e-Mail: kontakt@malteengeler.de
web: www.MalteEngeler.de

European Data Protection Board
Rue Montoyer 30
B-1000 Brussels
submitted via E-Mail to: EDPB@edpb.europa.eu

comment

as part of the public consultation

on the

Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects

submitted by

Dr. Malte Engeler
judge at the administrative court of Schleswig-Holstein, Germany

The European Data Protection Board (EDPB) has published its guidelines 02/2019[1] on its understanding of Art. 6(1)(b) GDPR, the legal basis for processing of personal data necessary for the fulfillment of a contract. The guidelines were published on April 9th 2019 after being worked on since July of 2018 in the Key Provision Subgroup.[2] They were open for public consultation until May 24th 2019.

The following review summarizes the EDPBs understanding of "necessary for the fulfillment of a contract" within Art. 6(1)(b) GDPR (1) and evaluates the legal reasoning behind it (2). It will then try to show how the EDPBs understanding is contradicting in itself as well as sidelining consumer protection and contractual law and how the justification given for this is insufficient (3). It will further demonstrate how the EDPBs guidelines may lead to undue legal uncertainty (4) and why they are likely to over-emphasizes consent as a result (5). This review will conclude by offering an alternative view on the notion of necessity closer aligned with existing contractual law and will try to show the merits of such an understanding while applying it to the examples given by the EDPB (6).

[1] Online available at https://edpb.europa.eu/our-work-tools/public-consultations/2019/guidelines-22019-processing-personal-data-under-article-61b_en.

[2] See Agenda of the 2nd EDPB meeting on 4 July 2018, online available at https://edpb.europa.eu/sites/edpb/files/files/file1/agenda_2nd_edpb_meeting_04072018_en_0.pdf.

1. "necessary for the fulfillment of a contract" as seen by the EDPB

The guidelines primary objective are to elaborate on the EDPBs understanding of the term "necessary for the performance of a contract" within Art. 6(1)(b) GDPR. In doing so the EDPB chooses a position that is usually referred to as the "core contract view".

The core contract view postulates that not the actual terms of a contract are the starting point for the examination of what is necessary for the performance of a contract. Instead, the EDPB requires to go beyond the actual terms and demands to identify something that it calls the "objective purpose", the "genuinely necessary" or the "core of the service". It wants to differentiate these from "artificial expansions" that are supposed to fall out of the scope of Art. 6(1)(b) GDPR.

In recitals 27, 28 and 31 the EDPB makes its position quite clear:

> *"Merely referencing or mentioning data processing in a contract is not enough to bring the processing in question within the scope of Article 6(1)(b). Where a controller seeks to establish that the processing is based on the performance of a contract with the data subject, it is important to assess what is **objectively necessary** to perform the contract. […]*
>
> *Necessary for the performance of a contract with the data subject must be interpreted strictly and does not cover situations where the processing is not **genuinely necessary** for the performance of a contract, but rather unilaterally imposed on the data subject by the controller. The fact that some processing is covered by a contract does not automatically mean that the processing is necessary for its performance. […] Even if these processing activities are specifically mentioned in the small print of the contract, this fact alone does not make them 'necessary' for the performance of the contract. […]*
>
> *Contracts for digital services may incorporate express terms that impose additional conditions about advertising, payments or cookies, amongst other things. A contract cannot **artificially expand** the categories of personal data or types of processing operation that the controller needs to carry out for the performance of the contract within the meaning of Article 6(1)(b)."*

The EDPB already gravitated towards this view in its WP29 guidelines on consent,[3] which (together with the WP29 guidelines on "legitimate interest"[4]) these guidelines are also endorsing and referencing extensively. In example 1 of said guidelines on consent the WP29 suggested that when it comes to e.g. a mobile photo editing application

> *"neither geo-localisation or online behavioural advertising are necessary for the provision of the photo editing service and go beyond the delivery of the **core service** provided."*

Instead the EDPB demands to identify the objective core and genuine purpose of the contract. Based on this classification of what it deems genuine the EDPB then applies its "necessity-test" which – as stated in recital 25 – is supposed to be achieved by a

[3] Online available under: https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=51030.
[4] Online available under: https://ec.europa.eu/justice/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf.

> *"a **combined, fact-based assessment** of the processing for the objective pursued and of whether it is less intrusive compared to other options for achieving the same goal."*

and should depend (recital 32)

> *"not just on the controller's perspective, but also a reasonable data subject's perspective when entering into the contract, and whether the contract can still be considered to be 'performed' without the processing in question. Although the controller may consider that the processing is necessary for the contractual purpose, it is important that they examine carefully the perspective of an average data subject in order to ensure that there is **a genuine mutual understanding on the contractual purpose**."*

The EDPBs necessity-test within Art. 6(1)(b) GDPR therefore consists of two steps:

> **Step 1: Identifying the core of the contract**
> First the EDPB expects controllers and Data Protection Authorities (DPAs) to identify the objective purpose or the genuine core of a contractual agreement. Within this identification process it expressively demands to set aside the actual contractual agreements and terms and expects an evaluation of the contract from a more abstract point of view based on the general expectations of consumers.
>
> **Step 2: Applying the necessity-test to the core contract**
> The EDPB then evaluates the necessity of data processing based on the core contract or objective purpose identified in step one and applies a strict data minimization test resulting in only data processing being covered by Art. 6(1)(b) GDPR which cannot be replaced by less intrusive but equally suitable data processing to fulfil the objective purpose of the contract.

2. The legal reasoning behind the EDPBs understanding of Art. 6(1)(b) GDPR

As legal reasoning behind its understanding the EDPB first points out that the GDPR as a whole needs to be considered when applying Art. 6(1)(b) GDPR. The EDPB points to the data protection principles pursuant to Art. 5 GDPR in particular (recital 11).

Within Art. 5 GDPR the EDPB puts special emphasis on Art. 5(1)(a) GDPR which requires all data to be processed lawfully, fairly and in a transparent manner (recital 12). Indeed, fairness seems to be the core of the EDPBs understanding. The EDPB seems to assume that the requirement of "fairness" allows for an independent assessment outside the boundaries of contractual law giving DPAs more freedom in applying Art. 6(1)(b) GDPR as a result. The EDPB deems itself confirmed by the recitals of the GDPR and – in footnote 8 of its guidelines – refers to recital 47 GDPR which requires controllers in the context of Art. 6(1)(f) GDPR to consider the reasonable expectations of data subjects based on their relationship with the controller and in recital 50 GDPR requires controllers to consider reasonable expectations of data subjects in the context of Art. 6 (4) GDPR.[5]

[5] That both recitals do not relate to Art. 6(1)(b) GDPR doesn't seem to bother the EDPB.

Additionally, the EDPB is looking at Art. 7 (4) GDPR and states (recital 27):

> *"This is also clear in light of Article 7(4), which makes a distinction between processing activities necessary for the performance of a contract, and terms making the service conditional on certain processing activities that are not in fact necessary for the performance of the contract."*

From all this the EDPB is deriving justification to distance itself from checking the actual terms of the contract and to choose a more generalizing position and – even if the terms stand the test of contractual law – to exercise an independent data protection driven evaluation based on the DPAs view on what the genuine purpose of a contract is.

3. The EDPBs understanding in review

The EDPBs legal reasoning for its core contract view should be challenged. The emphasis on "fairness" and its interpretation of Art. 7(4) GDPR do not sufficiently justify abandoning the parameters of contractual law (3.1). The EDPB's understanding also unduly restricts the relevance of the contractual agreements and is therefore at odds with contractual law and the fundamental rights it transforms (3.2).

3.1 Questioning the legal assessment of the EDPB

The EDPBs **first basic argument** is the application of fairness to the interpretation of Art. 6(1)(b) GDPR. It seems to argue that only processing that is necessary to fulfil the genuine purpose of a contract is fair within the meaning of Art. 5(1)(a) GDPR. This seems reasonable of course, but identifying the genuine core of contractual relations is a process of considerable vagueness. It is this ambiguity that is alien to the concept of necessity.

When assessing whether something is necessary the answer is always binary. Something is either definitely necessary or it is definitely not. There is no vagueness in necessity. This is different with the proportionality-test e.g. in Art. 6(1)(f) GDPR where there can be a range of results when weighing the legitimate interests of controllers and individuals concerned. Legal methodology reflects this distinction. While the concept of necessity is considered to be a rule, proportionality is a principle.[6] Rules can only be met or broken, principles (like proportionality) however, offer a range of results. The EDPBs understanding of the necessity-test in Art. 6(1)(f) GDPR is introducing this level of vagueness, known only from the principle of proportionality, into Art. 6(1)(b) GDPR which has no proportionality test. From the fact that the GDPR only requires necessity, not proportionality, in Art. 6(1)(b) GDPR it should therefore be derived that Art. 6(1)(b) GDPR requires an interpretation that gives way to **as little ambiguity as possible**.

The core contract position does not deliver such results as it introduces a considerable amount of vagueness to the task of applying Art. 6(1)(b) GDPR. Given the countless unique contractual relations that are possible due to the contractual freedom enshrined inter alia in Art. 16 Charta of Fundamental Rights (CFR) the objective to always identify a genuine core within all contractual relations would give way to a multitude of differing opinions. The more complex a contractual relationship the less able the core contract view is to offer the level of clarity the rule of necessity actually demands. The EDPBs self-perception as offering an "objective"

[6] *Alexy*, A Theory of Constitutional Rights, pp. 57

solution to Art. 6(1)(b) GDPR can therefore not be confirmed. To the contrary: The core contract view is a rather subjective one as it lacks objective criteria and allows for very diverging notions about what can be considered the core of a service, especially in complex- and multi-purpose services.

The **second argument** is the EDPBs interpretation of Art. 7(4) GDPR, more specifically the distinction presumed between the performance of a contract and the terms of a contract in the wording of Art. 7(4) GDPR. First it needs to be stressed that the wording of Art. 7(4) GDPR actually does not speak of the terms of a contract but only of data processing that is made conditional on consent. The actual wording of Art. 7(4) GDPR – if any – only shows that the GDPR does not favor the EDPBs core contract position. The wording of Art. 7(4) GDPR reads as follows:

> *"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."*

Art. 7(4) GDPR does expect controllers to consider whether the performance of a contract is made conditional on consenting to a specific data processing which is not actually necessary. Yet, Art. 7(4) GDPR is neither defining what is necessary nor how to interpret "performance of a contract". It merely defines the distinction and interplay between Art. 6(1)(b) GDPR and Art. 6(1)(a) GDPR. What is necessary for the performance of a contract is defined by Art. 6(1)(b) GDPR. In cases where Art. 6(1)(b) GDPR does not legitimize data processing a controller must be aware that opting for Art. 6(1)(a) GDPR will impose additional barriers for consent to be considered "freely given". This separation between Art. 6(1)(b) GDPR and Art. 6(1)(a) GDPR is at the core of Art. 7(4) GDPR. Beyond that the EDPB does not itself specify what is to be considered the performance of contract. Art. 7(4) GDPR doesn't even cover all contractual situations but only those where a controller is opting for Art. 6(1)(a) GDPR as a legal basis in addition to the contractual agreement. It would therefore be far fetching to read the general notion into Art. 7(4) GDPR that all terms that are made conditional for the performance of a contract are to be checked against Art. 7(4) GDPR and therefore need be considered outside of the scope of "performance of the contract". The contrary is the case: Only in cases where Art. 6(1)(b) GDPR no longer serves as a legal basis Art. 7(4) GDPR comes into play. This shows that Art. 7(4) GDPR actually requires to evaluate Art. 6(1)(b) GDPR on its own.

3.2 Misalignment with contractual law

By explicitly distancing itself from considering the actual terms of a contract as relevant for the application of Art. 6(1)(b) GDPR the EDPB is also evoking a conflict with contractual law. The problem, however, does not lie with the EDPBs understanding of necessity (step 2 of the necessity-test described above) which deserves unequivocal approval.[7] Instead, the problem lies with step 1 and the way the EDPBs wants to identify the purposes of the contract the necessity-test is then put up against. It is this contractual-law-agnostic understanding of Art. 6(1)(b) GDPR that is at odds with contractual and consumer protection law.

[7] The impact of data minimization and purpose limitation on the rule of necessity as pointed out by the EDPB in recital 6 of the opinion cannot be overemphasized.

Contractual law is built upon the foundation of private autonomy and contractual freedom. As advocate general *Kokott* wrote in her opinion on case C-441/07 P:[8]

> *"Contractual freedom is one of the general principles of Community law. It stems from the freedom to act for persons. It is also inseparably linked to the freedom to conduct a business. In a Community which must observe the principle of an open market economy with free competition, contractual freedom must be guaranteed."*

The core contract view of the EDPB, however, would have to be considered a limitation to contractual freedom. The freedom to act and the freedom to conduct a business allow all kinds of contractual agreements as long as they stay within the boundaries of the law. The terms that the EDPB is so generously excluding from its assessment of Art. 6(I)(b) GDPR would in many cases be perfectly valid from a contractual law point of view. To exclude these terms from the interpretation of "performance of the contract" makes data processing illegal for the purposes of fulfilling terms of a contract which the EDPB does not accept as part of the "core service", making such agreements (which in many cases act as a way of compensation for free services) basically impossible. The EDPB does so without providing solid criteria or reasoning of this indirect limitation of the freedom to act and the freedom to conduct business.

The EDPB itself actually seems to realize that its guidelines are at odds with consumer protection law. It tries to escape this by stating (recital 8 and 9):

> *"Data protection rules govern important aspects of how online services interact with their users, however, other rules apply as well. Regulation of online services involves cross-functional responsibilities in the fields of, inter alia,* ***consumer protection law****, and* ***competition law****. Considerations regarding these fields of law are* ***beyond the scope of these guidelines****.*
>
> *Although Article 6(1)(b) can only apply in a contractual context,* ***these guidelines do not express a view on the validity of contracts*** *for online services generally, as this is outside the competence of the EDPB. Nonetheless, contracts and contractual terms must comply with the requirements of contract laws and, as the case may be for consumer contracts, consumer protection laws in order for processing based on those terms to be considered fair and lawful."*

The EDPB does only seem to make contractual and consumer protection law a necessary requirement for its assessment of what is necessary to fulfill a contract. As stated in recital 13

> *"Contracts for online services must be valid under the applicable contract law."*

It does, on the other hand, not respect the unity of law as it does not consider valid terms as binding for the application of Article 6(1)(b) GDPR. Yet, neither the EDPB nor a consumer protection authority is at liberty to add its own evaluation from a limited data protection point of view. Such an approach contradicts the legal reasoning behind a harmonized European consumer protection law established e.g. in the Directive 93/13/EEC on unfair terms in consumer contracts which even the EPDB is referencing in recital 13 of its guidelines. The EDPB fails to give sufficient reasoning for this power to assess contractual necessity independently

[8] Opinion of Advocate General Kokott, 17 September 2009, Case C-441/07 P, Commission Of The European Communities v Alrosa Company Ltd, ECLI:EU:C:2009:555, recital 225.

and is even contradicting itself as it at a later point recognizes in recital 35 that the contractual freedom of the parties needs to stay untouched.

> *"Within the boundaries of contractual law, and if applicable, consumer law, controllers are free to design their business, services and contracts*."

The EDPB fails to resolve this contradiction. On the one hand, it recognizes that the parties of a contract are free to agree upon specific terms as part of their contractual freedom, enshrined inter alia in Art. 16 CFR. On the other hand, it then casts aside these individual agreements and imposes an overarching view on what it considers to be the real purpose of a contract.

4. Unnecessary legal uncertainty

By leaving the actual terms, provisions and "fine print" of the contract behind the EDPB basically empowers the DPAs to become regulators of contractual freedom overruling any assessment by contractual and consumer protection law. Even if specific contractual clauses would stand the test of consumer protection law, the DPAs would – according to the EDPB – be allowed to overrule these findings and ignore certain terms as long as the DPAs identify them to be outside of the scope of the "core of the contract" which they identified for themselves. By demanding this "meta test" of the contractual purposes the EDPB is making Art. 6(1)(b) GDPR a legal lever to assess contracts without respect for the unity of the law. It finds itself outside of the area of law that is designed to do so in the first place: contractual and consumer protection law

The core contract view would also lead to a lack in harmonization of the interpretation of Art. 6(1)(b) GDPR. What is to be considered the "genuine core of a contract" is not defined in the GDPR and even the EDPB only offers vague guidelines. It may very well be that the DPA in France comes to different conclusions than the DPA of Slovakia or the DPA of Portugal. Given that the European member states have diverging economic histories this will most likely affect the evaluation whether data processing is part of the genuine contract or not. The consistency mechanism (Art. 63 GDPR) will only partly be a solution to this, as it requires cross border cases and/or involvement of several DPAs which – as the experience has shown so far – isn't even necessarily the case in cases of high legal controversy within many member states.

5. Putting undue emphasize on consent

Finally, the stricter Art. 6(1)(b) GDPR is interpreted the more controllers are forced to choose consent according to Art. 6(1)(a) GDPR as legal basis instead. Consent, however, has proven to be a legal basis unfit to offer sufficient protection for individuals in scenarios of broad scale and ubiquitous data processing of everyday life. Online services and online commerce are contractual situations that occur in such frequency that individuals have already fallen victim to something called consent fatigue. The frequency of interactions has rendered the process of consent a burden for individuals[9] which in return leads to consent becoming a mere legal facade with little actual value for the protection of individuals who more and more tend to click through consent procedures with little regard to the actual consequences of their actions.

[9] See for example "The Cost of Reading Privacy Policies" by *McDonald* and *Cranor*, available online at: http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf.

The risks of overemphasizing consent are further illustrated by Art. 7(4) GDPR which requires additional attention to the requirement of freely given consent. When making data processing necessary for online advertisement purposes conditional for access to the service this will likely not meet the EDPBs understanding of Art. 6(1)(b) GDPR. The aforementioned data processing would therefore have to be based on another legal basis, likely Art. 6(1)(a) GDPR. Consent, however, would in many cases only be considered freely given according to Art. 7(4) GDPR when the controller offers alternatives that do not require the data processing in question.[10] The result has been an already widespread trend towards offering separate tiers of access to a service where free access to a service is made conditional on consenting to advertisement and the necessary data processing in addition to paid access without data processing for ads. This development is alarming as it, in the end, leads to a perpetuation of social inequality in the digital realm. Less financially capable individuals will have to consent to being served ads and being profiled for that purpose while more fortunate few may be able to pay for the privilege of data protection.

6. An alternative view on necessity within Art. 6 (1)(b) GDPR

Given the various shortcomings of the EDPBs understanding this review suggests to re-evaluate the core contract view and to adopt an interpretation that actually respects the terms and conditions of a contract as long as they are valid according to contractual and consumer protection law. Whatever (valid) terms are agreed upon then shall define the background Art. 6(1)(b) GDPR is applied on. "Fulfilment of a contract" according to Art. 6(1)(b) GDPR would then be interpreted as fulfilment of the sum of the valid terms that define the contract as a whole. All data processing that is necessary to fulfil the contract with these specific terms would therefore be considered necessary.

The merits of such an interpretation are as follows:

a) Equally high level of protection for individuals

First, it needs to be stressed that accepting all data processing that is necessary to fulfil the terms of a contract – even those that some may consider outside of the core of a service – as within the scope of Art. 6(1)(b) GDPR would not lead to a weaker level of protection for the rights of individuals. In fact, all the concerns of the EDPB about the dangers of unilateral imposed terms can be met even when renouncing its core contract view as a whole.

This is, due to the fact that the considerations of the EDPB are already part of contractual and consumer protection law. Clauses that are unfair, non-transparent and or outside of what can reasonably be expected by consumers simply wouldn't stand the test of consumer protection law as laid down inter alia in Directive 93/13/EEC on unfair terms in consumer contracts. Additionally, violations of GDPR are already part of the evaluation of the validity of individual contractual clauses.[11] There is simply no need to evaluate Art. 6(1)(b) GDPR separately based on "the GDPR as a whole" and limited to an arbitrary "core" when consumer protection already declares clauses invalid that violate the GDPR. Clauses and terms in violation of the GDPR are not part of the contract and data processing for the purpose of fulfilling these invalid terms is never necessary within the meaning of Art. 6(1)(b)

[10] Article 29 Working Party, Guidelines on consent under Regulation 2016/679, WP259 rev.01, page 9.

[11] See the various ongoing court proceedings brought forward by consumer protection agency, e.g. the recent ruling of the district court of Berlin who ruled several terms of Googles privacy policy invalid, see the German press release available at: https://www.vzbv.de/pressemitteilung/vzbv-klagt-erfolgreich-gegen-google.

GDPR in return. In the end this will in many cases deliver the same legal results as the core contract view of the EDPB.

The interpretation of Art. 6(1)(b) GDPR should therefore, strictly align with contractual and consumer protection law. The focus of the application of Art. 6(1)(b) GDPR should be to thoroughly check the specific terms and clauses of a contract for their validity in close cooperation with consumer protection agencies. As the EDPS already demanded in his own reply to the EDPBs guidelines and the Commissions announcement regarding Facebooks updated terms of service: [12]

> *"We need to talk about terms and conditions […] This announcement indicates a step in the right direction. But, as has been observed, the announcement also highlights the continued lack of genuine cooperation between data and consumer regulators and, where the company happens to be dominant in the market, between them and competition authorities. The common aim ought to be to ensure a coherent outcome in the interests of the individual, whether data subject or consumer."*

Such a coherent outcome would best be achieved when the contractual evaluation of the consumer regulators is respected and the unity of the law is preserved. Such a harmonized approach should provide the foundation of the DPAs application and enforcement of Art. 6(1)(b) GDPR.

b) Reduced legal uncertainty and harmonized application with the European Union in concert with consumer protection law

Such an understanding in strict alignment with consumer protection law would also greatly reduce the legal uncertainty described in section 4 of this review. While the task of identifying the genuine core of a contract comes with substantial uncertainty given the lack of legal and regulatory guidance the evaluation of terms and contractual clauses is a well-established legal procedure with consumer protection agencies and the courts concerned. The existing case law offers a rich legal background when evaluating the contractual agreements which are supposed to be the background for Art. 6(1)(b) GDPR. Respecting the existing legal framework of contractual and consumer protection law would therefore help to reduce the legal overhead otherwise caused by the core contract view.

Additionally, the evaluation of terms and contractual clauses is already a subject of ongoing and present legislation of the European Union giving way to a growing harmonization of consumer protection in the Union.[13] To open up Art. 6(1)(b) GDPR to an independent assessment of what is necessary to fulfil a contract would sidetrack these efforts. Respecting the results of consumer protection law on the other hand would give way to a more consistent application of Art. 6(1)(b) GDPR.

[12] *Buttarelli*, We need to talk about terms and conditions, blogpost from April 29th 2019, online available under: https://edps.europa.eu/press-publications/press-news/blog/we-need-talk-about-terms-and-conditions_en.

[13] See among others the ongoing efforts surrounding the Directive on contracts for the supply of digital content, COM(2015) 634 final.

c) Applying the alternate interpretation to the EDPBs examples

Applying this interpretation of Art. 6(1)(b) GDPR to the various examples of the EDPBs guidelines shows that it is able to produce reasonable results. To illustrate this, some of the examples given by the EDPB in its guidelines are to be examined.

Example 1:

In example 1 the EDPB argues that processing of a customer's address is not necessary for purchases that are supposed to be delivered to a pick-up point. Processing the home address of a contracting party can be the result of various legal obligations like invoicing, book keeping or financial supervision or may be part of a business model where purchases are kept in a personalized account for future reference by the customer. Terms and clauses that cover these additional purposes can be evaluated from a consumer protection point of view. In case the specific terms are not unfair or surprising there is little reason to not accept the processing necessary to fulfill these contractual obligations as covered by Art. 6(1)(b) GDPR. This becomes especially clear when considering that invoicing is covered by Art. 6(1)(b) GDPR in example 3 of the guidelines.

Example 2:

In example 2 the EDPB argues that processing of customer data for the purpose of offering lifestyle choices based on their visits falls outside the scope of the genuine purpose of online retail. Again, the focus could be set to examining the terms which cover this additional part of the contractual agreement. In case they are considered to be valid under consumer protection law, they should be respected under data protection law as part of the application of Art. 6(1)(b) GDPR. In case they are in breach of consumer protection law they are not part of the contractual agreement and would therefore have to be excluded from the application of Art. 6(1)(b) GDPR in the same way as the EDPB argues based on its core contract view.

Example 3:

In example 3 the EDPB argues that keeping customer data beyond the point of e.g. accounting purposes would have to be based on Art. 6(1)(c) GDPR. While Art. 6(1)(c) GDPR is obviously relevant in these scenarios, Art. 6(1)(b) GDPR can still serve as a legal basis depending on the specific contractual situation. In cases where a customer is setting up an account with an online retailer there may be a contractual agreement beyond the individual purchase. Contractual clauses that obligate the retailer to fulfil the contractual agreement regarding setting up and maintaining a customer account may very well be valid within the limits of consumer protection law and should therefore, not be excluded from the application of Art. 6(1)(c) GDPR only because a customer account may not be considered necessary for the fulfillment of the individual purchases.

Examples 7 and 8:

In example 7 the EDPB argues that profiling of user's past hotel bookings and financial data for recommendation purposes would not be objectively necessary for the performance of a contract, i.e. the provision of hospitality services based on particular search criteria provided by the user. Again, this evaluation should be left to contractual and consumer protection law. It may very well be the case that recommendations are a crucial part of the business model

specified in the contractual agreement and the core value why customers choose the search engine for booking hotels. In cases of non-transparent or misleading contractual terms about the recommendation part of the contract consumer protection law may on the other hand consider such terms invalid excluding them from the application of Art. 6(1)(b) GDPR in return.

The same can be said for example 8 where the EDPB deems the display of personalized product suggestions based on which listings the potential buyers have previously viewed on the platform in order to increase interactivity to not be objectively necessary to provide the marketplace service. Again, the answer should be sought for in consumer protection law which may or may not accept a personalization-based business model.

7. Conclusion

The interpretation and application of Art. 6(1)(b) GDPR is of utmost importance as it concerns one of the most relevant questions of data protection law today: whether and how processing of personal data can be made part of and even in a form act as compensation in contractual agreements.[14] This is a policy question and one that has yet to be answer by the European legislator. Applying a core contract view to Art. 6(1)(b) GDPR would circumvent the ongoing debate about data as an economic value.

The EDPB should refrain from sidestepping this ongoing process and apply Art. 6(1)(b) GDPR in strict unity with contractual and consumer protection law. The EDPB and the DPAs are an important voice within the debate but should not assume to answer this question alone out of concert with the various other stakeholders concerned, e.g. the consumer protection agencies. It would be wise and would mean a strengthening of data protection if unilateral approaches were avoided and strength sought in the unity of the legal system. This would also strengthen the application and enforcement of data protection law.

[14] See e.g. *Versaci*, Personal Data and Contract Law: Challenges and Concerns about the Economic Exploitation of the Right to Data Protection, ERCL 2018, 374, for a current overview about the issue.