

Questions Posed to Legal Counsel Summary

Preamble

With the thought that the full team will wish to see the Bird and Bird responses right away, it is proposed that the Legal Team start with the language below. There is some liberty taken in drafting a brief paragraph that rather tersely states the conclusions for each of the questions. The three summaries below are my opinion of the memos' conclusions – and your scrutiny is invited.

1. Legal vs. Natural

The EPDP Team discussed Charter Question h3, namely, should Contracted Parties be allowed or required to treat legal and natural persons differently, and what mechanism is needed to ensure reliable determination of status?

In determining the answer to this question, the EPDP Team sought the guidance of external legal counsel, inquiring specifically, “If a registrar permits a registrant, at the time of domain name registration, to self-identify as a natural or legal person, does a registrant’s incorrect self-identification that results in the public display of personal data create liability under GDPR? If so, please advise, for each possible participant in the domain name registration process listed below, if that participant incurs liability.”

In the response memo, external counsel noted that registrars would likely be liable for a GDPR violation if the registered name holder mistakenly self-identified as a legal person. The memo went on to state that while registrars could take steps to mitigate the risks (such as providing educational materials on their website), it is uncertain as to the effectiveness of those mitigations as a complete shield against liability.

Accordingly, the legal advice supports the EPDP Team’s conclusion to leave the language in the Temporary Specification in place, pending the outcome of more work in this area.

2. Legal Bases 6(1)f vs 6(1)b:

In conducting its analysis in reference to the lawful purposes for processing data, the EPDP team underwent a mapping exercise, whereby it outlined each identified data processing activity and the probably legal basis by which ICANN, registries and registrars could process the specified data elements. Through this exercise, a question of ICANN's lawful basis, i.e. can ICANN, an entity that does not have a contract with the registered name holder rely on 6(1)(b) performance of contract as a lawful basis? Accordingly, the following questions were posed to external legal counsel:

- a. 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?
- b. 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?

First and foremost, the legal memo indicated that the legal basis will ultimately be the choice of the data controller. Our reason for investigating the legal basis was to ensure that an adequate basis exists before recommending specific purposes for processing registration data. In the EPDP Team's discussions on this, it agreed that, for certain data processing purposes, Art 6(1)f definitely applied and Art 6(1)b may also apply. In other words, the lawful basis designations in the EPDP Report might be helpful to data controllers but cannot be dictatorial.

The legal memo confirmed the EPDP Team's interpretation of this that preferred Art 6(1)f as the legal basis for data processing purposes that result in data disclosure to third parties. The two key points of the memo are:

(1) "Article 6(1)(b) is clear that the data subject has to be a party to the contract, 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."

(2) However, "the [Art 6(1)b] provision must be interpreted strictly and does not cover situations where the processing is not genuinely 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." Therefore, it appears that this EPDP Team's recommendation would be for Data Controllers to use 6(1)f as a legal basis for all subsequent processing of registrant data that involves third parties and is not strictly required for the registrar to fulfill its obligations to the registered name holder.

3. Technical Contact

In discussing data elements to be collected, the EPDP Team extensively discussed the collection and disclosure of the Technical Contact Fields. In its Initial Report, the EPDP Team recommended the Technical Contact Name, Technical Contact Email, and Technical Contact Phone Number fields should be optional for the Registered Name Holder to provide.

Footnote 15 in the 15 July 2018 [letter from the EDPB to ICANN](#) provides:

“The notice requirements applicable to registrars described in the Temporary Specification (in particular at paragraph 7.1.3) do not clearly state that the provision of separate administrative and technical contact is voluntary rather than obligatory. Moreover, it should be ensured that the individual concerned is informed[.]”

In reviewing this footnote, the EPDP posed the following question to legal counsel,

With respect to the term “informed”, what would be appropriate notice, assuming the information is being held in a system where it is disclosed to specific categories of people/entities who meet certain established criteria?

The memo confirmed that, where the technical contact and the registered name holder are different people, the technical contact:

- (1) must be notified of the data disclosure to the registrar,
- (2) that the registrar could not count on the registered name holder to do that (even if instructed to do so by the registrar), and
- (3) if that personal data is disclosed to a third party, “GCPR consent” is required.

Recognizing that many registrars will continue to offer the Technical Contact fields, the memo seems to indicate that a phased approach (similar to the EPDP Team’s approach to the Organization field) is advisable. The phased approach would allow registrars to maintain compliance with existing Tech Contacts as well as introduce new ones in a GDPR-compliant manner.