

Guidelines



**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**
**關於向當事人提供線上服務時依GDPR第6條第1項第
b款運用個人資料之指引2/2019**

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The European Data Protection Board

Having regard to Article 70(1)e of Regulation 2016/679/EU of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC,

HAS ADOPTED THE FOLLOWING GUIDELINES

歐盟個人資料保護委員會

依據歐洲議會與歐盟理事會於2016年4月27日通過之「關於運用*個人資料時對自然人之保護與確保此等資料之自由流通，以及廢除指令95/46/EC的歐盟規則2016/679/EU」第70條第1項第e款，

通過以下指引：

1 PART 1 – INTRODUCTION

第1部分—導言

1.1 Background

背景

1. Pursuant to Article 8 of the Charter of Fundamental Rights of the European Union, personal data must be processed fairly for specified purposes and on the basis of a legitimate basis laid down by law. In this regard, Article 6(1) of the General Data Protection Regulation¹ (GDPR) specifies that processing shall be lawful only on the basis of one of six specified conditions set out in Article 6(1)(a) to (f). Identifying the appropriate legal basis that corresponds to the objective and essence of the processing is of essential importance. Controllers must, *inter alia*,

* 譯註：我國個資法將個資之使用分為蒐集(collection)、處理(processing)、利用(use)等不同行為態樣，且有相應之適用要件，而GDPR對個資之蒐集、處理、利用任一行為，皆統稱為processing。為與我國個資法中之「處理」有所區隔，本文因此將GDPR中的processing譯為「運用」，processor譯為「受託運用者」。

take into account the impact on data subjects' rights when identifying the appropriate lawful basis in order to respect the principle of fairness.

依據「歐洲聯盟基本權利憲章」第8條，個人資料之運用應為特定目的，基於法定之正當依據，以公平合理方式為之。在此方面，「一般資料保護規則」¹（GDPR）第6條第1項明確規定，唯有以第6條第1項第a款至第f款規定之六項條件為依據時，運用方為合法。依據運用之目標與本質，識別適當的法律依據，為核心重要事項。確認適當合法依據以求符合公平合理原則時，控管者須尤其（*inter alia*）考量對當事人權利之影響。

2. Article 6(1)(b) GDPR provides a lawful basis for the processing of personal data to the extent that “processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract”.² This supports the freedom to conduct a business, which is guaranteed by Article 16 of the Charter, and reflects the fact that sometimes the contractual obligations towards the data subject cannot be performed without the data subject providing certain personal data. If the specific processing is part and parcel of delivery of the requested service, it is in the interests of both parties to process that data, as otherwise the service could not be provided and the contract could not be performed. However, the ability to rely on this or one of the other legal bases mentioned in Article 6(1) does not exempt the controller from compliance with the other requirements of the GDPR.

GDPR第6條第1項第b款規定了一項個人資料運用之合法依據，即「運用係為履行當事人所立契約所必要，或係締約前應當事人之要求採取步驟所必要」²。本條支持「憲章」第16條所保障之營業自由，且反映出一項事實，即某些情況下，若當事人不提供特定個人資料，則無法對其履行契約義務。若特定運用行為是提供所請求之服務的必要部分，則運用此等資料符合契約雙方的利益，因為若非如此，

¹ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

歐洲議會與歐盟理事會於2016年4月27日通過之「關於運用個人資料時對自然人之保護與確保此等資料之自由流通，以及廢除指令95/46/EC的歐盟規則(EU) 2016/679」（一般資料保護規則）。

² See also recital 44.

另見前言第44點。

將無法提供服務，亦無法履行契約。然而，援用本款或第6條第1項所述的其他法律依據，並不免除控管者遵守GDPR其他要求之義務。

- Articles 56 and 57 of the Treaty on the Functioning of the European Union define and regulate the freedom to provide services within the European Union. Specific EU legislative measures have been adopted in respect of ‘information society services’.³ These services are defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.” This definition extends to services that are not paid for directly by the persons who receive them,⁴ such as online services funded through advertising. ‘Online services’ as used in these guidelines refers to ‘information society services’.

「歐洲聯盟運作條約」第56條和第57條定義並規範歐盟境內提供服務之自由。對於「資訊社會服務」（information society services），已採取具體歐盟立法措施³。此等服務被定義為「通常收取報酬、遠距、以電子方式且應服務接收者個別請求而提供之任何服務。」此一定義涵蓋非由服務接收者直接付費的服務⁴，如透過廣告獲得收入的線上服務。本指引所述之「線上服務」係指「資訊社會服務」。

- The development of EU law reflects the central importance of online services in modern society. The proliferation of always-on mobile internet and the widespread availability of connected devices have enabled the development of online services in fields such as social media, e-commerce, internet search, communication, and travel. While some of these services are funded by user payments, others are provided without monetary payment by the consumer, instead financed by the sale of online advertising services allowing for targeting of data subjects. Tracking of user behaviour for the purposes of such advertising is often carried out in ways the user is often not aware of,⁵ and it may not be

³ See for example Directive (EU) 2015/1535 of the European Parliament and of the Council, and Article 8 GDPR.

示例見歐洲議會與歐盟理事會之指令(EU) 2015/1535，以及GDPR第8條。

⁴ See Recital 18 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

見歐洲議會與歐盟理事會於2000年6月8日通過之「關於內部市場中資訊社會服務之特定法律面向，特別是電子商務的歐盟指令2000/31/EC」前言第18點。

immediately obvious from the nature of the service provided, which makes it almost impossible in practice for the data subject to exercise an informed choice over the use of their data.

歐盟法之發展反映出線上服務在現代社會中的核心重要性。藉助始終連線（always-on）的移動網路之激增與聯網裝置之普及，社群媒體、電子商務、網路搜尋、通訊和旅遊等領域的線上服務得以發展。雖然其中一些服務是透過使用者付費獲得收入，其他服務之提供則不向消費者收費，而是透過銷售能夠對當事人定向投放之線上廣告服務獲得收入。為此等廣告目的對使用者行為之追蹤，通常以使用者並不知情之方式實施⁵，且可能無法從所提供服務之性質立即呈現出來，因此使得當事人在實際上幾乎不可能就其資料之利用進行知情選擇。

5. Against this background, the European Data Protection Board⁶ (EDPB) considers it appropriate to provide guidance on the applicability of Article 6(1)(b) to processing of personal data in the context of online services, in order to ensure that this lawful basis is only relied upon where appropriate.

在此背景下，歐盟個人資料保護委員會⁶（EDPB）認為，宜就第6條第1項第b款對線上服務所涉個人資料運用之適用性提供指導，以確保僅於適當時援用此一合法依據。

6. The Article 29 Working Party (WP29) has previously expressed views on the contractual necessity basis under Directive 95/46/EC in its opinion on the notion of legitimate interests of the data controller.⁷ Generally, that guidance remains relevant to Article 6(1)(b) and the GDPR.

第29條工作小組（WP29）在其關於資料控管者正當利益概念之意見中，曾就指令95/46/EC規定的契約必要性依據發表見解⁷。一般而言，該指導對於第6條第1項第b款和GDPR仍具有相關性。

⁵ In this regard, controllers need to fulfil the transparency obligations set out in the GDPR. 在此方面，控管者需履行GDPR規定之透明化義務。

⁶ Established under Article 68 GDPR. 依GDPR第68條設立。

⁷ Article 29 Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP217). See in particular pages 11, 16, 17, 18 and 55. 第29條工作小組「關於指令95/46/EC第7條之資料控管者正當利益概念之意見06/2014」（WP217）。尤其參見頁11、16、17、18和55。

1.2 Scope of these guidelines

本指引之範圍

7. These guidelines are concerned with the applicability of Article 6(1)(b) to processing of personal data in the context of contracts for online services, irrespective of how the services are financed. The guidelines will outline the elements of lawful processing under Article 6(1)(b) GDPR and consider the concept of ‘necessity’ as it applies to ‘necessary for the performance of a contract’.

本指引係關於第6條第1項第b款對於線上服務契約所涉個人資料運用行為之適用性，而無論該等服務如何獲取收入。本指引將闡述GDPR第6條第1項第b款之合法運用要件，並討論「為履行契約所必要」中「必要」之含義。

8. 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.

資料保護規則規範線上服務與使用者互動之重要事項，然而，其他規則亦有其適用。線上服務之規範涉及跨部會（跨功能）之職責，特別是消費者保護法與競爭法領域。這些領域之考量已超出本指引之範圍。

9. 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.

雖然第6條第1項第b款僅適用於契約，本指引並不對線上服務契約之一般有效性表達見解，因為這已超出EDPB的職權範圍。然而，契約及契約條款須符合契約法，消費者契約還須符合消費者保護法，基於其條款之運用方可被視為公平且合法。

10. Some general observations on data protection principles are included

below, but not all data protection issues that may arise when processing under Article 6(1)(b) will be elaborated on. Controllers must always ensure that they comply with the data protection principles set out in Article 5 and all other requirements of the GDPR and, where applicable, the ePrivacy legislation.

下列內容包含資料保護原則的一般觀察，但不會對依第6條第1項第b款運用資料所涉之一切資料保護議題均作詳細說明。控管者必須確保遵守第5條規定的資料保護原則、GDPR的其他要求，以及在適用時，遵守電子隱私規範。

2 PART 2 - ANALYSIS OF ARTICLE 6(1)(B)

第2部分—第6條第1項第b款之分析

2.1 General observations

一般意見

11. The lawful basis for processing on the basis of Article 6(1)(b) needs to be considered in the context of the GDPR as a whole, the objectives set out in Article 1, and alongside controllers' duty to process personal data in compliance with the data protection principles pursuant to Article 5. This includes processing personal data in a fair and transparent manner and in line with the purpose limitation and data minimisation obligations.

以第6條第1項第b款為合法依據之運用，需考量GDPR整體、第1條規定之目標，以及控管者依第5條規定的資料保護原則運用個人資料之義務。這包括以公平合理及透明之方式運用個人資料，並符合目的限制與資料最小化義務。

12. Article 5(1)(a) GDPR provides that personal data must be processed lawfully, fairly and transparently in relation to the data subject. The principle of fairness includes, inter alia, recognising the reasonable expectations⁸ of the data subjects, considering possible adverse consequences processing may have on them, and having regard to the relationship and potential effects of imbalance between them and the controller.

GDPR第5條第1項第a款規定，個人資料之運用須以合法、公平合理和並對當事人以透明之方式為之。公平合理原則尤其包括識別當事人

之合理期待⁸，考量運用對其可能造成的不利影響，並顧及其與控管者間之關係，以及不對等關係之潛在影響。

13. As mentioned, as a matter of lawfulness, contracts for online services must be valid under the applicable contract law. An example of a relevant factor is whether the data subject is a child. In such a case (and aside from complying with the requirements of the GDPR, including the ‘specific protections’ which apply to children),⁹ the controller must ensure that it complies with the relevant national laws on the capacity of children to enter into contracts. Furthermore, to ensure compliance with the fairness and lawfulness principles, the controller needs to satisfy other legal requirements. For example, for consumer contracts, Directive 93/13/EEC on unfair terms in consumer contracts (the “Unfair Contract Terms Directive”) may be applicable.¹⁰ Article 6(1)(b) is not limited to contracts governed by the law of an EEA member state.¹¹

如前所述，合法性方面，線上服務契約依所適用之契約法須為有效。相關因素之一個示例為當事人是否為兒童。此時（在遵守GDPR之要求，包括適用於兒童之「特別保護」要求的同時）⁹，控管者必須確保遵守兒童締約能力相關的國內法律。此外，為確保遵守公平合理與合法性原則，控管者須滿足其他法律要求。例如，對於消費者契約，可能適用關於消費者契約中不公平條款之歐盟指令93/13/EEC（「不公平契約條款指令」）¹⁰。第6條第1項第b款並不限於受歐洲

⁸ Some personal data are expected to be private or only processed in certain ways, and data processing should not be surprising to the data subject. In the GDPR, the concept of ‘reasonable expectations’ is specifically referenced in recitals 47 and 50 in relation to Article 6(1)(f) and (4).

某些個人資料被期待為私密性質或僅得以特定方式運用，資料運用不應使當事人感到意外。GDPR中，「合理期待」之概念在前言第47點和第50點中被特別提及，此兩點係關於第6條第1項第f款和第4項。

⁹ See Recital 38, which refers to children meriting specific protection with regard to their personal data as they may be less aware of the risks, consequences and safeguards concerned and their rights in relation to the processing of personal data.

見前言第38點，該點提到，兒童之個人資料需要特別保護，因為兒童可能對個人資料運用所涉之風險、後果、安全維護措施及其權利的認知較低。

¹⁰ A contractual term that has not been individually negotiated is unfair under the Unfair Contract Terms Directive “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”. Like the transparency obligation in the GDPR, the Unfair Contract Terms Directive mandates the use of plain, intelligible language. Processing of personal data that is based on what is deemed to be an unfair term under the Unfair Contract Terms Directive, will generally not be consistent with the requirement under Article 5(1)(a) GDPR that processing is lawful and fair.

依不公平契約條款指令，若未經個別磋商的契約條款「違反善意要求，造成雙方間的契約權利

經濟區會員國法律管轄之契約¹¹。

14. Article 5(1)(b) of the GDPR provides for the purpose limitation principle, which requires that personal data must be collected for specified, explicit, and legitimate purposes and not further processed in a manner that is incompatible with those purposes.

GDPR第5條第1項第b款規定了目的限制原則，該原則要求個人資料之蒐集須有特定、明確且正當之目的，且不得以該等目的不相容之方式為進階運用。

15. Article 5(1)(c) provides for data minimisation as a principle, i.e. processing as little data as possible in order to achieve the purpose. This assessment complements the necessity assessments pursuant to Article 6(1)(b) to (f).

GDPR第5條第1項第c款已規定資料最小化原則，亦即，盡可能運用最少量的資料以達成目的。該資料最小化評估補充了第6條第1項第b款至第f款的必要性評估。

16. Both purpose limitation and data minimisation principles are particularly relevant in contracts for online services, which typically are not negotiated on an individual basis. Technological advancements make it possible for controllers to easily collect and process more personal data than ever before. As a result, there is an acute risk that data controllers may seek to include general processing terms in contracts in order to maximise the possible collection and uses of data, without adequately specifying those purposes or considering data minimisation obligations. WP29 has previously stated:

目的限制和資料最小化原則皆與線上服務契約尤其相關，此等契約通常未經個別磋商。技術進步使得控管者能夠比以往更輕易蒐集並運用大量個人資料。因此，存在如下嚴峻風險：控管者可能試圖在契約中納入一般性運用條款，以盡可能擴大資料之蒐集與使用範圍，而不充分具體說明其目的或考量資料最小化義務。第29條工作小組

義務嚴重不對等，且對消費者不利」，則該條款係不公正。與GDPR中的透明化義務類似，不公平契約條款指令要求使用平實易懂之語言。若個人資料之運用係以不公平契約條款指令所規定之不公平條款為依據，則其運用一般不符合GDPR第5條第1項第a款運用應合法且公平合理之要求。

¹¹ The GDPR applies to certain controllers outside the EEA; see Article 3 GDPR. GDPR適用於位於歐洲經濟區外的特定控管者，見GDPR第3條。

曾說明：

The purpose of the collection must be clearly and specifically identified: it must be detailed enough to determine what kind of processing is and is not included within the specified purpose, and to allow that compliance with the law can be assessed and data protection safeguards applied. For these reasons, a purpose that is vague or general, such as for instance 'improving users' experience', 'marketing purposes', 'IT-security purposes' or 'future research' will - without more detail - usually not meet the criteria of being 'specific'.¹²

必須明確具體地說明蒐集之目的：說明須足夠詳盡，以判斷何種運用係包含在該特定目的範圍內、何種運用係在該範圍之外，並應足以評估法律遵循狀況、適用資料保護安全維護措施。因此，模糊寬泛且未說明細節之目的，如「提升使用者體驗」、「行銷目的」、「信息技術目的」或「未來研究目的」等，通常不符「特定性」標準¹²。

2.2 Interaction of Article 6(1)(b) with other lawful bases for processing

第6條第1項第b款與其他運用之合法依據之關係

17. Where processing is not considered 'necessary for the performance of a contract', i.e. when a requested service can be provided without the specific processing taking place, the EDPB recognises that another lawful basis may be applicable, provided the relevant conditions are met. In particular, in some circumstances it may be more appropriate to rely on freely given consent under Article 6(1)(a). In other instances, Article 6(1)(f) may provide a more appropriate lawful basis for processing. The legal basis must be identified at the outset of processing, and information given to data subjects in line with Articles 13 and 14 must specify the legal basis.

若運用不構成「履行契約所必要」，亦即，若所請求之服務無需特定運用即可提供，EDPB認為，在滿足相關條件的情況下，可能適用其他合法依據。特別地，某些情況下，可能更宜適用第6條第1項第a

¹² Article 29 Working Party Opinion 03/2013 on purpose limitation (WP203), page 15–16.
第29條工作小組「關於目的限制之意見03/2013」（WP203），頁15-16。

款規定之自由給予之同意。其他情形下，第6條第1項第f款可能為運用提供更為適宜的合法依據。必須在運用初始即識別法律依據，且依第13條和第14條告知當事人之資訊必須明確其法律依據。

18. It is possible that another lawful basis than Article 6(1)(b) may better match the objective and context of the processing operation in question. The identification of the appropriate lawful basis is tied to principles of fairness and purpose limitation.¹³

第6條第1項第b款以外的其他合法依據可能更符合所涉運用之目的與情況。識別適當合法目的，與公平合理原則及目的限制密切相關¹³。

19. The WP29 guidelines on consent also clarify that where “a controller seeks to process personal data that are in fact necessary for the performance of a contract, then consent is not the appropriate lawful basis”. Conversely, the EDPB considers that where processing is not in fact necessary for the performance of a contract, such processing can take place only if it relies on another appropriate legal basis.¹⁴

第29條工作小組關於同意之指引亦釐清，「如控管者有意運用事實上係為履行契約所必要的個人資料，則同意即非適當的合法依據」。反之，EDPB認為，若運用事實上並非為履行契約所必要，則惟有援用其他適當之法律依據時，方得實施此等運用¹⁴。

20. In line with their transparency obligations, controllers should make sure to avoid any confusion as to what the applicable legal basis is. This is particularly relevant where the appropriate legal basis is Article 6(1)(b) and a contract regarding online services is entered into by data subjects. Depending on the circumstances, data subjects may erroneously get the impression that they are giving their consent in line with Article 6(1)(a) when signing a contract or accepting terms of service. At the same time, a controller might erroneously assume that the signature of a contract

¹³ When controllers set out to identify the appropriate legal basis in line with the fairness principle, this will be difficult to achieve if they have not first clearly identified the purposes of processing, or if processing personal data goes beyond what is necessary for the specified purposes.

控管者依公平合理原則識別適當法律依據時，若其未首先明確運用之目的，或若個人資料之運用超出特定目的所必要之範圍，則將很難符合公平合理原則。

¹⁴ For more information on implications in relation to Article 9, see Article 29 Working Party Guidelines on consent under Regulation 2016/679 (WP259), endorsed by the EDPB, pages 19–20.

關於第9條相關影響的更多資訊，見第29條工作小組「關於第2016/679號規則（GDPR）中的同意之指引」（WP259），EDPB採認，頁19-20。

corresponds to a consent in the sense of article 6(1)(a). These are entirely different concepts. It is important to distinguish between accepting terms of service to conclude a contract and giving consent within the meaning of Article 6(1)(a), as these concepts have different requirements and legal consequences.

為遵守其透明化義務，控管者須確保避免混淆所適用之法律依據。若以第6條第1項第b款為適當法律依據且與當事人訂立線上服務契約時，這一點尤為重要。根據具體情況，當事人可能錯誤地以為其在簽訂契約或接受服務條款時，係在依第6條第1項第a款給予同意。與此同時，控管者可能錯誤地以為，簽訂契約即等同第6條第1項第a款意義上之同意。此為完全不同之概念。重要的是區分接受服務條款以訂立契約，以及給予第6條第1項第a款之同意，因為這些概念有不同的要求與法律效果。

21. In relation to the processing of special categories of personal data, in the guidelines on consent, WP29 has also observed that:

關於運用特種個資，第29條工作小組在同意指引中說明：

Article 9(2) does not recognize ‘necessary for the performance of a contract’ as an exception to the general prohibition to process special categories of data. Therefore controllers and Member States that deal with this situation should explore the specific exceptions in Article 9(2) subparagraphs (b) to (j). Should none of the exceptions (b) to (j) apply, obtaining explicit consent in accordance with the conditions for valid consent in the GDPR remains the only possible lawful exception to process such data.¹⁵

第9條第2項未將「為履行契約所必要」列為禁止運用特種個資之例外。因此控管者及會員國對此應探究第9條第2項第b款至第j款的特殊例外規定。若第b款至第j款均不適用時，遵守GDPR對有效同意之條件以獲得明確同意，將成為運用該類個資唯一可能的合法例外¹⁵。

2.3 Scope of Article 6(1)(b)

第6條第1項第b款之範圍

¹⁵ Article 29 Working Party Guidelines on consent under Regulation 2016/679 (WP259), endorsed by the EDPB, page 19.

第29條工作小組「關於第2016/679號規則（GDPR）中的同意之指引」（WP259），EDPB採認，頁19。

22. Article 6(1)(b) applies where either of two conditions are met: the processing in question must be objectively necessary for the performance of a contract with a data subject, or the processing must be objectively necessary in order to take pre-contractual steps at the request of a data subject.

滿足如下兩個條件之一時，適用第6條第1項第b款：運用必須係為履行與當事人間契約所客觀必要，或運用係應當事人之要求採取締約前步驟所客觀必要。

2.4 Necessity 必要性

23. Necessity of processing is a prerequisite for both parts of Article 6(1)(b). At the outset, it is important to note that the concept of what is ‘necessary for the performance of a contract’ is not simply an assessment of what is permitted by or written into the terms of a contract. The concept of necessity has an independent meaning in European Union law, which must reflect the objectives of data protection law.¹⁶ Therefore, it also involves consideration of the fundamental right to privacy and protection of personal data,¹⁷ as well as the requirements of data protection principles including, notably, the fairness principle.

運用之必要性係第6條第1項第b款兩個部分共同之必要條件。首先須注意，「係為履行契約所必要」之概念並非契約條款允許或明定哪些事項之簡單判斷。必要性之概念在歐盟法中有獨立含義，且必須反映資料保護法之目的¹⁶。因此，其亦涉及考量隱私與個人資料保護之基本權利¹⁷，以及資料保護原則（其中尤其包括公平合理原則）之要求。

24. The starting point is to identify the purpose for the processing, and in the

¹⁶ The CJEU stated in *Huber* that “what is at issue is a concept [necessity] which has its own independent meaning in Community law and which must be interpreted in a manner which fully reflects the objective of that Directive, [Directive 95/46], as laid down in Article 1(1) thereof”. CJEU, Case C-524/06, *Heinz Huber v Bundesrepublik Deutschland*, 18 December 2008, para. 52.

*Huber*案中，歐盟法院（CJEU）認為，「本案之問題是，一個概念（必要性）在共同體法律中有其獨立含義，且其解釋須充分反映該指令（指令95/46）第1條第1項規定之目的」。歐盟法院，第C-524/06號案件（*Heinz Huber v Bundesrepublik Deutschland*）判決，2008年12月16日（譯註：原文18日應為誤植），第52段。

¹⁷ See Articles 7 and 8 of the Charter of Fundamental Rights of the European Union 見「歐洲聯盟基本權利憲章」第7條和第8條。

context of a contractual relationship, there may be a variety of purposes for processing. Those purposes must be clearly specified and communicated to the data subject, in line with the controller's purpose limitation and transparency obligations.

首先應識別運用之目的。對於契約關係而言，可能存在諸多運用目的。須依據控管者的目的限制和透明化義務，明確說明這些目的，並告知當事人。

25. Assessing what is 'necessary' involves 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".¹⁸ If there are realistic, less intrusive alternatives, the processing is not 'necessary'.¹⁹ Article 6(1)(b) will not cover processing which is useful but not objectively necessary for performing the contractual service or for taking relevant pre-contractual steps at the request of the data subject, even if it is necessary for the controller's other business purposes.

要判斷何為「必要」，須基於事實綜合評估，即評估「該運用之目的以及相較於其他可達成相同目的之選項，干預程度是否較低」¹⁸。若存在干預性更低的其他可行之替代方案，則運用並非「必要」¹⁹。

¹⁸ See EDPS Toolkit: Assessing the Necessity of Measures that limit the fundamental right to the protection of personal data, page 5.

見歐盟個人資料保護監察人（EDPS）工具庫（Toolkit）：「個人資料保護基本權利限制措施之必要性評估」，頁5。

¹⁹ In *Schecke*, the CJEU held that, when examining the necessity of processing personal data, the legislature needed to take into account alternative, less intrusive measures. CJEU, Joined Cases C-92/09 and C-93/09, *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, 9. November 2010. This was repeated by the CJEU in the *Rīgas* case where it held that "As regards the condition relating to the necessity of processing personal data, it should be borne in mind that derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary". CJEU, Case C-13/16, *Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme'*, para. 30. A strict necessary test is required for any limitations on the exercise of the rights to privacy and to personal data protection with regard to the processing of personal data, see EDPS Toolkit: Assessing the Necessity of Measures that limit the fundamental right to the protection of personal data, page 7.

*Schecke*案中，歐盟法院認為，檢視個人資料運用之必要性時，立法機關需考量干預性更低的替代方案。歐盟法院，合併審理之第C-92/09號案件（*Volker und Markus Schecke GbR*）和第C-93/09號案件（*Hartmut Eifert v Land Hessen*）判決，2010年11月9日。*Rīgas*案中，歐盟法院再次重申此一見解，認為「關於個人資料運用必要性之相關條件，應謹記個人資料保護相關之例外與限制，其適用以絕對必要為限」。歐盟法院，第C-13/16號案件（*Valsts policijas Rīgas reģiona pārvaldes Kārtības policijas pārvalde v Rīgas pašvaldības SIA 'Rīgas satiksme'*）判決，第30段。對於個人資料運用行為行使隱私權和資料保護權之任何限制均需通過絕對必要測試，見EDPS工具庫：

若運用雖然實用，但對於提供契約服務或應當事人之要求採取相關締約前步驟而言並非客觀必要，則其並不涵蓋在第6條第1項第b款範圍內，即使該運用係為控管者的其他業務目的所必要。

2.5 Necessary for performance of a contract with the data subject 為履行與當事人間契約所必要

26. A controller can rely on the first option of Article 6(1)(b) to process personal data when it can, in line with its accountability obligations under Article 5(2), establish both that the processing takes place in the context of a valid contract with the data subject and that processing is necessary in order that the *particular contract* with the data subject can be performed. Where controllers cannot demonstrate that (a) a contract exists, (b) the contract is valid pursuant to applicable national contract laws, and (c) that the processing is objectively necessary for the performance of the contract, the controller should consider another legal basis for processing.

若控管者能夠在遵守第5條第2項規定之課責性義務的情況下，同時確立運用係基於與當事人間之有效契約，以及運用係為履行與當事人間之該特定契約所必要，則其得援用第6條第1項第b款之第一個選項運用個人資料。若控管者無法證明（a）存在契約；（b）該契約依所適用之國內契約法係有效；且（c）運用係為履行該契約所客觀必要，則控管者應考慮運用之其他法律依據。

27. 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). On the other hand, processing may be objectively necessary even if not specifically mentioned in the contract. In any case, the controller must meet its transparency obligations. 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 performance’ clearly requires something more than a contractual clause. This is also clear in light of Article 7(4). Albeit this provision only regards validity of consent, it illustratively makes a distinction between processing activities

「個人資料保護基本權利限制措施之必要性評估」，頁7。

necessary for the performance of a contract, and *clauses* making the service conditional on certain processing activities that are not in fact necessary for the performance of the contract.

僅在契約中涉及或提到資料運用並不足以使相關運用落入第6條第1項第b款之範圍內。另一方面，即使契約並未明確提及，運用也可能係客觀必要。無論如何，控管者必須遵守其透明化義務。若控管者有意確立運用係基於履行與當事人間之契約，則須評估哪些事項係為履行契約所客觀必要。「履行所必要」所要求的顯然不止契約條款。這在第7條第4項也有明確表現。雖然該條僅涉及同意之有效性，其示範性地區分了為履行契約所必要之運用活動，以及規定服務係以特定運用活動為條件（而運用事實上並非履行契約所必要）之契約條款。

28. In this regard, the EDPB endorses the guidance previously adopted by WP29 on the equivalent provision under the previous Directive that ‘necessary for the performance of a contract with the data subject’:

在此方面，EDBP採認第29條工作小組此前通過的關於先前「指令」中相當規定（equivalent provision）之指導，認為「為履行與當事人間契約所必要」：

... 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. Also 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.²⁰

…必須嚴格解釋，且並不涵蓋運用並非真正為履行契約所必要，而是由控管者單方課加予當事人之情形。同時，契約涵蓋某種運用之事實，並不必然意味著運用係為履行契約所必要。…即使此等運用活動在契約中有明文規定，僅憑這一事實也並不使得運用係為履行契約所「必要」²⁰。

²⁰ Article 29 Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP217), page 16–17.

第29條工作小組「關於指令95/46/EC第7條之資料控管者正當利益概念之意見06/2014」（WP217），頁16-17。

29. The EDPB also recalls the same WP29 guidance stating:
EDPB亦重申第29條工作小組同一指導之如下見解：

*There is a clear connection here between the assessment of necessity and compliance with the purpose limitation principle. It is important to determine the exact rationale of the contract, i.e. its substance and fundamental objective, as it is against this that it will be tested whether the data processing is necessary for its performance.*²¹

必要性評估與遵守目的限制原則間有明確關聯。確定契約之確切意旨（*exact rationale*）很重要，亦即其本質與根本目標，因為這是審視資料運用是否為履行契約所必要之標準²¹。

30. When assessing whether Article 6(1)(b) is an appropriate legal basis for processing in the context of an online contractual service, regard should be given to the particular aim, purpose, or objective of the service. For applicability of Article 6(1)(b), it is required that the processing is *objectively necessary* for a purpose that is integral to the delivery of that contractual service to the data subject. Not excluded is processing of payment details for the purpose of charging for the service. The controller should be able to demonstrate how the main subject-matter of the *specific contract with the data subject* cannot, as a matter of fact, be performed if the specific processing of the *personal data in question* does not occur. The important issue here is the nexus between the personal data and processing operations concerned, and the performance or non-performance of the service provided under the contract.

評估第6條第1項第b款是否係提供線上契約服務時運用資料之適當法律依據，應考量該服務之特定目標、宗旨或目的。第6條第1項第b款之適用，要求運用係為向當事人提供契約服務不可或缺之目的所客觀必要。此未排除為收取服務費用而運用付款資料。控管者應能夠證明，若不運用相關個人資料，則與當事人間該特定契約之主要標的將如何在事實上無法履行。此處的要點是個人資料與運用活動間、以及與契約所涉服務之履行或不履行間的關聯。

31. Contracts for digital services may incorporate express terms that impose

²¹ Ibid., page 17.
同前註，頁17。

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).

數位服務契約可能包括廣告、付款或cookie等附加條件的明文條款。契約不可在第6條第1項第b款的規範意義外，刻意擴張控管者為履行契約所必須的個人資料類別或運用活動類型。

32. The controller should be able to justify the necessity of its processing by reference to the fundamental and mutually understood contractual purpose. This depends 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.

控管者應能夠援引雙方共同理解之契約根本目的，作為其運用必要性的正當化理由。這不僅取決於控管者的觀點，還包括理性當事人訂立契約時的觀點，以及如不進行相關運用，契約是否可視為已「履行」。即使控管者認為運用係為契約目的所必要，仍應仔細檢視一般當事人之觀點，以確保雙方對於契約目的有真正合意理解。

33. In order to carry out the assessment of whether Article 6(1)(b) is applicable, the following questions can be of guidance:

為評估第6條第1項第b款是否可適用，下列問題可提供指導：

- What is the nature of the service being provided to the data subject?
What are its distinguishing characteristics?
向當事人提供之服務之本質為何？其有哪些顯著特徵？
- What is the exact rationale of the contract (i.e. its substance and fundamental object)?
契約之確切意旨（亦即其本質與根本目標）為何？
- What are the essential elements of the contract?

契約的根本要素有哪些？

- What are the mutual perspectives and expectations of the parties to the contract? How is the service promoted or advertised to the data subject? Would an ordinary user of the service reasonably expect that, considering the nature of the service, the envisaged processing will take place in order to perform the contract to which they are a party?

契約雙方的共同觀點與期待有哪些？該服務是如何向當事人推銷或廣告？依該服務之本質，該服務的一般使用者身為契約當事人，可否合理期待將發生控管者為履行契約所預想的運用？

34. If the assessment of what is ‘necessary for the performance of a contract’, which must be conducted prior to the commencement of processing, shows that the intended processing goes beyond what is objectively necessary for the performance of a contract, this does not render such future processing unlawful per se. As already mentioned, Article 6 makes clear that other lawful bases are potentially available prior to the initiation of the processing.²²

何者「係為履行契約所必要」之評估必須在運用開始前為之，若此等評估表明有意實施之運用超出履行契約客觀必要之範圍，並不使得未來運用本身違法。如前所述，第6條已明確表示，開始運用前，其他合法依據可能有其適用²²。

35. If, over the lifespan of a service, new technology is introduced that changes how personal data are processed, or the service otherwise evolves, the criteria above need to be assessed anew to determine if any new or altered processing operations can be based on Article 6(1)(b).

在提供服務的過程中，若出現改變個人資料運用方式的新技術，或該服務發生其他演變，應重新評估上述標準，以確定新運用或改變後的運用活動能否以第6條第1項第b款為依據。

²² See Article 29 Working Party Guidelines on consent under Regulation 2016/679 (WP259), endorsed by the EDPB, page 31, in which it is stated that: “Under the GDPR, it is not possible to swap between one lawful basis and another.”

見第29條工作小組「關於第2016/679號規則（GDPR）中的同意之指引」（WP259），EDPB採認，頁31，該工作小組認為「依GDPR，不得將某一合法依據替換為其他依據」。

Example 1

A data subject buys items from an online retailer. The data subject wants to pay by credit card and for the products to be delivered to their home address. In order to fulfil the contract, the retailer must process the data subject's credit card information and billing address for payment purposes and the data subject's home address for delivery. Thus, Article 6(1)(b) is applicable as a legal basis for these processing activities.

However, if the customer has opted for shipment to a pick-up point, the processing of the data subject's home address is no longer necessary for the performance of the purchase contract. Any processing of the data subject's address in this context will require a different legal basis than Article 6(1)(b).

示例1

當事人向線上零售商購買物品。當事人希望以信用卡付款，並將產品運送至其住家地址。為履行該契約，零售商必須為付款目的運用當事人的信用卡資訊與帳單地址、為運送目的運用當事人的住家地址。因此，第6條第1項第b款可作為此等運用活動的法律依據。

然而，若消費者選擇運送至取貨點，則運用當事人之住家地址即不再為履行該買賣契約所必要。此時，對當事人地址之運用活動將需要第6條第1項第b款以外的其他法律依據。

Example 2

The same online retailer wishes to build profiles of the user's tastes and lifestyle choices based on their visits to the website. Completion of the purchase contract is not dependent upon building such profiles. Even if profiling is specifically mentioned in the contract, this fact alone does not make it 'necessary' for the performance of the contract. If the online retailer wants to carry out such profiling, it needs to rely on a different legal basis.

示例2

同一線上零售商希望根據使用者對網站的瀏覽狀況，剖析其品味與

生活方式。完成買賣契約並不需要此等剖析。即使契約中明文涉及剖析作業，僅憑這一事實並不使之成為履行該契約所「必要」。該線上零售商如希望實施此等剖析，需要援用其他法律依據。

36. Within the boundaries of contractual law, and if applicable, consumer law, controllers are free to design their business, services and contracts. In some cases, a controller may wish to bundle several separate services or elements of a service with different fundamental purposes, features or rationale into one contract. This may create a ‘take it or leave it’ situation for data subjects who may only be interested in one of the services.

在契約法以及消費者保護法（如適用）之範圍內，控管者得自由設計其業務、服務與契約。某些情形下，控管者可能希望在同一契約中，納入根本目的、特徵或意旨不同的數種獨立服務或服務要素。對於僅對其中一項服務感興趣的當事人而言，這可能造成「全盤接受或全盤拒絕」的局面。

37. As a matter of data protection law, controllers need to take into account that the processing activities foreseen must have an appropriate legal basis. Where the contract consists of several separate services or elements of a service that can in fact reasonably be performed independently of one another, the question arises to which extent Article 6(1)(b) can serve as a legal basis. The applicability of Article 6(1)(b) should be assessed in the context of each of those services *separately*, looking at what is objectively necessary to perform each of the individual services which the data subject has actively requested or signed up for. This assessment may reveal that certain processing activities are not necessary for the individual services requested by the data subject, but rather necessary for the controller’s wider business model. In that case, Article 6(1)(b) will not be a legal basis for those activities. However, other legal bases may be available for that processing, such as Article 6(1)(a) or (f), provided that the relevant criteria are met. Therefore, the assessment of the applicability of Article 6(1)(b) does not affect the legality of the contract or the bundling of services as such.

就資料保護法而言，控管者須考量所預期的運用活動必須具有適當

的法律依據。若契約包含數種不同服務或服務要素，且其事實上可彼此獨立履行，則將產生第6條第1項第b款在何種程度上可作為法律依據之問題。第6條第1項第b款之可適用性應針對各項服務進行個別評估，檢視當事人所請求或同意的各項服務之履行以何者為客觀必要。此一評估可能揭示特定運用活動並非當事人所請求的個別服務所必要，而是為控管者更廣泛的商業模式所必要。此時，第6條第1項第b款並非此等運用活動之法律依據。然而，在滿足相應條件的前提下，可能適用其他法律依據，如第6條第1項第a款或第f款。因此，第6條第1項第b款之可適用性評估並不影響契約或服務捆綁行為本身之合法性。

38. As WP29 has previously observed, the legal basis only applies to what is necessary for the *performance* of a contract.²³ As such, it does not automatically apply to all further actions triggered by non-compliance or to all other incidents in the execution of a contract. However, certain actions can be reasonably foreseen and necessary within a normal contractual relationship, such as sending formal reminders about outstanding payments or correcting errors or delays in the performance of the contract. Article 6(1)(b) may cover processing of personal data which is necessary in relation to such actions.

如第29條工作小組之前所述，本法律依據僅適用於為履行契約所必要²³。因此，其並不自動適用於契約不履行或契約實施過程中的其他事件所引發的一切後續行動。然而，可合理預見特定行為係為正常契約關係所必要，如針對拖欠款項發出正式提醒，或糾正契約履行之錯誤或遲延。第6條第1項第b款可能涵蓋為此等行為所必要之個人資料運用活動。

Example 3

A company sells products online. A customer contacts the company because the colour of the product purchased is different from what was agreed upon. The processing of personal data of the customer for the

²³ Article 29 Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP217) page 17–18.

第29條工作小組「關於指令95/46/EC第7條之資料控管者正當利益概念之意見06/2014」(WP217)，頁17-18。

purpose of rectifying this issue can be based on Article 6(1)(b).

示例3

一家公司在網路上銷售產品。一名消費者因所購產品之顏色不符初始同意而聯絡該公司。為改正此問題而運用該消費者之個人資料，得以第6條第1項第b款為依據。

39. Contractual warranty may be part of performing a contract, and thus storing certain data for a specified retention time after exchange of goods/services/payment has been finalised for the purpose of warranties may be necessary for the performance of a contract.

契約擔保可能是履行契約之一部分，因此，在商品/服務/款項交換完成後，為保固目的而將某些資料保留特定期間，可能係為履行契約所必要。

2.6 Termination of contract

契約之終止

40. A controller needs to identify the appropriate legal basis for the envisaged processing operations before the processing commences. Where Article 6(1)(b) is the basis for some or all processing activities, the controller should anticipate what happens if that contract is terminated.²⁴

在開始運用前，控管者需為所預想的運用活動識別適當法律依據。若第6條第1項第b款係此等運用活動之全部或一部之依據，則控管者應預估契約終止後之狀況²⁴。

41. Where the processing of personal data is based on Article 6(1)(b) and the contract is terminated in full, then as a general rule, the processing of that data will no longer be necessary for the performance of that contract and thus the controller will need to stop processing. The data

²⁴ If a contract is subsequently invalidated, it will impact the lawfulness (as understood in Article 5(1)(a)) of continued processing. However, it does not automatically imply that the choice of Article 6(1)(b) as the legal basis was incorrect.

若契約後來被認定無效，將影響繼續運用（在第5條第1項第a款意義上）的合法性。然而，這並不一定表示選擇以第6條第1項第b款為法律依據是錯誤的。

subject might have provided their personal data in the context of a contractual relationship trusting that the data would only be processed as a necessary part of that relationship. Hence, it is generally unfair to swap to a new legal basis when the original basis ceases to exist.

若個人資料係基於第6條第1項第b款而運用，且契約已完全終止，一般而言，資料運用不再為履行該契約所必要，控管者因此須停止運用。當事人可能在契約關係存續期間，提供其個人資料，信任該等資料之運用將以契約關係之必要部分為限。因此，在原有依據不復存在後，轉換至新的法律依據，通常有失公平。

42. When a contract is terminated, this may entail some administration, such as returning goods or payment. The associated processing may be based on Article 6(1)(b).

契約終止後，可能需進行一些管理，如返還商品或款項。相關運用得以第6條第1項第b款為依據。

43. Article 17(1)(a) provides that personal data shall be erased when they are no longer necessary in relation to the purposes for which they were collected. Nonetheless, this does not apply if processing is necessary for certain specific purposes, including compliance with a legal obligation pursuant to Article 17(3)(b), or the establishment, exercise or defence of legal claims, pursuant to Article 17(3)(e). In practice, if controllers see a general need to keep records for legal purposes, they need to identify a legal basis for this at the outset of processing, and they need to communicate clearly from the start for how long they plan to retain records for these legal purposes after the termination of a contract. If they do so, they do not need to delete the data upon the termination of the contract.

第17條第1項第a款規定，個人資料對蒐集之目的不再必要者，應予以刪除。然而，本款並不適用於係為某些特定目的所必要之運用，包括依第17條第3項第b款遵守法定義務，或依第17條第3項第e款建立、行使或防禦法律上之請求。實際上，若控管者為法律目的而有保存紀錄的需求，其在運用開始時即須識別法律依據，且需自始便明確溝通其在契約終止後為法律目的保存紀錄之預定期間。若依此行事，其無需在契約終止後刪除資料。

44. In any case, it may be that several processing operations with separate purposes and legal bases were identified at the outset of processing. As long as those other processing operations remain lawful and the controller communicated clearly about those operations at the commencement of processing in line with the transparency obligations of the GDPR, it will still be possible to process personal data about the data subject for those separate purposes after the contract has been terminated.

無論如何，運用開始時，可能已識別出數個目的與法律依據各不相同的運用活動。只要該等其他運用活動仍屬合法，且控管者在運用開始時即已依GDPR之透明化義務明確溝通這些活動，則在契約終止後，仍可為其他獨立目的而運用當事人之個人資料。

Example 4

An online service provides a subscription service that can be cancelled at any time. When a contract for the service is concluded, the controller provides information to the data subject on the processing of personal data.

The controller explains, *inter alia*, that as long as the contract is in place, it will process data about the use of the service to issue invoices. The applicable legal basis is Article 6(1)(b) as the processing for invoicing purposes can be considered to be objectively necessary for the performance of the contract. However, when the contract is terminated and assuming there are no pending, relevant legal claims or legal requirements to retain the data, the usage history will be deleted.

Furthermore, the controller informs data subjects that it has a legal obligation in national law to retain certain personal data for accounting purposes for a specified number of years. The appropriate legal basis is Article 6(1)(c), and retention will take place even if the contract is terminated.

示例4

一項線上服務提供可隨時取消之訂閱服務。該服務契約訂立後，控管者向當事人提供運用個人資料之資訊。

控管者解釋，(尤其包括)只要契約存續，其將運用服務使用狀況之資料，以開立發票。可適用之法律依據為第6條第1項第b款，因為開立發票目的可視為履行契約所客觀必要。然而，契約終止後，設若無其他尚未解決之相關法律請求或保存該資料之法律要求，則該使用歷史應予以刪除。

此外，控管者告知當事人依據國內法，其負有為會計目的將特定個人資料保存特定年限之法定義務。可適用之法律依據為第6條第1項第c款，且契約終止後，將繼續保留資料。

2.7 Necessary for taking steps prior to entering into a contract 為締約前採取步驟所必要

45. The second option of Article 6(1)(b) applies where *processing is necessary in order to take steps at the request of the data subject prior to entering into a contract*. This provision reflects the fact that preliminary processing of personal data may be necessary before entering into a contract in order to facilitate the actual entering into that contract.

若運用係締約前應當事人之要求採取步驟所必要，則適用第6條第1項第b款的第二個選項。本條反映出在締約前，為協助實際締約所必要，可能需要初步運用個人資料之事實。

46. At the time of processing, it may not be clear whether a contract will actually be entered into. The second option of Article 6(1)(b) may nonetheless apply as long as the data subject makes the request in the context of *potentially* entering into a contract and the processing in question is necessary to take the steps requested. In line with this, where a data subject contacts the controller to enquire about the details of the controller's service offerings, the processing of the data subject's personal data for the purpose of responding to the enquiry can be based on Article 6(1)(b).

運用時，可能尚不明確能否實際締約。然而，只要當事人在可能締約之情況下提出請求，且運用係為採取請求步驟所必要，即可能適用第6條第1項第b款的第二個選項。因此，若當事人聯絡控管者，詢問控管者服務之細節，為回應該詢問而運用當事人之個人資料，得以第6條第1項第b款為依據。

47. In any case, this provision would not cover unsolicited marketing or other processing which is carried out solely on the initiative of the data controller, or at the request of a third party.

無論如何，本規定不涵蓋主動提供之行銷，或僅由資料控管者主動實施或應第三方請求而實施的其他運用。

Example 5

A data subject provides their postal code to see if a particular service provider operates in their area. This can be regarded as processing necessary to take steps at the request of the data subject prior to entering into a contract pursuant to Article 6(1)(b).

示例5

當事人提供其郵遞區號，以查看某一服務是否在其所在地提供。這可視為第6條第1項第b款之締約前應當事人要求採取步驟所必要之運用。

Example 6

In some cases, financial institutions have a duty to identify their customers pursuant to national laws. In line with this, before entering into a contract with data subjects, a bank requests to see their identity documents.

In this case, the identification is necessary for a legal obligation on behalf of the bank rather than to take steps at the data subject's request. Therefore, the appropriate legal basis is not Article 6(1)(b), but Article 6(1)(c).

示例6

某些情形下，金融機構依其國內法，有義務識別其客戶。因此，在與當事人締約前，銀行可能要求檢視其身分文件。

此時，身分識別乃為銀行負有之法定義務所必要，而非應當事人要求採取步驟。因此，適當之法律依據並非第6條第1項第b款，而是第6條第1項第c款。

3 PART 3 – APPLICABILITY OF ARTICLE 6(1)(B) IN SPECIFIC SITUATIONS

第3部分—特定情境中第6條第1項第b款之可適用性

3.1 Processing for ‘service improvement’²⁵

為「改進服務」而運用²⁵

48. Online services often collect detailed information on how users engage with their service. In most cases, collection of organisational metrics relating to a service or details of user engagement, cannot be regarded as necessary for the provision of the service as the service could be delivered in the absence of processing such personal data. Nevertheless, a service provider may be able to rely on alternative lawful bases for this processing, such as legitimate interest or consent.

線上服務通常蒐集使用者參與其服務之詳細資訊。大多數情況下，蒐集某項服務之組織數據（organisational metric）或使用者參與之詳細資訊，不得視為提供服務所必要，因為即使不運用此等個人資料，亦可提供服務。然而，對於此等運用，服務提供者可能援用其他合法依據，如正當利益或同意。

49. The EDPB does not consider that Article 6(1)(b) would generally be an appropriate lawful basis for processing for the purposes of improving a service or developing new functions within an existing service. In most cases, a user enters into a contract to avail of an existing service. While the possibility of improvements and modifications to a service may routinely be included in contractual terms, such processing usually cannot be regarded as being objectively necessary for the performance of the contract with the user.

對於為改進服務或開發現有服務新功能目的之運用，EDPB並不認為第6條第1項第b款一般可作為適當合法依據。大多數情況下，使用者締約係為了利用現有服務。雖然契約條款往往包括服務之改進與修

²⁵ Online services may also need to take into account Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.05.2019, p. 1), which will apply as from 1 January 2022.

線上服務可能還需考慮歐洲議會與歐盟理事會於2019年5月20日通過之「關於數位內容和數位服務供應契約相關面向之指令(EU) 2019/770」（OJ L 136, 22.05.2019, p. 1），該指令將於2022年1月1日施行。

改，此等運用通常不得視為係為履行與當事人間之契約所客觀必要。

3.2 Processing for ‘fraud prevention’

為「防範詐欺」而運用

50. As WP29 has previously noted,²⁶ processing for fraud prevention purposes may involve monitoring and profiling customers. In the view of the EDPB, such processing is likely to go beyond what is objectively necessary for the performance of a contract with a data subject. However, the processing of personal data strictly necessary for the purposes of preventing fraud may constitute a legitimate interest of the data controller²⁷ and could thus be considered lawful, if the specific requirements of Article 6(1)(f)(legitimate interests) are met by the data controller. In addition Article 6(1)(c) (legal obligation) could also provide a lawful basis for such processing of data.

如第29條工作小組之前所指出²⁶，為防範詐欺目的運用資料可能涉及對消費者的監控與剖析。EDPB認為，此等運用很可能超出為履行與當事人間之契約所客觀必要之範圍。然而，出於防範詐欺目的之絕對必要而運用個人資料，可能構成資料控管者的正當利益²⁷，因此在資料控管者滿足第6條第1項第f款（正當利益）之具體要求時，可能被視為合法。此外，第6條第1項第c款（法定義務）亦可能作為此等資料運用之合法依據。

3.3 Processing for online behavioural advertising

為線上行為廣告而運用

51. Online behavioural advertising, and associated tracking and profiling of data subjects, is often used to finance online services. WP29 has previously stated its view on such processing, stating:

線上行為廣告及其相關之當事人追蹤與剖析，是線上服務獲利之常見方法。第29條工作小組之前曾對此等運用表明觀點，認為：

[contractual necessity] is not a suitable legal ground for building a profile

²⁶ Article 29 Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP217), page 17.

第29條工作小組「關於指令95/46/EC第7條之資料控管者正當利益概念之意見06/2014」（WP217），頁17。

²⁷ See Recital 47, sixth sentence.

見前言第47點，第6句。

*of the user's tastes and lifestyle choices based on his clickstream on a website and the items purchased. This is because the data controller has not been contracted to carry out profiling, but rather to deliver particular goods and services, for example.*²⁸

[契約必要性] 對於「根據使用者在網站上的點擊流與購買品項，對其品味及生活方式建立剖析」，並非適當的法律依據。這是由於資料控管者之契約並非為了實施剖析，而是基於例如提供特定商品和服務之目的²⁸。

52. As a general rule, processing of personal data for behavioural advertising is not necessary for the performance of a contract for online services. Normally, it would be hard to argue that the contract had not been performed because there were no behavioural ads. This is all the more supported by the fact that data subjects have the absolute right under Article 21 to object to processing of their data for direct marketing purposes.

一般而言，為行為廣告而運用個人資料並非履行線上服務契約所必要。通常難以主張未履行契約是因為缺乏行為廣告。更能佐證這一點的事實是，當事人依第21條對為行銷目的的資料運用活動享有絕對拒絕權。

53. Further to this, Article 6(1)(b) cannot provide a lawful basis for online behavioural advertising simply because such advertising indirectly funds the provision of the service. Although such processing may support the delivery of a service, this in itself is not sufficient to establish that it is necessary for the performance of the contract at issue. The controller would need to consider the factors outlined in paragraph 33.

更進一步而言，無法僅因線上行為廣告間接資助服務之提供，而認為第6條第1項第b款為此等廣告提供合法依據。雖然此等運用可能支援服務之提供，這本身並不足以確立此係履行相應契約所必要。控管者需考量第33段所列要素。

54. Considering that data protection is a fundamental right guaranteed by

²⁸ Article 29 Working Party Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP217), page 17.

第29條工作小組「關於指令95/46/EC第7條之資料控管者正當利益概念之意見06/2014」(WP217)，頁17。

Article 8 of the Charter of Fundamental Rights, and taking into account that one of the main purposes of the GDPR is to provide data subjects with control over information relating to them, personal data cannot be considered as a tradeable commodity. Even if the data subject can agree to the processing of personal data,²⁹ they cannot trade away their fundamental rights through this agreement.³⁰

由於資料保護乃「基本權利憲章」第8條所保障之基本權利，考量GDPR之主要目的之一係賦予當事人對其相關資訊之控制權，個人資料不得被視作可供交易之財貨。當事人雖可同意個人資料之運用²⁹，卻無法透過契約出售其基本權利³⁰。

55. The EDPB also notes that, in line with ePrivacy requirements and the existing WP29 opinion on behavioural advertising,³¹ and Working Document 02/2013 providing guidance on obtaining consent for cookies,³² controllers must obtain data subjects' prior consent to place the cookies necessary to engage in behavioural advertising.

EDPB還指出，依電子隱私要求、現行第29條工作小組關於行為廣告之意見³¹，以及為獲取cookie同意提供指導之工作文件02/2013³²，控管者在為行為廣告而置入所需的cookies時，必須獲得當事人的事前同意。

56. The EDPB also notes that tracking and profiling of users may be carried out for the purpose of identifying groups of individuals with similar

²⁹ See Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

見歐洲議會與歐盟理事會於2019年5月20日通過之「關於數位內容和數位服務供應契約相關面向之指令(EU) 2019/770」。

³⁰ Besides the fact that the use of personal data is regulated by the GDPR, there are additional reasons why processing of personal data is conceptually different from monetary payments. For example, money is countable, meaning that prices can be compared in a competitive market, and monetary payments can normally only be made with the data subject's involvement. Furthermore, personal data can be exploited by several services at the same time. Once control over one's personal data has been lost, that control may not necessarily be regained.

除使用個人資料受GDPR規範之事實外，運用個人資料與金錢給付還因其他原因而存在概念性區別。例如，金錢是可計算的，意即可在競爭市場中比較價格，且金錢給付通常非經當事人參與無法完成。此外，個人資料可供數項服務同時利用。一旦喪失對個人資料之控制，未必能夠重掌控制。

³¹ Article 29 Working Party Opinion 2/2010 on online behavioural advertising (WP171).

第29條工作小組「關於線上行為廣告之意見2/2010」（WP171）。

³² Article 29 Working Party Working Document 02/2013 providing guidance on obtaining consent for cookies (WP208).

第29條工作小組「為獲取cookie同意提供指導之工作文件02/2013」（WP208）。

characteristics, to enable targeting advertising to similar audiences. Such processing cannot be carried out on the basis of Article 6(1)(b), as it cannot be said to be objectively necessary for the performance of the contract with the user to track and compare users' characteristics and behaviour for purposes which relate to advertising to other individuals.³³ EDPB還指出，使用者追蹤和剖析可能係為了識別具有類似特徵的個人群體，以便向類似對象投放定向廣告。實施此等運用不得以第6條第1項第b款為依據，原因在於，為了向他人投放廣告之目的而追蹤和比較多數使用者的特徵與行為，無法解釋為係履行與該使用者間契約所客觀必要³³。

3.4 Processing for personalisation of content³⁴ 為個人化內容而運用³⁴

57. The EDPB acknowledges that personalisation of content may (but does not always) constitute an intrinsic and expected element of certain online services, and therefore may be regarded as necessary for the performance of the contract with the service user in some cases. Whether such processing can be regarded as an intrinsic aspect of an online service, will depend on the nature of the service provided, the expectations of the average data subject in light not only of the terms of service but also the way the service is promoted to users, and whether the service can be provided without personalisation. Where personalisation of content is not objectively necessary for the purpose of the underlying contract, for example where personalised content delivery is intended to increase user engagement with a service but is not an integral part of using the service, data controllers should consider an alternative lawful basis where applicable.

³³ See also Article 29 Working Party Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 (WP251rev.01), endorsed by the EDPB, page 13.

另見第29條工作小組「關於第2016/679號規則（GDPR）中的自動化個人決策和剖析之指引」（WP251rev.01），EDPB採認，頁13。

³⁴ Online services may also need to take into account Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (OJ L 136, 22.05.2019, p. 1), which will apply as from 1 January 2022.

線上服務可能還需考慮歐洲議會與歐盟理事會於2019年5月20日通過之「關於數位內容和數位服務供應契約相關面向之指令(EU) 2019/770」（OJ L 136, 22.05.2019, p. 1），該指令將於2022年1月1日施行。

EDPB承認，個人化內容可能（但並非總是）構成特定線上服務一項被期待的本質要素，因此可能在某些情形下被視為履行與服務使用者間契約所必要。此等運用能否被視為某一線上服務的本質面向之一，取決於所提供服務之性質、一般當事人的期待（不僅考量服務條款，還考量服務如何推銷給使用者），以及該服務能否不經個人化而提供。若個人化內容並非該契約目的所客觀必要，如個人化內容之目的係為了增進使用者對服務之參與，而非利用該服務所不可或缺之一部分，資料控管者應考量其他可適用之合法依據。

Example 7

An online hotel search engine monitors past bookings of users in order to create a profile of their typical expenditure. This profile is subsequently used to recommend particular hotels to the user when returning search results. In this case, profiling of user's past behaviour and financial data 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. Therefore, Article 6(1)(b) would not be applicable to this processing activity.

示例7

一家線上旅館搜尋引擎監控使用者的訂房紀錄，以剖析其通常消費。此等剖析結果隨後被用於在搜尋結果中向使用者推薦特定旅館。這種情形下，剖析使用者的過往行為與財務資料並非履行契約所客觀必要，也就是該契約係依使用者提供之搜尋條件提供餐旅服務。因此，第6條第1項第b款不適用於此等運用行為。

Example 8

An online marketplace allows potential buyers to browse for and purchase products. The marketplace wishes to display personalised product suggestions based on which listings the potential buyers have previously viewed on the platform in order to increase interactivity. This personalisation it is not objectively necessary to provide the marketplace service. Thus, such processing of personal data cannot rely on Article 6(1)(b) as a legal basis.

示例8

一家線上購物平台允許潛在買家瀏覽和購買產品。該平台希望依據潛在買家在該平台上已瀏覽過的商品，提供個人化的產品建議，以便提升互動性。這種個人化非為提供購物平台服務所客觀必要。因此，個人資料之此等運用不得以第6條第1項第b款為法律依據。