

24 October 2018

Dear Colleagues,

I refer to the draft “Guidelines on the application of Article 6(1)(b) GDPR in the context of the provision of online services” currently under consideration before the Key Provisions Subgroup.

Since the last Key Provisions meeting in September, the [REDACTED] [REDACTED] has received a number of observations from DPAs on the scope and application of Article 6(1)(b), and the draft paper circulated in September 2018. [REDACTED]

[REDACTED] Specifically, two separate approaches to the question of “necessity” have emerged.

It appears to the [REDACTED] that these two positions cannot easily reconciled, and therefore it is necessary to consider this matter in full at the next subgroup meeting on 8 November.

The two positions to be considered are as follows:

Option 1 – 6(1)(b) necessity is defined primarily by the terms of a contract itself

On the basis of recent written observations and comments at the subgroup meeting, we note that there is support for the position that what is “necessary” for the performance of a contract is primarily determined by the terms of the contract itself. Therefore, Article 6(1)(b) could apply *prima facie* in respect of the performance of all valid contractual terms which are agreed between parties. At the same time, this approach would not allow controllers to use contractual terms to set aside positive obligations of data protection law.

Following detailed consideration of this matter, the [REDACTED] supports the above approach to necessity. While we note that the CJEU has endorsed a narrow construction of necessity generally, it appear to us that an approach which limits contractual necessity to “core” functions is unduly restrictive. We note that nothing in the text or recitals to the GDPR directs such a restrictive approach to the scope of 6(1)(b). We also note limiting the scope of 6(1)(b) to core contractual functions does not accord with principles of European law regarding freedom to contract, and Article 16 of the Charter of Fundamental Rights.

We note that the [REDACTED] DPA, and [REDACTED], have also made comments in support of this view on “necessity”. We also observe that this view has been expressed in past subgroup discussions on this topic, at the initial meeting in April and most recently by the [REDACTED] representative at the September meeting.

Option 2 – 6(1)(b) applies only to core functions of a contract

Conversely, there is also support for the previous approach of the subgroup, which is based on a strict interpretation of contractual necessity. This approach limits the application of Article 6(1)(b) to the core functions of a contract (as viewed from the position of the data subject). The draft paper circulated to the subgroup in September 2018 is predicated on this interpretative approach.

We note that since the September meeting, a number of DPAs have proposed the position that the scope of necessity should be strictly interpreted, to include in this case only the core functions of a contract, when seen from the perspective of the data subject.

We note that written observations from the [REDACTED], and [REDACTED] as well as the [REDACTED] support the “core functions” approach, and that such a view is also preferred by the co-rapporteurs of this paper.

Updated papers for comparison

In order to properly compare and consider these two different positions, the [REDACTED] has prepared an updated draft of the paper, which adopts the alternative to the “core functions” interpretation of Article 6(1)(b). We note that we have received many useful written observations in relation to the previous paper, and that it is not our intention to disregard these views. Notwithstanding this, we consider that this fundamental issue must be resolved before further progress can be achieved.

[REDACTED]

We note that these two papers are very different in content, due to the fundamentally different approaches adopted in each.

We would ask that subgroup members consider these two papers separately, and in particular, the sections relating to necessity contained in each, in order to facilitate a full discussion of this matter at the subgroup meeting on 8 November next, and in order to reach consensus on the correct approach in relation to Article 6(1)(b).

We appreciate your detailed consideration of this matter to date, and we look forward to discussing this matter further at the next subgroup meeting.