse. Its conclusion in Paragraph 10 does not consider the other purposes identified by the EPDP in Rec 1, and, in any event should consider the recent EC recognition that ICANN has a broad purpose to:

‘contribute to the maintenance of the security, stability, and resiliency of the Domain Name System in accordance with ICANN’s mission’, which is at the core of the role of ICANN as the “guardian” of the Domain Name System.’ (A3)

- **WHOIS in the Public Interest** - Similarly, B&B should advise on the extent to which GDPR’s public interest basis 6(1)e (**Note that this purpose is limited in who can act upon it. This is not a general use purpose but a purpose with official agencies authorized by law to act in the public interest. It would not apply to ICANN but may apply to LEAs and public agencies making requests of ICANN. Therefore this is a third party purpose not to be conflated with ICANNs purposes**) is applicable, in light of the EC’s recognition that:
“With regard to the formulation of purpose two, the European Commission acknowledges ICANN’s central role and responsibility for ensuring the security, stability and resilience of the Internet Domain Name System and that in doing so it acts in the public interest.” (A3)

Natural v. Legal Persons Memo

- The EDPD should explore with B&B the possible ways of protecting against an erroneous identification as a legal person (**This is not a question**). The policy recommendations could point to different practices that exist today (relying on the CCTLD research referenced in the EPDP Phase 1 report) that could enable the natural/legal person distinction to be made. For example, the EPDP could propose a verification component, based on a number of indicators that can determine whether the registrant is a legal entity.
- Has B&B considered how the natural/legal person distinction is handled by ccTLDs? (B6) (**This is too broad. It would require an in-depth review of all ccTLDs and their methodology, legal basis for their processes and policies and legal analysis thereof. It is better handled outside of legal review as part of team workplan.**)
- With regard to concerns about emails possibly containing personal info – has B & B considered whether the risk could be mitigated if the registrant is asked if the email is “role based” or identifies an actual individual? (B3) (**This could be asked, but is largely superfluous: The question is already answered by court decisions and applicable legal definitions. Any data set that can be used in conjunction with other data sets available to the processor or anyone with access to the data can be PII. See also: IP Addresses. If the role can be traced without much issue to one individual, it is PII. For example, if the role is "CEO" and the mail "ceo@company.TLD", it would be childs' play to figure out who the data refers to.**)

Further, no clean methodology or process comes to mind for contracted parties to automatically differentiate where a contact is role based or direct PII.)

Accuracy

Has B&B reviewed the statistics from the WHOIS ARS on accuracy levels or the findings of the 1st and 2nd WHOIS RT with regard to accuracy? **(What is the value of this YES/NO question supposed to be? The statistics themselves are irrelevant to their findings, only the purpose for creating such statistics in the first place could be relevant. Question would need significant rewrite to become relevant.)** This should factor into the summary conclusions in Paragraph 21. (D3)

Thick WHOIS

Did B&B review the GNSO's Final Report and analysis in support of the Thick WHOIS policy recommendations? **(What is the value of this YES/NO question supposed to be?)** Specifically, the consensus policy was based on recognized benefits to the Internet Ecosystem of having Thick WHOIS. For example, under the Thick WHOIS policy, the registry is the authoritative place for domain name registration records. (G1)