JONES DAY

July 17, 2018

Via fax in advance: [redacted]
Via courier
Regional Court of Bonn
10th Civil Chamber
Wilhelmstraße 21
53111 Bonn

DR. JAKOB GUHN
Büro Düsseldorf
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JG

In the proceedings

of **Internet Corporation for Assigned Names and Numbers (ICANN),** represented by its president, Göran Marby, 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA,

- Applicant -

Attorneys of record: JONES DAY Rechtsanwälte,
Neuer Stahlhof, Breite Straße 69, 40213 Düsseldorf

versus

EPAG Domainservices GmbH, represented by its managing director, [redacted]

- Defendant -

Attorneys of record: Rickert Rechtsanwaltsgesellschaft mbH
Kaiserplatz 7-9, 53113 Bonn

Fieldfisher (Germany) LLP
[redacted]

Docket no.: LG Bonn 10 O 171/18

We see a need to answer the statements made by the Defendant in its response brief of 11 July 2018 (hereinafter also "**RB**"). Taking into account the urgency of the matter we will – as notified by phone – stick to the points relevant for these proceedings. If the court, however, wishes us to clarify why the further argumentation raised by the Defendant is not relevant for this matter we kindly ask for respective legal notice according to § 139 ZPO.

The response presents numerous arguments as to why the Defendant, in its opinion, it need not fulfill its contractual obligations. However, Defendant fails to provide facts or legal substance to support those arguments. The line of arguments is vague and it is not clear to the reader whether the Defendant refers to duties of the Applicant or its own duties under GDPR that allegedly prevent the Defendant from fulfilling its contractual obligations. Defendant raises numerous, but irrelevant arguments in order to confuse the chamber.

Indeed, a clear analysis of the facts shows that the brief is without substance. Therefore, the Applicant sees a need to clarify the factual and legal situation with regard to nearly each argument of the Defendant.

In detail:

A. The main claim is justified

It is striking that the Defendant's brief does not differentiate between facts and legal requirements. The Defendant's brief does not contain a clear subsumption of facts under relevant laws either. As a result, the Defendant's brief is not substantiated and thus does not credibly show that GDPR provisions justify refusal to collect Admin-C and Tech-C data during the domain name registration process.

The Defendant is under the *undisputed* contractual obligation to collect the data in question. Accordingly, the relevant question to be decided by the court is whether the Defendant would violate the GDPR by collecting Admin-C and Tech-C data. Whether the Defendant believes that other obligations under the RAA and the Temporary Specification violate the GDPR is wholly without relevance for the proceedings at hand. The court rightfully held that the Defendant can only refuse performance of its contractual obligations **to the extent** it is in violation of the law:

> "*Against this background, the Applicant can only claim loyalty to the Contract from the Defendant to the extent that the contractual agreements are in accordance with applicable law, § 242 BGB.*" (Decision of 29 May 2018, p. 5)

I. Art. 5 – The collection of the data in dispute complies with all principles relating to processing of personal data

The Defendant justifies its breach of contract by claiming that it - the Defendant - would violate Article 5 GDPR by collecting the data in dispute:

> "*The Defendant cannot fulfil the contractual obligation to collect and transmit the data without violating the basic processing requirements laid down in Article 5 of the GDPR*." (RB p. 6)

The relevant questions, therefore, are: (1.) is the Defendant – based on the information provided by the Applicant – able to provide Registrants with a legitimate, explicit and specified purpose for the optional indication of personal data for the Admin-C and Tech-C, and (2.) does collection of the Admin-C and Tech-C data comply with the principle of data minimization. Both questions must be answered in the affirmative.

1. Designating a third party as Admin-C and Tech-C constitutes a legitimate purpose

The Applicant has elaborated extensively on the role and significance of the Admin-C and the Tech-C. The collection of Admin-C and Tech-C data has the legitimate purpose of enabling Registrants to appoint third parties as Admin-C or Tech-C if they designate a different person or organization (Immediate Complaint, p. 6-11). The Defendant does not question the legitimacy of this purpose at all.

That this purpose is legitimate is apparently also the opinion of the European Data Protection Board (hereinafter "**EDPB**") (Annex AS-13). The Board's letter in the Applicant's reading suggests that providing Admin-C and the Tech-C details for persons other than the Registrant, if the Registrants wish to delegate these functions, is legitimate and in line with the GDPR (Annex AS-13; Applicant's submission of 11 July 2018, p. 3).

Given the undisputed legitimate purpose of collecting Admin-C or Tech-C data, the Defendant tries to confuse the court by questioning the roles of Tech-C and Admin-C. The Defendant alleges, that the roles are not sufficiently defined (cf. 2.2 and 2.3 RB) and are not necessary (cf. 2.6 RB). This is not convincing. The Applicant has submitted the Master Domain Registration Agreement as Annex AS 11, which shows that the Defendant's group of companies does indeed recognize the role of Admin-C and the Tech-C. The Defendant does not mention this

submission by the Applicant in its response brief. For good reason. Annex A to the Defendant's domain registration agreement, which we submit as

- Appendix AS 14 -

also explicitly recognizes the roles of Admin-C and Tech-C:

> *"8. CORRECT STATEMENTS. The domain holder assures and guarantees that:*
>
> *[...]*
>
> *it will respond to requests from EPAG to the e-mail address of the domain holder, **the administrative contact person**, the contact person for invoices or the **contact person for technical matters** regarding the correctness of contact information.*
>
> *[...]*
>
> *21. CHANGE OF OWNERSHIP. The person named in the Whois as the domain holder is considered to be the "registered domain holder". The person designated as administrative contact at the time the relevant account is obtained shall be deemed to be designated by domain holder with the authority to administer the domain".*

2. The Temporary Specification provides sufficient basis for the Defendant to clearly explain the purpose to the Registrants

The Defendant argues that it cannot comply with its obligation to collect Admin-C and Tech-C data, if offered by the Registrant, based on the notion that it cannot clearly explain the purpose for the data processing to the Registrants. This assertion is incorrect.

It is the Defendant that has to describe to the Registrant a specific purpose for the optional indication of Admin-C and Tech-C data vis-à-vis the Registrants. If this is possible for the Defendant, its non-compliance with the obligations under the RAA in connection with the Temporary Specification is not justified.

However, without doubt, the Defendant is capable of explaining a specific and explicit purpose for the collection of Admin-C and Tech-C data.

The Defendant can seek guidance from the purposes indicated in the Temporary Specification but does not have to do so. In this regard, the Defendant argues that the Applicant did not

sufficiently specify the purpose for the data processing and is of the opinion that the Temporary Specification does not contain a specific purpose for the use of the data of Admin-C and Tech-C (RB, p. 7).

Apparently, the Defendant tries to argue that the Defendant itself cannot describe a specific purpose to the Registrants when enabling them to provide Admin-C and Tech-C data. This is incorrect. Sections 4.4.7 and 4.5.1 of the Temporary Specification and the purposes laid out in Sections 4.4.8 and 4.4.9 of the Temporary Specification are sufficient.

Defendant fails to provide any detailed explanations as to why it could not describe the legitimate purpose of its processing to the Registrant. It is also important to note that the Defendant had an identical obligation to describe the legitimate purpose even before the GDPR came into force. According to § 4 Para. 3 No. 2 BDSG old, the data subject was to be informed about "*the purposes of the collection*" by the controller. The Defendant fails to provide any comprehensible explanation as to why it should no longer be possible for the Defendant to inform the Registrant of the purpose for collecting Admin-C and Tech-C data now that the GDPR is in force.

These requirements can easily be met by the Defendant by looking at the purposes indicated by the Applicant and informing the Registrants. Fulfilment of the contract is therefore possible for the Defendant without violating the GDPR.

3. No violation of the principle of data minimization

The Defendant further alleges that "*the collection of the three data sets was not yet necessary to achieve the purpose either*" (RB, p. 12) and concludes that the collection would violate the principle of data minimization.

In making this statement, the Defendant misjudges the purpose of the collection. If a legitimate purpose is to enable a third party to be designated as Admin-C and/or Tech-C, then the optional collection of data is of course necessary to achieve this purpose.

The abuse contacts (RB, p. 13-14) cited by the Defendant do not make the collection of Admin-C and Tech-C data superfluous. The abuse contacts have other tasks than the Admin-C and the Tech-C. These are provided by the Registrars, but a Registrant cannot delegate any tasks to an abuse contact (cf. para. 3.18 RAA, already submitted as Annex AS 4). Thus, abuse contact and

Admin-C and Tech-C perform completely different tasks, so that neither of them could make the other dispensable.

The principle of data minimization is therefore not violated either. The optional collection of the Admin-C and/or Tech-C data of a person different than the Registrant is adequate and relevant as well as limited to what is necessary.

II. Art. 6 (1) GDPR – The collection of the data in dispute is lawful

The Defendant argues that the legal bases for data collection mentioned by the Applicant (consent, fulfilment of a contract and legitimate interest) do not justify collection of personal data of the Admin-C and Tech-C. Further, the Defendant argues that the Applicant has to explicitly tell the data subject on which of available justifications under Art. 6 (1) GDPR the data collection is justified. Both arguments are unfounded.

1. The data in dispute can be collected based on consent

With regard to the question of consent, the Defendant argues that (a) the RAA does not provide for optional provision of the data in question, (b) requesting the collection of consent is against the prohibition of bundling, and (c) it is impossible to collect consent in accordance with the law under the given circumstances.

All these allegations are without substance:

a) The RAA agreement does not obligate the Registrant to provide personal data of an Admin-C and Tech-C

The Defendant states:

> *The Temporary Specification does not offer flexibility for registrars with respect to Admin-C and Tech-C data.*
>
> *Accordingly, in its letter of 5 July 2018 (**AG 5**), the European Data Protection Board recommends that the Applicant amend the Temporary Specification in view of the present proceedings. The registrant shall be free to provide either Admin-C and Tech-C data identical to the registrant or to provide non-personal data (e.g. "admin@domain.com"). The Board obviously shares the Defendant's view that the RAA and the Temporary Specification do not at present provide for optional collection of the data in dispute.*

> Denn Flexibilität für die Registrare bieten die Temporären Spezifikationen im Hinblick auf die Daten zu Admin-C und Tech-C gerade nicht.
>
> Dementsprechend empfiehlt der Europäische Datenschutzausschuss in seinem Schreiben vom 5. Juli 2018 (**AG 5**) der Antragstellerin in Ansehung des vorliegenden Verfahrens eine Änderung der Temporären Spezifikation. Dem Registranten soll freigestellt werden, entweder einen mit dem Registranten personengleichen Admin-C und Tech-C oder nicht personenbezogene Daten angeben (z.B. "admin@domain.com"). Der Ausschuss teilt damit offensichtlich die Auffassung der Antragsgegnerin, dass das RAA und die Temporäre Spezifikation bislang keine optionale Erhebung der streitgegenständlichen Daten vorsehen.

Saying this, the Defendant seems to allege that the Defendant is obliged by the RAA, in conjunction with the Temporary Specification, to require the Registrant to provide personal data of an Admin-C and Tech-C that is not the Registrant. This is not the case. Such duty can neither be found in the RAA nor in the Temporary Specification.

The registrar is free to name itself, a third person or an anonymized reference (like admin@company.com) as Admin-C and Tech-C without providing personal data at all. This is not only clear from the RAA, it is also understood and is common practice by all registrars including the Defendant. Notably the Defendant has processed millions of domain name registrations without personal data of an Admin-C and Tech-C.

Furthermore, the EDPB is cited wrongly in this context. The EDPB advises to be clear and precise towards the Registrant, *as part of the registration process*. In fact, the EDPB says in its letter of 5 July:

> ICANN also clarifies that the administrative or contact person may be a legal person and that it is not necessary that the contact information provided directly identifies a natural person.[14]
>
> The EDPB considers that registrants should in principle not be required to provide personal data directly identifying individual employees (or third parties) fulfilling the administrative or technical functions on behalf of the registrant. Instead, registrants should be provided with the option of providing contact details for persons other than themselves if they wish to delegate these functions and facilitate direct communication with the persons concerned. It should therefore be made clear, as part of the registration process, that the registrant is free to (1) designate the same person as the registrant (or its representative) as the administrative or technical contact; or (2) provide contact information which does not directly identify the administrative or technical contact person concerned (e.g. admin@company.com). For the avoidance of doubt, the EDPB recommends explicitly clarifying this within future updates of the Temporary Specification.[15]

Thus, the EDPB endorses the option for the Registrant to delegate the administrative and technical tasks and suggest that *registrars clarify during the registration process* the Registrants' options for designating Admin-C and Tech-C.

In other words: The EDPB does not say, as the Defendant would have the court believe, that the RAA or the Temporary Specification force the Registrant to provide personal data when designating the Admin-C and Tech-C. Rather, the Registrant shall and does just have the option to provide such data. And if provided, the Defendant must collect such data in accordance to GDPR requirements.

b) The registrar may be obliged to collect consent if Registrant provides personal data of Admin-C or Tech-C

The Defendant further claims that the Defendant must not be obligated by the Applicant to request consent from the Admin-C and Tech-C in case the Registrant provides respective personal data. According to the Defendant, this would be a contravention of the prohibition of bundling, i.e. making performance of a contract conditional on consent to the processing of personal data that is not necessary for the performance of that contract:

> *"When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract."*
>
> *"Dem Betroffenen muss damit also das Recht offenstehen, die Dienstleistung in Anspruch zu nehmen und zu erbringen, ohne dass eine Einwilligung in die – nicht zwingend erforderliche – Nutzung personenbezogener Daten erteilt wird."*
>
> *(EPAG brief of 10 July, page 17)*

The Defendant neglects the facts at hand. The Defendant is only required to collect consent ***if*** a Registrant provides personal data of the Admin-C or Tech-C, Sec. 3.7.7.6. The Registrant is, however, not obliged to provide personal data. The Defendant is well aware that the RAA and the Temporary Specification do not require provision of personal data for the Admin-C or Tech-C. Indeed, as previously noted, the Defendant has registered millions of domain names without referring to personal data of an Admin-C and Tech-C. Accordingly, none of these registrations will ever require collection of consent.

Thus, it is without question that the Registrant may register a domain name without providing personal data of a third person it chooses as Admin-C and/or Tech-C. Consequently, the domain name registration is not conditional upon consent. Bundling is not an issue here. Art. 7 par. 4 GDPR is not applicable.

c) It is possible to collect consent in accordance with the GDPR

Lastly, the Defendant tries to argue that it is impossible to collect consent in accordance with the GDPR (p. 18 of the brief of 10 July 2018).

The Defendant argues that in order for the consent to be valid, the data subject must be informed about each and every person who might be provided with the data in the future. This view is not substantiated. Neither courts nor literature nor the EDPB agree. Moreover, the Article 29 Working Party has already explained in its Guidelines on transparency under Regulation 2016/679 (17/EN WP260) that recipients of personal data can also be described by categories of recipients, for example law enforcement authorities, rather than the name of the actual recipient (page 32). Indeed, the Applicant encourages the Defendant to name these categories to the data subject during registration process, see Temp. Spec. 3.7.7.4.2.

In its Guidelines on consent under Regulation 2016/679 (17/EN WP259 rev.01), the Article 29 Working Party clarified that informed consent does not require any and all information under Art. 13 and Art. 14 GDPR to be provided to the data subject. Rather the following minimum content requirements apply for consent to be informed (page 13):

> *"(i) the controller's identity,*
> *(ii) the purpose of each of the processing operations for which consent is sought,*
> *(iii) what (type of) data will be collected and used,*
> *(iv) the existence of the right to withdraw consent,*
> *(v) information about the use of the data for automated decision-making in accordance*
> *with Article 22 (2)(c) where relevant, and*
> *(vi) on the possible risks of data transfers due to absence of an adequacy decision and of appropriate safeguards as described in Article 46."*

Obviously, it is possible for the Defendant to provide this information in order to collect consent.

Furthermore, the Defendant argues that Art. 7 requests not only collection but also proof of consent. The Defendant argues that such proof has to be provided to other controllers which would not be possible for the time being because the Applicant allegedly does not enable the transfer of such proof (RB, p. 19).

Where data processing occurs based on consent, it is a legal requirement stipulated by the GDPR that the controller must be able to prove that consent was obtained. And the Applicant assumes that the Defendant collects such proof of consents accordingly. It might be also true that the Registrar needs to forward this proof to third parties requiring this information. However, these requirements are set by the law. The Defendant does not substantiate why the Defendant should not be able to forward such proof and why the Applicant should be responsible for providing communications means to do so to the Defendant.

In this context we have to stress again that the same representatives of the Defendant have explicitly mentioned in their "GDPR Domain Industry Playbook" that "

> *"a respective processing (based on consent) is possible"*
>
> (Appendix AA 9, page 13).

Thus, the whole argumentation of the Defendant is contradictory to what its own lawyers have said beforehand. And the same lawyers do not even try to argue against that. This is not very convincing.

2. The Collection of data is required contractual fulfillment

The Defendant argues that the collection of the Admin-C and Tech-C data is not required for the contractual fulfillment. The Defendant argues that this requirement refers to the contract between the registrar and Registrant only and that other legal obligations, in particular between Registrant and Admin-C and Tech-C would not be relevant under Art. 6 (1) b) GDPR. These views are also not correct.

The Applicant has explained in its immediate appeal of 13 June, page 28 that the GDPR just refers to "***a*** *contract*" of the data subject. Therefore, Art. 6 (1) b) GDPR may also

legitimize third persons if data collection is required for fulfillment of the contract (BeckOK DSGVO, Art. 6 Rn. 30). If a Registrant decides to instruct a third person to act on his behalf as Admin-C or Tech-C, this requires that the contact data is available to enable third parties to contact the person acting as Admin-C or Tech-C. Thus, the fulfillment of the obligations of the Registrant towards the Admin-C and Tech-C and vice versa requires processing of such personal data. Therefore, we have a clear case of justification according to Art. 6 (1) b) GDPR.

The Defendant disagrees with this but has not raised any argument against this.

Thus, data processing is also justified for fulfillment of a contract.

3. The collection of data is based on legitimate interests

The Defendant only superficially refutes that there is legitimate interests in the data processing (RB p. 20), which the Applicant explained in detail in its submission. The Defendant does not cite a single relevant source to support its position that the Applicant does not have a legitimate interest in the processing of the data pursuant to Art. 6 (1) f) GDPR.

The processing of the personal data concerned is clearly in the legitimate interest of the controllers and third parties pursuant to Art. 6 (1) f) GDPR. In order to avoid repetition, the Applicant refers to the Immediate Appeal (p. 28 et seq.). The legitimate interest in data processing set out therein is based, inter alia, on recitals 47 and 49 of the GDPR and the examples referred to therein. Furthermore, the commentary literature referred to concerning Art. 6 (1) f) GDPR and the explanations of the Art. 29 Working Party also support the Applicant's position.

The Defendant does not substantially object to this. Instead, the Defendant claims - wrongly - that the Applicant did not take into account the "*interests of the persons concerned*" - i.e. Admin-C and Tech-C - in the sense of Art. 6 (1) f) DSGVO (defendant's pleading, p. 20). In fact, the Applicant in its submission first sets out in detail the considerable legitimate interests in data processing (Immediate Appeal, p. 29 to p. 31) and subsequently sets these out in relation to the rights and interests of the persons concerned - Admin-C and Tech-C (Immediate Complaint, p. 31 to p. 33). The collection of the data ultimately also lies in the interest of the data subjects. Without the collection they would not be able to fulfill their roles as Admin-C and Tech-C.

The Defendant's attempt to construct further interests of the Admin-C and Tech-C in order to cast doubt on data processing pursuant to Art. 6 (1) lit. f GDPR is not comprehensible. It ignores the facts of the present case. The Applicant has repeatedly made clear that - and the Defendant is of course aware that - the collected Tech-C and Admin-C data will not be published without their consent. In view of this, it is incomprehensible how, on the basis of the collection of Tech-C and Admin-C data by the Defendant, "authoritarian states" are supposed to "exert pressure on the Admin-C of a website", as the Defendant claims (Defendant's pleading, p. 20).

Finally, the Defendant makes reference to the ECJ ruling on data retention (ECJ, judgment of 21.12.2016, C-203/15 and C-698/15, ECLI:EU:C:2016:970). In this case, however, the issue was the "*general and indiscriminate retention of all traffic and location data of all participants and registered users in relation to all electronic means of communication*": According to the decision of the European Court of Justice, Article 15 (1) of the Data Protection Directive for Electronic Communications (2002/58/EC) precludes national legislation providing for such retention in order to combat crime. This has nothing to do with the present case: The present case is not about the state-mandated data retention, no "*general and indiscriminate*" data storage is involved and no "*traffic and location data*" are affected. Indeed, the Defendant itself recognizes in its submission that the precedent - its only source cited in this section – is not applicable to the case at hand. Hence, the only conclusion drawn from the ECJ judgment by the Defendant – which it seeks to apply to the present case - is that the "*storage and transmission* [of data] *must be proportionate*". This, however, is undisputed between the parties and results directly from Art. 6 (1) lit. f GDPR, which serves precisely to bring about a reconciliation of interests and thus ensure the proportionality of data collection. However, the Defendant does not deal with the requirements of this provision, which were discussed in detail by the Applicant.

4. The Applicant may provide more than one legal basis for the data collection

The Defendant further argues that the Applicant has to provide one concrete legal basis for the data collection according to the GDPR at the time of data processing.

At the outset, the Applicant wishes to clarify that the Temporary Specification provides the framework for parties to comply with the GDPR when they are processing (or

collecting) data from the Registrant. It is therefore *the Defendant* that has to specify the legal grounds for data collection during the data collection process from the Registrant.

More relevant to this particular issue, however, it is not true that collection of data may not be based on several legal grounds of Art. 6 GDPR in parallel. Art. 13 and 14 GDPR do not prohibit such reference to more than one legal ground for data collection. That various legal grounds may justify a data processing activity is also apparent under Art. 17 para. 1 lit. b GDPR where it is stated

> "*The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies: …the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing; …*".

It is therefore possible and legally acknowledged under the GDPR that, for example, besides consent, other legal grounds for processing, such as legitimate interests, may apply.

Thus, also in this regard the argumentation of the Defendant is not substantiated.

III. Art. 44 – Transfer of data is not relevant in the case at hand

The Defendant tries to confuse the court by making unsubstantiated assertions that do not relate to the collection of the data in dispute:

> *"Already for this reason the data processing, which in the case of the Applicant consists of access to data for compliance purposes, is without legal basis."* (RB p. 22)

Firstly, the *transfer* of data is not the subject of Applicant's application for interim relief. Secondly, there is **no** transfer of data to the Applicant in the normal course of business as evidenced by the Industry Playbook cited by the Defendant. Thirdly, if Defendant was truly of the opinion that the collection of the data was in violation of the GDPR it would have to stop selling domain name registrations, as this would equally affect the collection of the Registrants' data. Fourthly, as the Defendant rightfully points out, it is the Defendant's obligation to ensure that any data transfer by the Defendant to a third party is in compliance with the GDPR.

1. Data transfer not subject to the present dispute

The Defendant now for the first time asserts that the transfer of the data would be unlawful. This assertion is without merit. Foremost because the transfer of the Admin-C and Tech-C data is not even subject to the Applicant's application for interim relief.

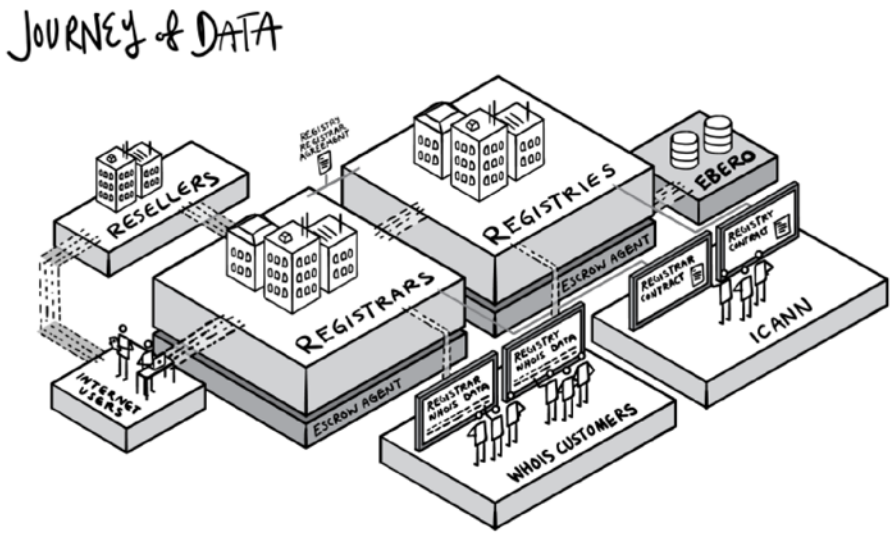
Further, each act of processing is to be assessed independently. A possible infringement of the GDPR by a subsequent act of processing – here the data transfer – does not affect the legality of the processing of a previous act of processing – here the collection of the data. This is a fundamental principle of data processing:

> "*The* [....] *principle of legality means that a legal basis is required for* ***each data processing operation*** [...]." (Gola, DSGVO, Art. 5 Rn. 6, emphasis added)

> „*Der […] Grundsatz der Rechtmäßigkeit meint, dass* ***für jeden Datenverarbeitungsvorgang*** *eine Rechtsgrundlage erforderlich ist* […]." (Gola, DSGVO, Art. 5 Rn. 6; Hervorhebung durch Unterzeichner)

2. No data transfer to the Applicant in the normal course of business

The Defendant merely asserts that multiple parties "*receive or have access to personal data in accordance with the Applicant's instructions*" (Response Brief p. 21). In that generality the statement is not only unsubstantiated but also in contradiction to the graphical representation of the data flows depicted in the GDPR Domain Industry Playbooks (already submitted as Appendix AS 9) which the Defendant explicitly references on p. 23 of the Response Brief:



The GDPR Domain Industry Playbook explains "*Dotted lines represent data flows*" (p. 8). As can be seen from the graphic above, there are no dotted lines between the Applicant and Registrars such as the Defendant and/or other third parties involved. In the ordinary course of business, no transfer of the Admin-C and Tech-C data to Applicant (ICANN in the above depiction) occurs and the Defendant has not made any specific assertions to the contrary. If the court requires further clarification of the data transfers, we are able to provide more background including respective evidence on short notice.

3. Defendant's behavior is contradictory

The Defendant continues to offer and sell domain name registrations. In doing so it collects and processes in other ways personal data of the Registrants. If the Defendant was truly of the opinion that the collection of personal data in connection with a domain name registration would be unlawful because of subsequent transfer obligations regarding such data, it would immediately have to stop offering and selling domain name registrations as such an alleged violation of the GDPR would equally affect the Registrant's personal data as well as the Admin-C and Tech-C data. The fact that the Defendant continues to offer and sell domain name registrations and collects the Registrants' personal data shows that the Defendant ultimately shares the Applicant's

view that the RAA and the Temporary Specification do not require any transfer of data in violation of the GDPR.

4. Defendant's obligation to meet the requirements of the GDPR

The Defendant rightfully points out that it is the **Defendant's** obligation to ensure that when the **Defendant** transfers data to any third party, all requirements of the GDPR are met (see p 22 Response Brief). It is again contradictory that the Defendant tries to justify its breach of contract to collect the data in dispute by arguing that it also breaches another contractual obligation. As the Defendant raises this argument for the first time, the Applicant is unaware of what specific acts of transfer of data to the Applicant the Defendant refers to.

IV. Art. 13 and 14 GDPR

The Defendant's line of argument in relation to Art. 13 and 14 GDPR is astonishing. The Defendant asserts:

> "[…] *on the basis of the information provided by the Applicant, the Defendant is not in a position to fulfil its duty to inform registrants and thus indirectly the data subjects. Art. 13 GDPR prescribes that the data subjects are informed at the time the data are collected. This obligation to provide information covers not only the purposes of the collection, but also the specific legal basis. The recipients or categories of recipients must also be named. On none of the above points could the Defendant provide sufficiently specific information on the basis of the information provided by the Applicant.*"

The Defendant shall be reminded that it is a controller under the GDPR. Thus, the Defendant is addressee of the obligations under Art. 13 and 14 GDPR. The Defendant now seems to argue that because the Applicant does not precisely inform the Defendant on how to fulfill **Defendant's obligations** under the GDPR, Defendant is entitled to reject fulfilling its contractual obligations vis-à-vis the Applicant. This is without merit as it is already by law (Art. 13 and 14 GDPR) Defendant's obligation to inform the data subjects.

Besides, the Applicant has elaborated on the purpose as well as on the available justifications under the GDPR available to the Defendant in its request for a preliminary injunction as well as in its immediate appeal in detail.

The Defendant's argument is an unfounded assertion designed solely to justify Defendant's culpable breach of contract. The obligation to provide information about the purpose and the recipients of the data is no new obligation. The Defendant was under the same obligation already under the German Data Protection Law (BDSG) before the GDPR entered into force. § 4 para (3) BDSG stipulated:

> "*3) If personal data are collected from the data subject, the controller is to inform him/her as to*
>
> 1. *the identity of the controller,*
> 2. ***the purposes of collection, processing or use and***
> 3. ***the categories of recipients*** *only in so far as the circumstances of the individual case provide no grounds for the data subject to assume that data will be transferred to such recipients,*
>
> *unless the data subject has already acquired such knowledge by other means. […]*."

The Defendant's assertion lacks any explanation on what specific information the Defendant is missing to comply with its duties under the GDPR to provide information to the data subject. The Defendant also does not explain why it has been able to fulfil its legal obligation to inform the data subject without any problems in the past but now – all of a sudden – is allegedly not able to do so anymore.

V. Art. 26 and 28

The Defendant's argument that the parties had not entered into a joint-controller agreement also falls into the category of arguments raised in an attempt to confuse the court.

The Defendant asserts:

> "*In addition to the requirement of a legal basis for the collection of the data, the disclosure of the data to third parties would also have to be legitimized. The legal requirements for this are lacking for various reasons*.
>
> […]
>
> *There is no (a) legitimization of the transfer of data requested by the applicant for registrants, Admin-C and Tech-C to the respective Registries; (b) legitimization of the transfer of data to the Escrow Agents; (c) legitimization of the transfer to the EBERO; and (d) legitimization of the transfer of data to the Applicant.*" (Response Brief p. 23 et seq)

Again, we would like to highlight that only the ***collection*** of Admin-C and Tech-C data is subject to the dispute at hand. Any concerns the Defendant may have regarding the transfer of the data do not affect the legality of the collection of the data.

However, the arguments raised regarding the transfer of the data are also without merit. The requirements for lawful processing are set out in Art. 5 and 6 GDPR. Neither Art. 5 nor Art. 6 GDPR require that a joint-controller agreement must have been concluded prior to the processing of personal data. While Art. 5 (1) a) GDPR requires that processing shall be "lawfully" this refers (only) to the justifications for "lawful processing" set out in Art. 6 GDPR (see. Kühling/Buchner, DS-GVO, 2nd edition, Art. 5 marginal 9; BeckOK DatenschutzR/, DS-GVO Art. 5 marginal 5; see also Ehmann/Selmayr, EU-DSGVO, Art. 5 marginal 8; Paal/Pauly, DS-GVO BDSG, Art. 5 GDPR marginal 14f.). In other words, a violation of the obligation to enter into a joint controller agreement does not render processing of the data by either of the joint-controllers unlawful.

B. The alternative application for relief no. 2)

The Applicant has explained in detail that the Defendant can in any case fulfil its obligation to enable the collection of Admin-C and Tech-C data without any problems if the data are not related to natural persons or if the data subject has given its consent. The Defendant cannot reasonably object to this.

Defendant's argument that Sections 3.3.1.7 and 3.3.1.8 RAA are null and void pursuant to § 134 BGB (RB, pp. 25-27) and that a reduction maintaining validity (*geltungserhaltende Reduktion*) is excluded (RB, pp. 27-28) is incorrect. It is therefore up to the Defendant to determine whether personal data are affected by the collection and whether consent to the collection exists.

I. The contractual stipulations are not void

First, it should be noted that sections 3.3.1.7 and 3.3.1.8 RAA have nothing at all to do with the collection of Admin-C and Tech-C data by the Defendant. They concern the publication of the data in WHOIS and the stipulations are now supplemented by Appendix A of the Temporary Specification.

The relevant contractual obligation from Section 3.4.1 of the RAA in connection with Sections 3.3.1.7 and 3.3.1.8 themselves is neutral. That is to say, they leave the way of fulfilment to the

Defendant. The Defendant's argument that it could fulfil its contractual obligation in breach of the GDPR, and therefore the contractual obligation was void under § 134 BGB is absurd. The fulfilment of any contractual obligations can be presented in either a lawful or in an unlawful manner. It is precisely up to the obligor to fulfil its duty in a lawful manner. There could only be nullity according to § 134 BGB if the collection of the data in dispute in can only be done in an unlawful manner. This is not the case. This is confirmed by the EDPB's opinion.

Ultimately, the Regional Court also assessed this appropriately in its decision and concluded - in its view logically - that "*the Applicant can only claim loyalty to the contract from the Defendant to the extent that the contractual agreement is in accordance with applicable law, § 242 BGB*". (Decision, p. 5).

II. Reduction that maintains validity (*geltungserhaltende Reduktion*) is therefore not an issue

The Defendant further argues that a reduction of the relevant provisions requiring the Defendant to collect the Admin-C and Tech-C data to maintain validity (*geltungserhaltende Reduktion*) of the RAA should not be applied by the court. A reduction to maintain validity would require that the contractual stipulation is void. However, this is not the case (see above B. I.).

III. Differentiation between personal and non-personal data is possible

The Defendant further submits that it the Applicant's alternative claim 2 a) was without merit as it would be impossible for the Defendant to differentiate between personal and non-personal data (RB, pp. 28-29). The Defendant thus essentially argues that term "personal data" as used in the GDPR is too vague and lacks legal certainty. This is not correct. The term "personal data" is legally defined in Art. 4 para. 1 DSGVO. No substantive concerns are raised against the sufficient legal certainty of the term "personal data" or even support by legal scholars.

The latest EDPB statement also shows that a distinction between personal and non-personal data is possible:

> *"The GDPR does not apply to the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person." (Letter dated July 5, 2018, p. 4)*

> "*The EDPB considers that registrants should in principle not be required to provide personal data directly identifying individual employees (or third parties) fulfilling the administrative or technical functions on behalf of the registrant. Instead, registrants should be provided with the option of providing contact details for persons other than themselves if they wish to delegate these functions'·and facilitate direct communication with the persons concerned. It should therefore be made clear, as part of the registration process, that the registrant is free to (1) designate the same person as the registrant (or its representative) as the administrative or technical contact; or (2) provide contact information which does not directly identify the administrative or technical contact person concerned (e.g. admin@company.com).*"

IV. Consent can be obtained

In relation to the alternative claim 2 b) the Defendant argues that the collection of consent of Admin-C and Tech-C would be in contravention of the prohibition of bundling. This is obviously wrong as the Registrant is not obliged to name an Admin-C or Tech-C other than himself (see above A. II. 1.). It is a mere option. It is also understood as a mere option as more than 50% of the Registrants do not refer to a separate Admin-C or Tech-C. If the Defendant sees a need to clarify this to the Registrant during the registration process, though, the Applicant encourages the Defendant to do so.

C. Reason for injunctive relief

There is also a reason for injunctive relief. The Applicant asserts a cease and desist claim based on contractual obligation. It is without question that such cease and desist claim rendered in preliminary proceedings does not anticipate main proceedings. The Applicant does not request fulfillment of the contract. The Applicant requests that the Defendant be stopped from offering domain name registrations within the top level domains listed in Appendix AS 1 without collecting Admin-C and Tech-C data. Such cease and desist order in preliminary injunction proceedings is a preliminary order subject to review in the appeal stage and also in main action proceedings.

Dr. Jakob Guhn
Rechtsanwalt

Henning Heinrich
Rechtsanwalt