

MEMORANDUM

To: ICANN GNSO Expedited Policy Development Process on the Temporary Specification for gTLD Registration Data team ("EPDP team")
From: Clara Clark-Nevola & Ruth Boardman, Bird & Bird LLP
Date: 9th September 2019
Client: The Internet Corporation of Assigned Names and Numbers
Subject: "Batch 4" of GDPR questions regarding disclosures of personal data to law enforcement authorities

Question 4:lawful basis for disclosure to law enforcement authorities outside the controller's jurisdiction

1. CAN A DATA CONTROLLER RELY ON ART 6(1)(C) GDPR TO DISCLOSE PERSONAL DATA TO LAW ENFORCEMENT AUTHORITIES OUTSIDE THE DATA CONTROLLER'S JURISDICTION?

1.1 Article 6(1)(c) (processing necessary for compliance with a legal obligation to which the controller is subject) is only available where the legal obligation is set out in EU or Member State law. Article 6(3) states that the basis for processing under Art 6(1)(c) must be "*Union law or Member State law to which the controller is subject*".

1.2 Therefore, where the controller is subject to disclosure obligations which arise from laws in jurisdictions outside the EU, the controller cannot rely on Art 6(1)(c). This is confirmed by Article 29 Working Party¹ guidance:

"... an obligation imposed by a foreign legal statute or regulation...may not qualify as a legal obligation by virtue of which data processing in the EU would be made legitimate." ([WP 117](#))²

1.3 In some cases, a controller may be subject to a legal obligation under EU or Member State law to disclose personal data to a non-EU law enforcement authority. By way of example, an Article 29 Working Party paper on pre-trial discovery for cross border civil litigation states that

"An obligation imposed by a foreign legal statute or regulation may not qualify as a legal obligation by virtue of which data processing in the EU would be made legitimate. However, in individual Member States there may exist a legal obligation to comply with an Order of a Court in another jurisdiction seeking such discovery." ([WP 158](#)).

1.4 The Working Party's guidance on legitimate interest also states that

¹ A group established under Directive 95/46/EC and which consisted, i.a. of a representative from the supervisory authority of each Member State and which has now been replaced by the European Data Protection Board. The Working Party guidance continues to be persuasive and is widely followed.

² Although this guidance refers to Directive 95/46/EC, which was repealed and replaced by the GDPR, the commentary is still highly relevant as the Directive set out substantially similar legal grounds for processing.

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"Obligations under the laws of third countries ... are not covered by this ground. To be valid, a legal obligation of a third country would need to be officially recognised and integrated in the legal order of the Member State concerned, for instance under the form of an international agreement" ([WP 217](#))

1.5 Disclosures of personal data to a non-EU law authority may therefore be covered by international agreements, such as mutual legal assistance treaties (MLATs).

1.6 Art 6(1)(c) may also be available in cases in which the enforcement authority is located in the EU, either in the same or in a different Member State as the controller. Where the enforcement authority is located outside the Member State in which the controller is subject, the issue of territoriality and enforcement would need to be considered to establish whether or not the controller is subject to the law enforcement authority's request. Some jurisdictions have disclosure obligations that purport to have extraterritorial reach, for example the Investigatory Powers Act 2016 in the UK. Even where a law from a jurisdiction outside the one in which the controller is based extends to the controller, the controller will have to ensure that the requested disclosure does not violate the laws of the country in which it is based. This issue is summarised in the EDPB's legal assessment of the US CLOUD Act:

"service providers controlling personal data whose processing is subject to the GDPR or other EU or Member States' law will be susceptible to facing a conflict of laws between US law and the GDPR and other applicable EU or national law of Member States"

Although this commentary refers to US law, the issue identified applies to laws of other jurisdictions as well.

1.7 The EDPB's guidance is that, where there is an international agreement (such as an MLAT) in place and a controller receives a direct request from another jurisdiction, the controller should not comply with the request:

"In situations where there is an international agreement, such as a mutual legal assistance treaty (MLAT), EU companies should generally refuse direct requests and refer the requesting third country authority to existing MLAT or agreement." ([Guidelines 2/2018](#))

1.8 The guidance is silent on what a controller should do in situations in which there is no international agreement to cover the request. In order to assess whether the controller is subject to a direct request from a third country, the controller would need to assess both the territoriality provisions of the law under which the request is made and the laws of the country in which the controller is located, to ensure that the disclosure to the third countries would not be in breach of local law. This analysis would need to be made on a case-by-case basis.

2. MAY THE DATA CONTROLLER RELY ON ANY OTHER LEGAL BASES, BESIDES ART 6(1)(F) GDPR, TO DISCLOSE PERSONAL DATA TO LAW ENFORCEMENT AUTHORITIES OUTSIDE THE DATA CONTROLLER'S JURISDICTION?

2.1 Article 6 GDPR sets out six lawful bases for processing personal data. This paragraph will deal with them briefly in turn, explaining whether or not, and why, they apply to the disclosure of personal data to a law enforcement authority.

Consent

- 2.2 Under Art 6(1)(a), personal data may be published where the data subject has consented to the processing. In the context of a disclosure to a law enforcement authority, the ground is not appropriate as, should the data subject refuse or withdraw their consent, the processing could not be carried out.

Contract

- 2.3 Art 6(1)(b) is not relevant to the current case, as the disclosure is not "*necessary for the performance of a contract to which the data subject is party*" nor does it occur "*at the request of the data subject*".

Legal obligation

- 2.4 The answers in section 1 above deals with Art 6(1)(c).

Vital interests of a person

- 2.5 Art 6(1)(d) applies only where the processing is "*necessary to protect the vital interests of the data subject or of another person*". Although scenarios can be envisaged, in the context of a criminal investigation, in which this ground could apply, we think Art 6(1)(d) will not have a wide ranging application to disclosures of domain name registration data.

Public interest or official authority

- 2.6 Art 6(1)(e) applies where the processing is necessary for a task in the public interest or "*in the exercise of official authority vested in the controller*".
- 2.7 Art 6(3) makes clear that the task or authority in question must be laid down by EU or Member State law and that the processing must meet an objective of public interest and be proportionate to the legitimate aim pursued. Recital 45 further notes that it is for the relevant EU or Member State law to set out whether the body which performs the task or exercise the authority should be a public authority, a body otherwise governed by public law, or – where it is in the public interest – a person solely governed by private law ("*such as a professional association*").
- 2.8 Under Directive 95/46/EC, the provision equivalent to Art 6(1)(e) was wider, and covered processing for a task carried out "*in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed*" (emphasis added). This allowed this legal basis to be used by controllers making disclosures to a third party such as a regulator or a law enforcement authority. When the GDPR was drafted to replace the Directive, the part underlined above was not included, meaning that a controller can no longer rely on Art 6(1)(e) for disclosures to third parties exercising powers in the public interest or official authority.

Legitimate interest

- 2.9 The final legal basis available for processing personal data is Art 6(1)(f). This ground allows personal data to be processed where it is in the legitimate interest of the controller or a third party "*except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject*". This requires the

interests of the data subjects to be balanced against the interests of the controller or the third party.

2.10 Where a non-EU law enforcement authority makes a request to obtain personal data from a controller in the EU, the controller may be able to show a legitimate interest in disclosing the data. The EDPB has also suggested this approach in correspondence to ICANN (e.g. EDPB-85-2018).

3. IS IT POSSIBLE FOR NON-EU-BASED LAW ENFORCEMENT AUTHORITIES TO RELY ON ART 6(1)(F) GDPR AS A LEGAL BASIS FOR THEIR PROCESSING? IN THIS CONTEXT, CAN THE DATA CONTROLLER RELY ON ART 6(1)(F) GDPR TO DISCLOSE THE PERSONAL DATA? IF NON-EU-BASED LAW ENFORCEMENT AUTHORITIES CANNOT RELY ON ART 6(1)(F) GDPR AS A LEGAL BASIS FOR THEIR PROCESSING, ON WHAT LAWFUL BASIS CAN NON-EU-BASED LAW ENFORCEMENT RELY?

3.1 Law enforcement authorities of one country cannot be subject to laws imposed by another country. This is the public international law principle of state immunity, which the Max Planck Encyclopedia of Public International Law summarises as:

*"the immunity that a State enjoys in respect of itself (jurisdictional immunity) and its property (enforcement immunity) from the jurisdiction of the courts of another State...State immunity protects the State as an international legal personality as well as its organs, components, entities, and representatives."*³

3.2 As entities of a country, law enforcement authorities are covered by state immunity and therefore non-EU-based law enforcement authorities are not subject to the GDPR.

3.3 Even assuming the GDPR could apply to non-EU-based law enforcement authorities (the full analysis of which is beyond the scope of this memorandum), it seems unlikely that law enforcement authorities outside the EU would consider justifying their processing under the GDPR.

Transfers to non-EU based law enforcement authorities

3.4 Despite this, the controller will still need a valid basis to disclose data. The basis of the transfer, as discussed above, will be the controller's legitimate interest in most cases. The controller will also need to consider how to meet the obligations in Chapter V (transfers of personal data to third countries or international organisations). We understand that analysis of this point is not required for this memorandum.

³ Peter-Tobias Stoll, State Immunity (April 2011) in Rüdiger Wolfrum (ed), Max Planck Encyclopedia of Public International Law (online edn)