

Guidelines



Guidelines 2/2018 on the derogations of Article 49 under
Regulation 2016/679
關於第 2016/679 號規則(GDPR)第 49 條的例外情形之指引 2/2018

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本文擷取自國家發展委員會委託達文西個資暨高科技法律事務所執行之「GDPR 相關指引文件研析」委託研究計畫結案報告，完整全文請至：https://www.ndc.gov.tw/News_Content.aspx?n=B7C121049B631A78&sms=FB990C08B596EA8A&s=97C7AD99A362EF7A。

Contents 目錄

1. GENERAL 總論	4
2. SPECIFIC INTERPRETATION OF THE PROVISIONS OF ARTICLE 49	
第 49 條規定之具體解釋.....	11
2.1 The data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards - Article (49 (1) (a)) 第 49 條第 1 項第 a 款 – 當事人在被告知由於缺乏適足性認定和適當安全維護措施而導致資料傳輸對當事人可能造成的風險後，明確同意所計劃之傳輸.....	11
2.1.1 Consent must be explicit 同意必須明確	12
2.1.2 Consent must be specific for the particular data transfer/set of transfers 針對特定資料傳輸/系列傳輸需給予明確同意	13
2.1.3 Consent must be informed particularly as to the possible risks of the transfer 同意必須為知情的，尤其是關於傳輸可能造成之風險	14
2.2 Transfer necessary for the performance of a contract between the data subject and the controller or for the implementation of precontractual measures taken at the data subject's request – (49(1)(b)) 第 49 條第 1 項第 b 款 – 傳輸對履行當事人與控管者間契約、或依當事人之請求執行契約前措施為必要.....	16
2.3 Transfer necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person - (49 (1) (c)) 第 49 條第 1 項第 c 款 – 傳輸對締結或履行控管者與其他自然人或法人間，基於當事人之利益所締結之契約為必要.....	19
2.4 Transfer is necessary for important reasons of public interest - (49 (1) (d)) 第 49 條第 1 項第 d 款 – 傳輸因公共利益之重要原因為必要.....	21
2.5 Transfer is necessary for the establishment, exercise or defense of legal claims - (49 (1) (e)) 第 49 條第 1 項第 e 款 – 傳輸對建構、行使或防禦法律上之請求為必要.....	24
2.6 Transfer necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent – (49 (1) (f)) 第 49 條第 1 項第 f 款 – 於當事人身體上或法律上無法為同意之表示時，傳輸對保護當事人或其他人之重大利益為必要.....	27
2.7. Transfer made from a public register - (49 (1) (g) and 49 (2)) 第 49 條第 1 項第 g 款及第 49 條第 2 項 – 由公眾登記處所為之傳輸.....	30

2.8. Compelling legitimate interests – (49 (1) § 2) 第 49 條第 1 項第 2 段 – 必要 正當利益.....	32
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The European Data Protection Board

Having regard to Article 70 (1j) and (1e) of the 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 FOLLOWING GUIDELINES:

歐洲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 日通過之歐盟 2016/679/EU 號規則（即 GDPR）第 70 條第 1 項第 j 款及第 e 款，有鑒於在運用（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」) 個人資料時對自然人之保護與確保該資料之自由流通，以及指令 95/46 / EC 之廢除，

通過以下指引：

1. GENERAL 總論

This document seeks to provide guidance as to the application of Article 49 of the General Data Protection Regulation (GDPR)¹ on derogations in the context of transfers of personal data to third countries.

本指引旨在就一般資料保護規則 (GDPR)¹ 第 49 條傳輸個人資料至第三國之例外情形提供指導。

The document builds on the previous work² done by the Working Party of EU Data Protection Authorities established under Article 29 of the Data Protection Directive (the WP29) which is taken over by the European Data Protection Board (EDPB) regarding central questions raised by the application of derogations in the context of transfers of personal data to third countries. This document will be reviewed and if

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). 2016 年 4 月 27 日歐洲議會和歐盟理事會在個人資料運用上為保護自然人與確保該資料之自由流通，制定第 2016/679 號規則 (EU)，並廢除第 95/46 / EC 號指令 (一般資料保護規則)。

necessary updated, based on the practical experience gained through the application of the GDPR.

本指引建立在依個人資料保護指令第 29 條所成立之歐盟第 29 條工作小組 (WP29) (該小組由歐洲個人資料保護委員會 (EDPB) 取代) 先前建構之基礎上²，適用於申請傳輸個人資料至第三國之例外情形。本文件將依據適用 GDPR 所得之實際經驗進行檢討，並在必要時更新。

When applying Article 49 one must bear in mind that according to Article 44 the data exporter transferring personal data to third countries or international organizations must also meet the conditions of the other provisions of the GDPR. Each processing activity must comply with the relevant data protection provisions, in particular with Articles 5 and 6. Hence, a two-step test must be applied: first, a legal basis must apply to the data processing as such together with all relevant provisions of the GDPR; and as a second step, the provisions of Chapter V must be complied with.

在適用第 49 條時需注意，依據第 44 條，當資料輸出者將個人資料傳送至第三國或國際組織時，也必須符合 GDPR 其他條文之要件。每項運用活動必須符合相關資料保護規定，特別是有關第 5 條和第 6 條之規定。因此，須採行二步驟的分析方式：第一，資料運用的法源依據需符合 GDPR 所有相關條文規定；第二，需遵守第五章之規定。

Article 49 (1) states that in the absence of an adequacy decision or of appropriate safeguards, a transfer or a set of transfers of personal data to a third country or an international organization shall take place only under certain conditions. At the same time, Article 44 requires all provisions in Chapter V to be applied in such a way as to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined. This also implies that recourse to the derogations of Article 49 should never lead to a situation where fundamental rights might be breached.³

第 49 條第 1 項規定，在沒有適足性認定或適當安全維護措施的情況下，一次傳輸或一系列傳輸個人資料至第三國或國際組織，需符合一定之要件。同時，第 44

² Article 29 Working Party, Working Document on a common interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, November 25, 2005 (WP114).

29 條工作小組，依 1995 年 10 月 24 日第 95/46 / EC 號指令對第 26 條第 1 項所作共同解釋工作文件，2005 年 11 月 25 日 (WP114)。

條要求適用第五章所有規定，需確保 GDPR 所保障之自然人保護程度不受減損。這也意味著訴諸第 49 條之例外情形不得導致可能違反基本權利之情事³。

The WP29, as predecessor of the EDPB, has long advocated as best practice a layered approach to transfers of considering first whether the third country provides an adequate level of protection and ensuring that the exported data will be safeguarded in the third country. If the level of protection is not adequate in light of all the circumstances, the data exporter should consider providing adequate safeguards. Hence, data exporters should first endeavor possibilities to frame the transfer with one of the mechanisms included in Articles 45 and 46 GDPR, and only in their absence use the derogations provided in Article 49 (1).

作為 EDPB 的前身，29 條工作小組長期以來一直主張以階層式方法評估傳輸為最佳實務做法⁴。首先需考量第三國是否可提供充足的保護，並確保被傳輸之資料在第三國得到保障。若在所有情況下，皆缺乏充足程度之保護時，資料輸出者應考量提供充分的安全維護措施。因此，資料輸出者應首先致力於依照 GDPR 第 45 條和第 46 條之機制來建構傳輸的可能性，且僅有在欠缺其要件的情形下，始可適用第 49 條第 1 項之例外情形。

Therefore, derogations under Article 49 are exemptions from the general principle that personal data may only be transferred to third countries if an adequate level of protection is provided for in the third country or if appropriate safeguards have been adduced and the data subjects enjoy enforceable and effective rights in order to continue to benefit from their fundamental rights and safeguards.⁵ Due to this fact and in accordance with the principles inherent in European law,⁶ the derogations must be interpreted restrictively so that the exception does not become the rule.⁷ This is also supported by the wording of the title of Article 49 which states that derogations are to be used for specific situations (“Derogations for specific situations”).

因此，第 49 條之例外情形係對一般原則之免除。一般原則係指個人資料之傳輸僅得發生在當第三國可提供充足程度之保護，或資料輸出者可提供適當安全維護措施，及當事人享有可執行且有效的權利，以便得以持續受益於其基本權利和保障。

³ Article 29 Working Party, WP 114, p.9, and Article 29 Working Party Working Document on surveillance of electronic communications for intelligence and national security purposes (WP228), p.39. 29 條工作小組，WP114，第 9 頁和 29 條工作小組有關為情報和國家安全目所為之監視電子通信工作文件（WP228），第 39 頁。

⁴ Article 29 Working Party, WP114, p.9. 29 條工作小組，WP114，第 9 頁。

⁵依據此一事實與歐洲法律的既有原則⁶，例外情形須限縮解釋，才不致使例外成為規則。⁷第 49 條標題的用詞也支持此一論點，該條規定了例外適用的特定情形（「特定情形下之例外」）。

When considering transferring personal data to third countries or international organizations, data exporters should therefore favour solutions that provide data subjects with a guarantee that they will continue to benefit from the fundamental rights and safeguards to which they are entitled as regards processing of their data once this data has been transferred. As derogations do not provide adequate protection or appropriate safeguards for the personal data transferred and as transfers based on a derogation are not required to have any kind of prior authorisation from the supervisory authorities, transferring personal data to third countries on the basis of derogations leads to increased risks for the rights and freedoms of the data subjects concerned.

因此，在考量將個人資料傳輸到第三國或國際組織時，資料輸出者應該採行得為當事人提供保護之解決方式，即確保一旦資料被傳輸，當事人將繼續受益於其與資料運用相關之基本權利和保障。由於例外情形不能為傳輸之個人資料提供充足之保護或適當的安全維護措施，並且基於例外之傳輸不需要得到監管機關任何形式的事先授權，因此，依據例外情形將個人資料傳輸至第三國將導致當事人權利和自由的風險增加。

⁵ Recital 114.

前言第 114 點。

⁶ Article 29 Working Party, WP114, p.7.

29 條工作小組，WP114，第 7 頁。

⁷ See already Article 29 Working Party, WP114, pg. 7. The European Court of Justice repeatedly underlined that “the protection of the fundamental right to respect for private life at EU level requires that derogations from and limitations on the protection of personal data should apply only in so far as is strictly necessary” (judgments of 16 December 2008, Satakunnan Markkinapörssi and Satamedia, C 73/07, paragraph 56; of 9 November 2010, Volker und Markus Schecke and Eifert, C 92/09 and C 93/09, paragraph 77; the Digital Rights judgment, paragraph 52, and of 6 October 2015, Schrems, C 362/14, paragraph 92, and of 21 December 2016, Tele2 Sverige AB, C 203/15, paragraph 96). See also report on the Additional Protocol to Convention 108 on the control authorities and cross border flows of data, Article 2(2) (a), p.6 accessible at

<https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/181.1>)

請參照 29 條工作小組，WP114，第 7 頁。歐洲法院一再強調，「在歐盟體制下，基於保護尊重私生活的基本權利，個人資料保護之例外和限制僅在嚴格必要之情況始得適用」。(2008 年 12 月 16 日判決，Satakunnan Markkinapörssi 和 Satamedia，C 73/07，第 56 段；2010 年 11 月 9 日判決，Volker 和 Markus Schecke 和 Eifert，C 92/09 及 C 93/09，第 77 段；數位權利判決第 52 段和 2015 年 10 月 6 日判決，Schrems，C 362/14，第 92 段；和 2016 年 12 月 21 日判決，Tele2 Sverige AB，C 203/15，第 96 段)。另請參照關於控管當局和跨境資訊傳輸第 108 號公約附加協議之報告，第 2 條第 2 項第 a 款，第 6 頁，可查閱 <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/181.1>)

Data exporters should also be aware that, in the absence of an adequacy decision, Union or Member State law may, for important reasons of public interest, expressly limit transfers of specific categories of personal data to a third country or an international organization (Article 49 (5)).

資料輸出者另需注意，在無適足性認定的情況下，基於公共利益之重要原因，歐盟或其成員國的法律可明確限制特定類別個人資料傳輸至第三國或國際組織。(第 49 條第 5 項)。

Occasional and not repetitive transfers

非經常性且非重複性之傳輸

The EDPB notes that the term “occasional” is used in recital 111 and the term “not repetitive” is used in the “compelling legitimate interests” derogation under Article 49 par. 1 §2. These terms indicate that such transfers may happen more than once, but not regularly, and would occur outside the regular course of actions, for example, under random, unknown circumstances and within arbitrary time intervals. For example, a data transfer that occurs regularly within a stable relationship between the data exporter and a certain data importer can basically be deemed as systematic and repeated and can therefore not be considered occasional or not-repetitive. Besides, a transfer will for example generally be considered to be non-occasional or repetitive when the data importer is granted direct access to a database (e.g. via an interface to an IT-application) on a general basis.

EDPB 指出，「非經常性」一詞用於前言第 111 點，「非重複性」一詞用於第 49 條第 1 項第 2 段例外情形下強調之「必要正當利益」。這些用詞表示此類傳輸雖可能不只發生一次，但非經常性，且需發生在常規的活動外，例如，在隨機、未知的情況下以及在任意的時間間隔內。例如，在資料輸出者和資料輸入者間的穩定關係中，定期發生之資料傳輸，基本上即可被視為是有系統且重複之傳輸行為，因此不得被當作是非經常性或非重複之傳輸。此外，當資料輸入者在通常情況下有權限直接存取資料庫（例如，透過 IT 應用程式之介面），資料之傳輸一般會被視為係經常性且反覆之行為。

Recital 111 differentiates among the derogations by expressly stating that the “contract” and the “legal claims” derogations (Article 49 (1) subpar. 1 (b), (c) and (e)) shall be limited to “occasional” transfers, while such limitation is absent from the “explicit consent derogation”, the “important reasons of public interest derogation”, the “vital

interests derogation” and the “register derogation” pursuant to Article 49 (1) subpar. 1 (a), (d), (f) and, respectively, (g).

為區分例外情形，雖然前言第 111 點明確表示基於「契約」和「法律上主張」之例外（第 49 條第 1 項第 b、c 和 e 款）僅限於「非經常性」之傳輸，但「明確同意例外」、「公共利益重要原因例外」、「重大利益例外」和「登記例外」（第 49 條第 1 項第 a、d、f 和 g 款）皆無此類限制。

Nonetheless, it has to be highlighted that even those derogations which are not expressly limited to “occasional” or “not repetitive” transfers have to be interpreted in a way which does not contradict the very nature of the derogations as being exceptions from the rule that personal data may not be transferred to a third country unless the country provides for an adequate level of data protection or, alternatively, appropriate safeguards are put in place.⁸

然而，仍須強調，即使上揭例外情形並未明確限於「非經常性」或「非重複性」之傳輸，此些條款仍須以不與例外本質矛盾之方式解釋，意即原則上不得將資料傳輸至第三國，除非該第三國對個人資料提供充足程度保護或以適當安全維護措施替代。⁸

Necessity test

必要性判斷

One overarching condition for the use of several derogations is that the data transfer has to be “necessary” for a certain purpose. The necessity test should be applied to assess the possible use of the derogations of Articles 49 (1) (b), (c), (d), (e) and (f). This test requires an evaluation by the data exporter in the EU of whether a transfer of personal data can be considered necessary for the specific purpose of the derogation to be used. For more information on the specific application of the necessity test in each of the concerned derogations, please refer to the relevant sections below.

數項引用例外情形之首要條件，係資料之傳輸就其特定目的而言是「必要」的。在評估第 49 條第 1 項第 b、c、d、e 及 f 款例外情形時，需考量必要性之要件。此要件要求位於歐盟之資料輸出者需評估，個人資料之傳輸對於為達到例外情形中之特殊目的是否為必要。有關必要性要件對每一例外情形之具體應用，請參閱以下相關章節。

⁸ 原文即無文字呈現。

Article 48 in relation to derogations

第 48 條與例外情形之關聯

The GDPR introduces a new provision in Article 48 that needs to be taken into account when considering transfers of personal data. Article 48 and the corresponding recital 115 provide that decisions from third country authorities, courts or tribunals are not in themselves legitimate grounds for data transfers to third countries. Therefore, a transfer in response to a decision from third country authorities is in any case only lawful, if in line with the conditions set out in Chapter V.⁹

在考慮傳輸個人資料時，需將 GDPR 在第 48 條中引入的新規定納入考量。第 48 條和相對應之前言第 115 點規定，第三國行政機關、法院或法庭之決定本身不得作為向該國傳輸資料的正當理由。因此，僅有在符合第五章之規定時，依據第三國機關決定而進行之傳輸始為合法。⁹

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

在有國際協定的情況下，例如司法互助協定（MLAT），歐盟公司通常應拒絕直接請求，並將現有的司法互助協定或其他協定介紹給請求之第三國機關。

This understanding also closely follows Article 44, which sets an overarching principle applying to all provisions of Chapter V, in order to ensure that the level of protection of natural persons guaranteed by the GDPR is not undermined.

上述理解也符合第 44 條之規範，該條設立了適用於第五章所有規定之總體原則，以確保不減損 GDPR 對自然人權利保障之程度。

⁹ See Recital 115 sentence 4.
參照前言第 115 點，第 4 句。

2. SPECIFIC INTERPRETATION OF THE PROVISIONS OF ARTICLE 49

2. 第 49 條規定之具體解釋

2.1 The data subject has explicitly consented to the proposed transfer, after having been informed of the possible risks of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards - Article (49 (1) (a))

2.1 第 49 條第 1 項第 a 款 – 當事人在被告知由於缺乏適足性認定和適當安全維護措施而導致資料傳輸對當事人可能造成的風險後，明確同意所計劃之傳輸

The general conditions for consent to be considered as valid are defined in Articles 4 (11)¹⁰ and 7 of the GDPR¹¹. The WP29 provides guidance on these general conditions for consent in a separate document, which is endorsed by the EDPB.¹² These conditions also apply to consent in the context of Article 49 (1) (a). However, there are specific, additional elements required for consent to be considered a valid legal ground for international data transfers to third countries and international organizations as provided for in Article 49 (1) (a), and this document will focus on them.

GDPR 第 4 條第 11 款¹⁰和第 7 條¹¹對同意之定義被認為是有效之一般要件。29 條工作小組在另一份文件中提供對同意一般要件之指引，該文件已獲 EDPB 認可。¹² 此一般要件適用於第 49 條第 1 項第 a 款範圍內之同意。然而，依據第 49 條第 1 項第 a 款規定，若欲將同意作為向第三國和國際組織傳輸資料之有效法律依據，則尚需符合其他具體要件，本文件將側重於此些要件。

Therefore, this section (1) of the present guidelines shall be read in conjunction with the WP29 guidelines on consent, endorsed by the EDPB, which provide a more detailed analysis on the interpretation of the general conditions and criteria of consent under the GDPR.¹³ It should also be noted that, according to Article 49 (3), public authorities are not able to rely on this derogation in the exercise of their public powers. 因此，本章節（1）應與 EDPB 所認可之 29 條工作小組的同意指引一併閱讀，該

¹⁰ According to Article 4(11) of the GDPR, 'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.

依據 GDPR 第 4 條第 11 款，當事人之「同意」係指當事人為表達同意運用與其有關之個人資料，藉由聲明或清楚肯定之行動而自由給予之特定、知情及非模糊之意思表示。

¹¹ Also recitals 32, 33, 42 and 43 give further guidance on consent.

有關同意之進一步闡釋，請參照前言第 32 點、33 點、42 點和 43 點。

¹² See Article 29 Working Party Guidelines on Consent under Regulation 2016/679 (WP259).

參照 29 條工作小組依據第 2016/679 號規則簽署之同意指引（WP259）。

文件對 GDPR 中同意的一般要件和標準的解釋，提供了更詳細的分析。¹³ 另需注意，依據第 49 條第 3 項，公務機關在行使其公權力時不適用此例外規定。

Article 49 (1) (a) states that a transfer of personal data to a third country or an international organization may be made in the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, including binding corporate rules, on the condition that ‘the data subject has *explicitly consented* to the proposed transfer, *after having been informed of the possible risks* of such transfers for the data subject due to the absence of an adequacy decision and appropriate safeguards’.

第 49 條第 1 項第 a 款規定，於欠缺第 45 條第 3 項之適足性認定，或欠缺第 46 條之適當安全維護措施時，包括有拘束力之企業守則，傳輸個人資料至第三國或國際組織需符合「當當事人已被告知因欠缺適足性認定及適當安全維護措施可能對自身造成之風險後，已明確同意所計劃之傳輸」。

2.1.1 Consent must be explicit

2.1.1 同意必須明確

According to Article 4 (11) of the GDPR, any consent should be freely given, specific, informed and unambiguous. On this very last condition, Article 49 (1) (a) is stricter as it requires “explicit” consent. This is also a new requirement in comparison to Article 26 (1) (a) of Directive 95/46/EC, which only required “unambiguous” consent. The GDPR requires explicit consent in situations where particular data protection risks may emerge, and so, a high individual level of control over personal data is required, as is the case for the processing of special category data (Article 9 (2) (a)) and automated decisions (Article 22 (2) (c)). Such particular risks also appear in the context of international data transfers.

依據 GDPR 第 4 條第 11 款之規定，任何同意都應該是自由給予、特定的、知情的和非模糊的。在最後一個要件下，第 49 條第 1 項第 a 款規定更為嚴格，因為該條要求同意必須「明確」。與指令 95/46 / EC 第 26 條第 1 項第 a 款相較，明確同意亦是一項新要求，因該指令僅要求同意需「不模糊」。GDPR 要求在可能出現特殊資料保護風險，因而需要對個人資料有更高度之個別控制水平時，同意必須

¹³ Idem.
同上。

明確，例如在運用特殊類別資料（第 9 條第 2 項第 a 款）和自動化決策（第 22 條第 2 項第 c 款）的情形。此種特殊風險也存在於國際資料傳輸的情形。

For further guidance on the requirement of explicit consent, and for the other applicable requirements needed for consent to be considered valid, please refer to the WP29's Guidelines on Consent which are endorsed by the EDPB.¹⁴

有關明確同意要求的進一步指導，以及有效同意所需要的其他適用要求，請參閱由 EDPB 認可之 29 條工作小組的同意指引。¹⁴

2.1.2 Consent must be specific for the particular data transfer/set of transfers

2.1.2 針對特定資料傳輸/系列傳輸需給予明確同意

One of the requirements of valid consent is that it must be specific. In order to constitute a valid ground for a data transfer pursuant to Article 49 (1) (a), hence, consent needs to be specifically given for the particular data transfer or set of transfers. 同意必須特定係有效同意的要件之一。因此，為構成第 49 條第 1 項第 a 款進行資料傳輸的有效理由，針對特定的資料傳輸或系列傳輸，必須提供明確的同意。

The element “specific” in the definition of consent intends to ensure a degree of user control and transparency for the data subject. This element is also closely linked with the requirement that consent should be “informed”.

同意定義中的「特定」要件旨在確保當事人一定程度的用戶控制權和透明化。此要件與同意中「知情」之要求密切相關。

Since consent must be specific, it is sometimes impossible to obtain the data subject's prior consent for a future transfer at the time of the collection of the data, e.g. if the occurrence and specific circumstances of a transfer are not known at the time consent is requested, the impact on the data subject cannot be assessed. As an example, an EU company collects its customers' data for a specific purpose (delivery of goods) without considering transferring this data, at that time, to a third party outside the EU. However, some years later, the same company is acquired by a non-EU company which wishes to transfer the personal data of its customers to another company outside the EU. In order for this transfer to be valid on the grounds of the consent derogation, the data subject should give his/her consent for this specific transfer at the time when the transfer is

¹⁴ Idem.
同上。

envisaged. Therefore, the consent provided at the time of the collection of the data by the EU company for delivery purposes is not sufficient to justify the use of this derogation for the transfer of the personal data outside the EU which is envisaged later. 由於同意必須特定，因此有時無法在蒐集資料時獲得當事人事先同意將來的傳輸，例如，若在要求同意時無法明確知悉傳輸的發生和具體情況，則無法評估對當事人的影響。例如，歐盟公司為特定目的（交付貨品）蒐集客戶資料時，並未考慮將此資料傳輸至歐盟以外之第三國。然而，幾年後，同一家公司被一家非歐盟公司收購，該公司希望將其客戶的個人資料傳輸至歐盟以外的另一家公司。為使該傳輸符合同意之例外情形而為有效，當事人須對預期之特定傳輸表示同意。因此，當事人因貨品交付而同意歐盟公司對其個資之蒐集，不足以合理化其基於例外而事後傳輸個人資料至歐盟境外之情形。

Therefore, the data exporter must make sure to obtain specific consent before the transfer is put in place even if this occurs after the collection of the data has been made. This requirement is also related to the necessity for consent to be informed. It is possible to obtain the specific consent of a data subject prior to the transfer and at the time of the collection of the personal data as long as this specific transfer is made known to the data subject and the circumstances of the transfer do not change after the specific consent has been given by the data subject. Therefore the data exporter must make sure that the requirements set out in section 1.3 below are also complied with.

因此，資料輸出者必須確保在傳輸前獲得當事人對傳輸的特定同意，即使該傳輸發生在資料蒐集之後。此項要求與同意中知情的必要性相關。只要當事人知悉該特定傳輸且傳輸的情況在當事人為特定同意後並無改變，即有可能在資料傳輸之前和蒐集個人資料時獲得當事人對傳輸之特定同意。因此，資料輸出者必須亦確保符合以下第 1.3 節中規定之要求。

2.1.3 Consent must be informed¹⁵ particularly as to the possible risks of the transfer

2.1.3 同意必須為知情的¹⁵，尤其是關於傳輸可能造成之風險

This condition is particularly important since it reinforces and further specifies the general requirement of “informed” consent as applicable to any consent and laid down in Art. 4 (11).¹⁶ As such, the general requirement of “informed” consent, requires, in

¹⁵ The general transparency requirements of Articles 13 and 14 of the GDPR should also be complied with. For more information see Guidelines on transparency under Regulation 2016/679 (WP 260). 亦須遵守 GDPR 第 13 條和第 14 條的一般透明化要求。更多資訊請參閱第 2016/679 號規則透明化指引（WP 260）。

the case of consent as a lawful basis pursuant to Article 6(1) (a) for a data transfer, that the data subject is properly informed in advance of the specific circumstances of the transfer, (i.e. the data controller's identity, the purpose of the transfer, the type of data, the existence of the right to withdraw consent, the identity or the categories of recipients).¹⁷

此要件之重要性在於其強化並進一步說明了適用於第 4 條第 11 款同意的一般要求中，規範任何同意必須為「知情」的同意。¹⁶ 因此，「知情」同意的一般要求，在依據第 6 條第 1 項第 a 款以同意作為進行資料傳輸的合法基礎情況下，要求當事人在特定傳輸情況之前獲得適當的通知（即資料控管者之身分、傳輸之目的、資料的類型、撤回同意的權利以及資料接收者之身分或類別）。¹⁷

In addition to this general requirement of “informed” consent, where personal data are transferred to a third country under Article 49 (1) (a), this provision requires data subjects to be also informed of the specific risks resulting from the fact that their data will be transferred to a country that does not provide adequate protection and that no adequate safeguards aimed at providing protection for the data are being implemented. The provision of this information is essential in order to enable the data subject to consent with full knowledge of these specific facts of the transfer and therefore if it is not supplied, the derogation will not apply.

除了「知情」同意的一般要求外，依據第 49 條第 1 項第 a 款規定將個人資料傳輸至第三國，當該第三國無法對個人資料提供充足保護且無針對傳輸資料提供適當安全維護措施時，該條款要求當事人應被告知該傳輸之具體風險。為了使當事人在完全了解傳輸的具體事實下行使其同意，此資訊中之條款至關重要，因此，若無法提供此資訊，則例外情形不適用。

The information provided to data subjects in order to obtain consent for the transfer of their personal data to third parties established in third countries should also specify all data recipients or categories of recipients, all countries to which the personal data are being transferred to, that the consent is the lawful ground for the transfer, and that the third country to which the data will be transferred does not provide for an adequate level of data protection based on a European Commission decision.¹⁸ In addition, as mentioned above, information has to be given as to the possible risks for the data

¹⁶ See Article 29 Working Party Guidelines on Consent under Regulation 2016/679 (WP259). 請參閱 29 條工作小組第 2016/679 號規則同意指引（WP 259）。

¹⁷ *Idem*, page 13
同上，第 13 頁。

subject arising from the absence of adequate protection in the third country and the absence of appropriate safeguards. Such notice, which could be standardized, should include for example information that in the third country there might not be a supervisory authority and/or data processing principles and/or data subject rights might not be provided for in the third country.

為了獲得當事人同意將個人資料傳輸至設立於第三國之第三方而提供之資訊，應詳細指明所有資料接收者或接收者之類別、所有個人資料擬傳輸之國家、同意是傳輸的合法依據、以及資料傳輸至之第三國並未根據歐盟執委會的決議提供充足程度的資料保護。¹⁸此外，如上所述，資訊亦須包含有關當事人因第三國缺乏充足保護以及缺乏適當安全維護措施而可能存在之風險。此類可被標準化之通知應包括例如在該第三國可能沒有監管機關、和/或資料運用原則、和/或第三國可能無法提供當事人權利等資訊。

In the specific case where a transfer is performed after the collection of personal data from the data subject has been made, the data exporter should inform the data subject of the transfer and of its risks before it takes place so as to collect his explicit consent to the “proposed” transfer.

在從當事人蒐集個人資料後始進行傳輸的特定情形下，資料輸出者應在資料傳輸發生前告知當事人該傳輸及風險，並獲得其對此「計劃」之傳輸明確的同意。

As shown by the analysis above, the GDPR sets a high threshold for the use the derogation of consent. This high threshold, combined with the fact that the consent provided by a data subject can be withdrawn at any time, means that consent might prove not to be a feasible long term solution for transfers to third countries.

如上所示，GDPR 對例外情形下之同意設立很高的門檻。此一高門檻，再加上當事人可隨時撤回其同意之事實，意味著同意可能不是傳輸資料至第三國之可行長期解決方案。

2.2 Transfer necessary for the performance of a contract between the data subject and the controller or for the implementation of precontractual measures taken at the data subject's request – (49(1)(b))

2.2 第 49 條第 1 項第 b 款 – 傳輸對履行當事人與控管者間契約、或依當事人之

¹⁸ The last mentioned requirement also stems from the duty to inform the data subjects (Article 13(1)(f), Article 14(1)(e)).

最後提及之要件亦源於向當事人提供資訊之義務(第 13 條第 1 項第 f 款和第 14 條第 1 項第 e 款)。

請求執行契約前措施為必要

In view of recital 111, data transfers on the grounds of this derogation may take place “where the transfer is *occasional* and *necessary* in relation to a contract (...)”¹⁹

依據前言第 111 點，基於這種例外之資料傳輸可能發生在當「傳輸*非經常性*且基於契約有所*必要*（.....）」。¹⁹

In general, although the derogations relating to the performance of a contract may appear to be potentially rather broad, they are being limited by the criteria of “*necessity*” and of “*occasional transfers*”.

一般而言，雖然與履行契約相關之例外情形似乎相當廣泛，但仍受到「*必要性*」和「*非經常性傳輸*」之標準限制。

Necessity of the data transfer

資料傳輸之必要性

The “*necessity test*”²⁰ limits the number of cases in which recourse can be made to Article 49 (1) (b).²¹ It requires a close and substantial connection between the data transfer and the purposes of the contract.

「*必要性判斷*」²⁰ 限制了可訴諸第 49 條第 1 項第 b 款的案件數量。²¹ 該條款要求資料傳輸與契約目的之間存在密切且實質的關聯。

This derogation cannot be used for example when a corporate group has, for business purposes, centralized its payment and human resources management functions for all its staff in a third country as there is no direct and objective link between the performance of the employment contract and such transfer.²² Other grounds for transfer as provided for in Chapter V such as standard contractual clauses or binding corporate rules may, however, be suitable for the particular transfer.

例如，當企業集團為了營業目的而將所有員工的(薪資)給付和人力資源管理的功

¹⁹ The criterion of “occasional” transfers is found in recital 111 and applies to the derogations of Article 49 (1) (b), (c) and (e).

「非經常性」移轉之標準見於前言第 111 點，並適用於第 49 條第 1 項第 b、c 和 e 款之例外情形。

²⁰ See also 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 (WP 217).

請另參閱 29 條工作小組意見 06/2014，有關資料控管者依據指令 95/46 / EC (WP 217) 第 7 條的正當利益概念。

²¹ The “necessity” requirement also can be found in the derogations set forth in Article 49 (1) (c) to (f).

「必要性」要求亦規範於第 49 條第 1 項第 c 至 f 款之例外情形。

能集中於第三國處理時，即不適用此類型之例外情形，因為僱傭契約的履行與資料傳輸之間並無直接和客觀的關聯。²² 然而，第五章規定的其他傳輸理由，如標準契約條款或具有約束力的企業守則，則可適用於此特定傳輸。

On the other hand, the transfer by travel agents of personal data concerning their individual clients to hotels or to other commercial partners that would be called upon in the organization of these clients' stay abroad can be deemed necessary for the purposes of the contract entered into by the travel agent and the client, since, in this case, there is a sufficient close and substantial connection between the data transfer and the purposes of the contract (organization of clients' travel).

另一方面，旅遊業者為安排其客戶在國外旅行，將有關客戶的個人資料傳輸至酒店或其他可能拜會的商業合作夥伴，此傳輸行為可被視為履行旅遊業者和客戶間之契約所必須，因為在此種情形下，資料傳輸與契約目的（客戶旅遊的安排）之間存在足夠密切且實質的關聯。

This derogation cannot be applied to transfers of additional information not necessary for the performance of the contract or, respectively, for the implementation of precontractual measures requested by the data subject²³; for additional data other tools would hence be required.

此類型之例外不得適用於傳輸其他非履行契約以及執行當事人要求之契約前行為所必要之額外資訊²³；傳輸額外資料尚需其他方法。

Occasional transfers

非經常性之傳輸

Personal data may only be transferred under this derogation when this transfer is occasional.²⁴ It would have to be established on a case by case basis whether data transfers or a data transfer would be determined as “occasional” or “non-occasional”.

個人資料僅有在非經常性之傳輸時始有例外情形的適用。²⁴ 必須依據具體個案情況認定資料之傳輸或系列傳輸是否可被視為係「非經常性」或「經常性」。

²² In addition it will not be seen as being occasional (see below).

此外，該移轉行為不會被視為係非經常性之移轉（見下文）。

²³ More generally, all derogations of Article 49(1) (b) to (f) only allow that the data which are necessary for the purpose of the transfer may be transferred.

更一般地說，第 49 條第 1 項第 b 至 f 款的所有例外情形僅適用於當移轉係為實現其目的所必要時始可為之。

²⁴ As to the general definition of the term « occasional » see page 4.

A transfer here may be deemed occasional for example if personal data of a sales manager, who in the context of his/her employment contract travels to different clients in third countries, are to be sent to those clients in order to arrange the meetings. A transfer could also be considered as occasional if a bank in the EU transfers personal data to a bank in a third country in order to execute a client's request for making a payment, as long as this transfer does not occur in the framework of a stable cooperation relationship between the two banks.

例如，某一銷售經理基於僱傭契約需拜訪位於第三國的不同客戶時，此處的傳輸該經理個人資料給客戶以便安排會議即可被視為非經常性。若位於歐盟的銀行將個人資料傳輸至第三國的銀行以執行客戶的付款請求，只要該傳輸不屬於兩家銀行之間穩定合作關係的框架內，即可被視為係非經常性之傳輸。

On the contrary, transfers would not qualify as “occasional” in a case where a multi-national company organises trainings in a training centre in a third country and systematically transfers the personal data of those employees that attend a training course (e.g. data such as name and job title, but potentially also dietary requirements or mobility restrictions). Data transfers regularly occurring within a stable relationship would be deemed as systematic and repeated, hence exceeding an “occasional” character. Consequently, in this case many data transfers within a business relationship may not be based on Article 49 (1) (b).

相反的，若跨國公司在第三國的培訓中心安排培訓，並有系統地傳輸參加培訓課程員工的個人資料（例如，姓名和職稱等，亦可能是對飲食要求或行動限制的資料），該傳輸則不符合「非經常性」之要件。在穩定關係中定期發生的資料傳輸應被視為是系統性且重複的行為，故而超出了「非經常性」的定義。因此，於此情形下，業務關係中之許多資料傳輸不屬於第 49 條第 1 項第 b 款之適用範圍。

According to Article 49(1) (3), this derogation cannot apply to activities carried out by public authorities in the exercise of their public powers.

依據第 49 條第 1 項及第 3 項，此例外情形不適用於公務機關執行公權力之活動。

2.3 Transfer necessary for the conclusion or performance of a contract concluded in the interest of the data subject between the controller and another natural or legal person - (49 (1) (c))

2.3 第 49 條第 1 項第 c 款 – 傳輸對締結或履行控管者與其他自然人或法人間，

「非經常性」的一般定義請參見第 4 頁(譯註：即本翻譯文件第 8 頁)。

基於當事人之利益所締結之契約為必要

The interpretation of this provision is necessarily similar to that of Article 49 (1) (b); namely, that a transfer of data to a third country or an international organization in the absence of an adequacy decision pursuant to Article 45(3), or of appropriate safeguards pursuant to Article 46, can only be deemed to fall under the derogation of Article 49(1) (c), if it can be considered to be “*necessary for the conclusion or performance of a contract between the data controller and another natural or legal person, in the interest of the data subject*”.

此條款之解釋應類似於第 49 條第 1 項第 b 款之解釋；也就是在欠缺第 45 條第 3 項之適足性認定時，或欠缺第 46 條之適當安全維護措施時，若欲適用第 49 條第 1 項第 c 款之例外情形，將個人資料傳輸至第三國或國際組織須符合「*傳輸對締結或履行控管者與其他自然人或法人間，基於當事人之利益所締結之契約為必要*」。

Aside from being necessary, recital 111 indicates that, data transfers may only take place “*where the transfer is occasional and necessary in relation to a contract (...)*” Therefore, apart from the “*necessity test*”, personal data here as well may only be transferred under this derogation only when the transfer is occasional.

除了必要之要件外，前言第 111 點指出，資料之傳輸僅可發生於「*當傳輸基於契約上主張之必要而非經常性之情形 (.....)*」。因此，除了「*必要性判斷*」外，此處之資料傳輸也僅有在該傳輸係非經常性時始可適用例外情形。

Necessity of the data transfer and conclusion of the contract in the interest of the data subject

資料傳輸和契約締結係基於當事人利益之必要

Where an organization has, for business purposes, outsourced activities such as payroll management to service providers outside the EU, this derogation will not provide a basis for data transfers for such purposes, since no close and substantial link between the transfer and a contract concluded in the data subject’s interest can be established even if the end purpose of the transfer is the management of the pay of the employee.²⁵ Other transfer tools provided in Chapter V may provide a more suitable basis for such transfers such as standard contractual clauses or binding corporate rules.

若公司基於商業目的，將諸如薪資管理等活動外包給位於歐盟外之服務提供者，

即使傳輸的最終目的係管理員工薪資，例外情形之規範仍無法作為此類型傳輸之依據，因為該傳輸與基於當事人之利益而締結的契約之間沒有密切和實質性之關聯。²⁵ 第五章規定的其他傳輸方法，如標準契約條款或具有拘束力之企業守則，可為此類型之傳輸提供更適合之基礎。

Occasional transfers

非經常性之傳輸

Moreover, personal data may only be transferred under this derogation, when the transfer is occasional as it is the case under the derogation of Article 49 (1) (b). Therefore, in order to assess whether such transfer is occasional, the same test has to be carried out²⁶.

此外，如同第 49 條第 1 項第 b 款的例外情形，此處之例外僅適用於當個人資料之傳輸屬非經常性。因此，為評估該傳輸是否屬非經常性，須適用相同之標準進行評估。²⁶

Finally, according to Article 49(1) (3), this derogation cannot apply to activities carried out by public authorities in the exercise of their public powers.²⁷

最後，依據第 49 條第 1 項及第 3 項，此例外情形不適用於公務機關執行公權力之活動。²⁷

2.4 Transfer is necessary for important reasons of public interest - (49 (1) (d))

2.4 第 49 條第 1 項第 d 款 – 傳輸因公共利益之重要原因為必要

This derogation, usually referred to as the “important public interest derogation”, is very similar to the provision contained in Directive 95/46/EC²⁸ under Article 26 (1) (d), which provides that a transfer shall take place only where it is necessary or legally required on important public interest grounds.

這類型之例外情形，通常被稱作「重要公共利益之例外」。與指令 95/46 / EC 第

²⁵ In addition it will not be seen as being occasional (see below).

此外，該移轉行為不會被視為係非經常性之移轉（見下文）。

²⁶ As to the general definition of the term “occasional” please see page 4.

「非經常性」之一般定義請參見第 4 頁(譯註：即本翻譯文件第 8 頁)。

²⁷ For more information please refer to section 1, page 5 above.

詳細資訊請參閱前述第一節，第 5 頁(譯註：即本翻譯文件第 9 頁)。

26 條第 1 項第 d 款²⁸的規定非常相似，該條款規定傳輸之發生僅可基於必要或法律上所要求之重要公共利益。

According to Article 49 (4), only public interests recognized in Union law or in the law of the Member State to which the controller is subject can lead to the application of this derogation.

依據第 49 條第 4 項，只有在歐盟法或控管者受拘束之成員國法所承認之公共利益才適用於此例外情形。

However, for the application of this derogation, it is not sufficient that the data transfer is requested (for example by a third country authority) for an investigation which serves a public interest of a third country which, in an abstract sense, also exists in EU or Member State law. Where for example a third country authority requires a data transfer for an investigation aimed at combatting terrorism, the mere existence of EU or member state legislation also aimed at combatting terrorism is not as such a sufficient trigger to apply Article 49 (1) (d) to such transfer. Rather, as emphasized by the WP29, predecessor of the EDPB, in previous statements,²⁹ the derogation only applies when it can also be deduced from EU law or the law of the member state to which the controller is subject that such data transfers are allowed for important public interest purposes including in the spirit of reciprocity for international cooperation. The existence of an international agreement or convention which recognises a certain objective and provides for international cooperation to foster that objective can be an indicator when assessing the existence of a public interest pursuant to Article 49 (1) (d), as long as the EU or the Member States are a party to that agreement or convention.

然而，在此例外情形實際適用上，當第三國為其公共利益進行調查，而要求資料傳輸（例如由第三國主管機關），即使在抽象概念層面，此公共利益也存在於歐盟或成員國法律中，該要求仍不足以符合例外的情形。例如，第三國政府為打擊恐怖主義的調查要求資料傳輸，即使歐盟或成員國的法律亦存在打擊恐怖主義的相關規範，該立法並不足以觸發第 49 條第 1 項第 d 款之適用。相反的，正如 EDPB 的前身 29 條工作小組在先前陳述中所強調的²⁹，只有在歐盟法律或控管者所受拘

²⁸ DIRECTIVE 95/46/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL, of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

1995 年 10 月 24 日歐洲議會和理事會通過之第 95/46 / EC 號指令，關於保護自然人之個人資料運用和該資料之自由流通。

²⁹ Article 29 Working Party Opinion 10/2006 on the processing of personal data by the Society for Worldwide Interbank Financial Telecommunication (SWIFT) (WP128), p. 25.

束之成員國法律所承認可被用於作為資料傳輸之重要公共利益目的者，包括基於互惠精神而進行的國際合作，始有例外情形之適用。依據第 49 條第 1 項第 d 款評估公共利益之存在與否時，現有之國際協定或公約只要其認可某一目標並提供國際合作以促成該目標，則該國際協定或公約可作為衡量標準，只要歐盟或其成員國是該協議或公約的締約方。

Although mainly focused to be used by public authorities, Article 49 (1) (d) may also be relied upon by private entities. This is supported by some of the examples enumerated in recital 112 which mention both transfers by public authorities and private entities³⁰.

雖然主要著重於公務機關之援用，但私人實體亦適用第 49 條第 1 項第 d 款之規範。前言第 112 點中所列舉之範例可作為依據，該前言中提及了公務機關和私人實體所為之傳輸³⁰。

As such, the essential requirement for the applicability of this derogation is the finding of an important public interest and not the nature of the organization (public, private or international organization) that transfers and/or receives the data.

因此，適用此類例外的基本要求係找到重要公共利益為何，而非傳輸和/或接收資料組織（公共、私人或國際組織）之性質。

Recitals 111 and 112 indicate that this derogation is not limited to data transfers that are “occasional”³¹. Yet, this does not mean that data transfers on the basis of the important public interest derogation under Article 49 (1) (d) can take place on a large scale and in a systematic manner. Rather, the general principle needs to be respected according to which the derogations as set out in Article 49 shall not become “the rule” in practice, but need to be restricted to specific situations and each data exporter needs to ensure that the transfer meets the strict necessity test.³²

前言第 111 點和第 112 點指出此類例外情形之適用不限於「非經常性」³¹ 的資料

29 條工作小組有關環球同業銀行金融電信協會(SWIFT)運用個人資料第 10/2006 號意見(WP128)，第 25 頁。

³⁰ “international data exchange between competition authorities, tax or customs administrations, between financial supervisory authorities, between services competent for social security matters, or for public health, for example in the case of contact tracing for contagious diseases or in order to reduce and/or eliminate doping in sport.”

「例如競爭法主管機關、稅務或關務機關之間、金融監管機關之間、社會安全或公共衛生服務專責機關之間的國際資料交換；例如傳染病之接觸追蹤或為了降低並/或消除運動比賽興奮劑濫用之情形」。

³¹ As to the general definition of the term « occasional » see page 4.

「非經常性」的一般定義請參見第 4 頁(譯註：即本翻譯文件第 8 頁)。

傳輸。然而，這並不意味著可基於第 49 條第 1 項第 d 款重大公共利益之例外而進行大規模和系統性的資料傳輸。相反的，仍需遵守一般性原則。依據該原則，第 49 條規範之例外情形不得在實踐中被視為「規則」，而必須被限縮至特定情形，且各資料輸出者須確保傳輸符合嚴格的必要性判斷。³²

Where transfers are made in the usual course of business or practice, the EDPB strongly encourages all data exporters (in particular public bodies³³) to frame these by putting in place appropriate safeguards in accordance with Article 46 rather than relying on the derogation as per Article 49(1) (d).

若因通常的商業行為或業務而進行之傳輸，EDPB 強烈建議所有資料輸出者（特別是公務機關³³）依據第 46 條制定適當的安全維護措施，而非依賴第 49 條第 1 項第 d 款的例外情形。

2.5 Transfer is necessary for the establishment, exercise or defense of legal claims - (49 (1) (e))

2.5 第 49 條第 1 項第 e 款 – 傳輸對建構、行使或防禦法律上之請求為必要

Establishment, exercise or defense of legal claims

建構、行使或防禦法律上之請求

Under Article 49 (1) (e), transfers may take place when “*the transfer is necessary for the establishment, exercise or defense of legal claims*”. Recital 111 states that a transfer can be made where it is “*occasional and necessary in relation to a contract or a legal claim, regardless of whether in a judicial procedure or whether in an administrative or any out-of-court procedure, including procedures before regulatory bodies*”. This covers a range of activities for example, in the context of a criminal or administrative investigation in a third country (e.g. anti-trust law, corruption, insider trading or similar situations), where the derogation may apply to a transfer of data for the purpose of defending oneself or for obtaining a reduction or waiver of a fine legally foreseen e.g. in anti-trust investigations. As well, data transfers for the purpose of formal pre-trial discovery procedures in civil litigation may fall under this derogation. It can also cover actions by the data exporter to institute procedures in a third country for example

³² See also page 3.

另參見第 3 頁(譯註：即本翻譯文件第 4 頁)。

³³ For example financial supervisory authorities exchanging data in the context of international transfers of personal data for administrative cooperation purposes.

例如，金融監管機關為了行政合作目的，在國際個資移轉的背景下交換資料。

commencing litigation or seeking approval for a merger. The derogation cannot be used to justify the transfer of personal data on the grounds of the mere possibility that legal proceedings or formal procedures may be brought in the future.

第 49 條第 1 項第 e 款規定，當「傳輸對建構、行使或防禦法律上之請求為必要」時可進行傳輸。前言第 111 點指出，傳輸須「基於契約或法律上主張之必要且不具經常性，不問係基於訴訟、行政程序或任何法庭外程序，包括監管機關前之程序」。此涵蓋了一系列程序，例如，在第三國的刑事或行政調查中（例如反壟斷法、貪腐、內線交易或其他類似情況），為自身之辯護或為減輕或免除法律上可預見罰鍰之目的（例如在反壟斷調查案件），資料之傳輸可適用例外情形。同樣，在民事訴訟程序中，因正式的審前證據開示程序而進行之資料傳輸亦可適用於例外情形。這也包含資料輸出者在第三國所發動之程序行為，例如提起訴訟或申請合併批准。然而，僅僅只是未來有可能提起法律訴訟或正式程序，不得作為例外情形下傳輸資料之正當理由。

This derogation can apply to activities carried out by public authorities in the exercise of their public powers (Article 49 (3)).

此例外情形可適用於公務機關執行公權力之活動（第 49 條第 3 項）。

The combination of the terms “legal claim” and “procedure” implies that the relevant procedure must have a basis in law, including a formal, legally defined process, but is not necessarily limited to judicial or administrative procedures (“or any out of court procedure”). As a transfer needs to be made in a procedure, a close link is necessary between a data transfer and a specific procedure regarding the situation in question. The abstract applicability of a certain type of procedure would not be sufficient.

「法律上之請求」和「程序」的合併使用意味著相關程序必須具有法律依據，包括正式、依法定義之程序，但不限於司法或行政程序（「或任何法庭外程序」）。由於傳輸須發生於程序進行中，因此資料傳輸和系爭情況下之特定程序間應有密切之關聯。對某種程序的抽象適用性不足以符合該條之要件。

Data controllers and data processors need to be aware that national law may also contain so-called “blocking statutes”, prohibiting them from or restricting them in transferring personal data to foreign courts or possibly other foreign official bodies.

資料控管者和資料受託運用者需清楚意識到，國家法律也可能包含所謂的「阻礙性法律」（blocking statutes），禁止或限制將個人資料傳輸至外國法院或其他可能之外國官方機構。

Necessity of the data transfer

資料傳輸之必要性

A data transfer in question may only take place when it is necessary for the establishment, exercise or defense of the legal claim in question. This “*necessity test*” requires a close and substantial connection between the data in question and the specific establishment, exercise or defense of the legal position.³⁴ The mere interest of third country authorities or possible “good will” to be obtained from the third country authority as such would not be sufficient.

資料之傳輸只有對建構、行使或防禦法律上之請求為必要時始得為之。此「必要性判斷」要求所涉及之資料與建構、行使或防禦法律上之請求之間存在密切且實質之關聯。³⁴ 僅係基於第三國當局之利益或從第三國當局可能獲得之「善意」不足以符合必要性之要件。

Whilst there may be a temptation for a data exporter to transfer all possibly relevant personal data in response to a request or for instituting legal procedures, this would not be in line with this derogation or with the GDPR more generally as this (in the principle of data minimization) emphasizes the need for personal data to be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed.

雖然資料輸出者為回覆請求或提起訴訟程序，有誘因傳輸所有可能相關的個人資料，然而，此行為不符合例外情形和 GDPR 之一般適用，因為 GDPR 強調（基於資料最小化原則）個人資料必須適當、相關且限於運用之目的所必要。

In relation to litigation proceedings the WP29, predecessor of the EDPB, has already set out a layered approach to the question of whether the personal data should be transferred, including the application of this principle. As a first step, there should be a careful assessment of whether anonymized data would be sufficient in the particular case. If this is not the case, then transfer of pseudonymized data could be considered. If it is necessary to send personal data to a third country, its relevance to the particular matter should be assessed before the transfer – so only a set of personal data that is

³⁴ Recital 111: “necessary in relation to a contract or a legal claim.”
前言第 111 點：「基於契約或法律上主張之必要。」

actually necessary is transferred and disclosed.

關於訴訟程序，EDPB 的前身 29 條工作小組已就是否得傳輸個人資料的問題制定了階層式的分析方法，該分析方法亦適用於此原則。第一步，應仔細評估匿名資料在特定情況下是否足夠。若不足夠，則可考慮傳輸假名化資料（pseudonymized data）。若將個人資料傳輸至第三國為必要時，則應在傳輸前評估其與特定事實之關聯性 - 因此，只需傳輸和揭露實際所需之個人資料。

Occasional transfer

非經常性之傳輸

Such transfers should only be made if they are occasional. For information on the definition of occasional transfers please see the relevant section on “occasional and “non-repetitive” transfers.³⁵ Data exporters would need to carefully assess each specific case.

此類型之傳輸僅得於非經常性的情況下始得為之。有關非經常性傳輸之定義，請參閱「非經常性」和「非重複性」傳輸之相關章節。³⁵資料輸出者需仔細評估每一具體個案。

2.6 Transfer necessary in order to protect the vital interests of the data subject or of other persons, where the data subject is physically or legally incapable of giving consent – (49 (1) (f))

2.6 第 49 條第 1 項第 f 款 - 於當事人身體上或法律上無法為同意之表示時，傳輸對保護當事人或其他人之重大利益為必要

The derogation of Article 49 (1) (f) obviously applies when data is transferred in the event of a medical emergency and where it is considered that such transfer is directly necessary in order to give the medical care required.

第 49 條第 1 項第 f 款的例外情形明顯適用於發生醫療緊急情況時資料傳輸之情形，尤其是當資料之傳輸係為提供所需的醫療服務為直接必要時。

Thus, for example, it must be legally possible to transfer data (including certain personal data) if the data subject, whilst outside the EU, is unconscious and in need of urgent medical care, and only an exporter (e.g. his usual doctor), established in an EU Member State, is able to supply these data. In such cases the law assumes that the

³⁵ Page 4.

第 4 頁(譯註：即本翻譯文件第 8 頁)。

imminent risk of serious harm to the data subject outweighs data protection concerns.

因此，例如，若當事人位於歐盟境外，在無意識並需要緊急醫療護理的情況下，且只有位於歐盟成員國境內的資料輸出者（例如他的常用醫生）能夠提供這些資料，則必須得以合法傳輸資料（包括某些個人資料）。在此情形下，法律假定對當事人造成嚴重損害的緊急風險勝過對資料保護之疑慮。

The transfer must relate to the individual interest of the data subject or to that of another person's and, when it bears on health data, it must be necessary for an essential diagnosis. Accordingly, this derogation cannot be used to justify transferring personal medical data outside the EU if the purpose of the transfer is not to treat the particular case of the data subject or that of another person's but, for example, to carry out general medical research that will not yield results until sometime in the future.

傳輸必須涉及當事人或其他人之個人利益，且當傳輸與健康資料有關時，該資料須以進行必要之診斷為必要。因此，若傳輸之目的不是為了在特定情況下治療當事人或另一人之健康情形，而是為例如進行一般醫學研究，且其成果僅會發生於未來某個時點，則例外情形不得作為此類傳輸個人醫療資料至歐盟境外的合理依據。

Indeed, the GDPR does not restrict the use of this derogation to the physical integrity of a person but also leaves room for example to consider the cases where the mental integrity of a person should be protected. In this case, the person concerned would also be incapable - physically or legally - of providing his/her consent for the transfer of his/her personal data. In addition, the concerned individual whose personal data are the subject of the transfer specifically must not be able to give his/her consent - physically or legally - to this transfer.

實際上，GDPR 並沒有將此類例外情形的適用限縮在個人身體完整性，而是保留空間以考量個人精神完整性應受保護之情況。於此情形下，系爭之個人 – 不論在身體或法律上 – 可能無能力對傳輸其個人資料之行為給予同意。此外，當系爭個人之個人資料是傳輸的主要目標時，當事人必須在 – 身體或法律上 – 無能力同意該傳輸。

However, whenever the data subject has the ability to make a valid decision, and his/her consent can be solicited, then this derogation cannot apply.

然而，只要當事人有能力做出有效決定，並且可以徵求其同意，此類例外情形即不適用。

For example, where the personal data is required to prevent eviction from a property, this would not fall under this derogation as, even though housing be considered as a vital interest, the person concerned can provide his/her consent for the transfer of his/her data.

例如，所需之個人資料係為防止從房產中被驅逐，此時不適用例外情形，因為即使居所被認為是一種至關重大的利益，當事人仍可提供對其資料傳輸之同意。

This ability to make a valid decision can depend on physical, mental but also legal incapability. A legal incapability can encompass, without prejudice to national representation mechanisms, for example, the case of a minor. This legal incapability has to be proved, depending on the case, through either a medical certificate showing the mental incapability of the person concerned or through a governmental document confirming the legal situation of the person concerned.

能否做出有效決定可取決於身體和精神狀態，但也包含是否具備法律上的行為能力。例如，在不牴觸國家代理體系的情況下，法律上的無能力可包括因未成年而無行為能力之情形。證明這種法律上的無行為能力，必須依據具體情況，透過得顯示當事人精神上無能力的醫療證明或透過政府文件確認該當事人為法律上無行為能力者。

Data transfers to an international humanitarian organization, necessary to fulfil a task under the Geneva Conventions or to comply with international humanitarian law applicable in armed conflict may also fall under Article 49 (1) (f), see recital 112. Again, in such cases the data subject needs to be physically or legally incapable of giving consent.

為履行「日內瓦公約」中之任務或遵守於武裝衝突時所適用之國際人道法所必需時，得依第 49 條第 1 項第 f 款向國際人道主義組織傳輸資料，請參見前言第 112 點。同樣，在此情形下，當事人必需在身體或法律上無能力給予同意。

The transfer of personal data after the occurrence of natural disasters and in the context of sharing of personal information with entities and persons for the purpose of rescue and retrieval operations (for example, relatives of disaster victims as well as with government and emergency services), can be justified under this derogation. Such unexpected events (floods, earthquakes, hurricanes etc.) can warrant the urgent transfer of certain personal data to learn for example, the location and status of victims. In such situations it is considered that the data subject concerned is unable to provide his/her

consent for the transfer of his/her data.

自然災害發生後個人資料之傳輸，以及為了救援和恢復行動而與法律實體和他人（例如，災民親屬以及政府和緊急服務組織）分享個人資料之情事，可適用此類例外情形。意外災害（洪水、地震、颶風等）之發生可作為緊急傳輸某些個人資料之合理依據，例如為了掌握受災者的位置和狀態。在此情形下，當事人被視為無能力對傳輸其個人資料之行為給予同意。

2.7. Transfer made from a public register - (49 (1) (g) and 49 (2))

2.7. 第 49 條第 1 項第 g 款及第 49 條第 2 項 – 由公眾登記處所為之傳輸

Article 49 (1) (g) and Article 49 (2) allow the transfer of personal data from registers under certain conditions. A register in general is defined as a “(written) record containing regular entries of items or details” or as “an official list or record of names or items »³⁶, where in the context of Article 49, a register could be in written or electronic form.

第 49 條第 1 項第 g 款和第 49 條第 2 項允許在某些條件下傳輸公眾登記之個人資料。登記一般被定義為「(書面)記錄，包含常規項目或細節的記載」或「姓名或項目的正式清單或記錄」³⁶，在第 49 條的範圍內，登記得以書面或電子形式呈現。

The register in question must, according to Union or Member State law, be intended to provide information to the public. Therefore, private registers (those in the responsibility of private bodies) are outside of the scope of this derogation (for example private registers through which credit-worthiness is appraised.

依據歐盟或成員國之法律，登記旨在向公眾提供資訊。因此，私人登記（由私人機構負責）則不屬於此類例外情形之範圍（例如，為評估信用價值所為之私人登記）。

The register must be open to consultation by either:

登記必須對下列任一請求者開放查詢/諮詢：

³⁶ Merriam Webster Dictionary, <https://www.merriam-webster.com/dictionary/register> (22.01.2018); Oxford Dictionary <https://en.oxforddictionaries.com/definition/register> (22.01.2018). 美國韋氏字典, <https://www.merriam-webster.com/dictionary/register> (22.01.2018) ; 牛津字典 <https://en.oxforddictionaries.com/definition/register> (22.01.2018)。

(a) the public in general or

一般民眾，或

(b) any person who can demonstrate a legitimate interest.

任何得舉證具正當利益者。

These could be, for example: registers of companies, registers of associations, registers of criminal convictions, (land) title registers or public vehicle registers.

這些可以是，例如：公司登記、協會登記、刑事犯罪登記、（土地）所有權登記或公眾車輛登記。

In addition to the general requirements regarding the set-up of the registers themselves, transfers from these registers may only take place if and to the extent that, in each specific case, the conditions for consultation that are set forth by Union or Member State law are fulfilled (regarding these general conditions, see Article 49 (1) (g).

除了關於設置登記本身的一般要求外，在每種特定情況下，只有當歐盟或成員國法律所規定之查詢/諮詢要件被滿足時，始得自登記者進行傳輸。（相關一般要件，請參閱第 49 條第 1 項第 g 款）。

Data controllers and data processors wishing to transfer personal data under this derogation need to be aware that a transfer cannot include the entirety of the personal data or entire categories of the personal data contained in the register (Article 49 (2)). Where a transfer is made from a register established by law and where it is to be consulted by persons having a legitimate interest, the transfer can only be made at the request of those persons or if they are recipients, taking into account of the data subjects' interests and fundamental rights³⁷. On a case by case basis, data exporters, in assessing whether the transfer is appropriate, would always have to consider the interests and rights of the data subject.

希望依據此例外情形傳輸個人資料的資料控管者和資料受託運用者需要瞭解不得傳輸登記內全部個人資料或個人資料之所有類別（第 49 條第 2 項）。若傳輸資料係來自法定登記者且要求查詢/諮詢之個人具正當利益，傳輸僅得在其請求下，或若其為接收者時始得發生，且應考量當事人之利益和基本權利。³⁷依據個案情形，資料輸出者在評估傳輸是否合適時，必須始終考量當事人的利益和權利。

³⁷ Recital 111 of the GDPR.

請參閱 GDPR 前言第 111 點。

Further use of personal data from such registers as stated above may only take place in compliance with applicable data protection law.

進一步使用上述登記中之個人資料必須遵守所適用之個人資料保護法。

This derogation can also apply to activities carried out by public authorities in the exercise of their public powers (Article 49 (3)).

這類例外情形亦適用於公務機關執行公權力之活動（第 49 條第 3 項）。

2.8. Compelling legitimate interests – (49 (1) § 2)

2.8. 第 49 條第 1 項第 2 段 – 必要正當利益

Article 49 (1) § 2 introduces a new derogation which was not previously included in the Directive. Under a number of specific, expressly enumerated conditions, personal data can be transferred if it is necessary for the purposes of compelling legitimate interests pursued by the data exporter.

第 49 條 1 項第 2 段加入了先前指令中並未規範之新的例外情形。若符合各項具體、明確列舉之要件，且為資料輸出者追求必要正當利益所必須，得進行個人資料之傳輸。

This derogation is envisaged by the law as a last resort, as it will only apply where “*a transfer could not be based on a provision in Article 45 or 46, including the provisions on binding corporate rules, and none of the derogations for a specific situation is applicable*”.³⁸

法律將此類型之例外情形作為最後手段，因其僅適用於當「傳輸無法符合第 45 條或第 46 條之規定，包括有拘束力之企業守則之規定，且無法適用任何特定例外之情形」。³⁸

This layered approach to considering the use of derogations as a basis for transfers requires consideration of whether it is possible to use a transfer tool provided in Article 45 or 46 or one of the specific derogations set out in Article 49 (1) § 1, before resorting to the derogation of Article 49 (1) § 2. This can only be used in residual cases according to recital 113 and is dependent on a significant number of conditions expressly laid down by law. In line with the principle of accountability enshrined in the GDPR³⁹ the data exporter must be therefore able to demonstrate that it was neither possible to

³⁸ Article 49 (1) § 2 GDPR.

請參閱第 49 條第 1 項第 2 段。

frame the data transfer by appropriate safeguards pursuant to Article 46 nor to apply one of the derogations as contained in Article 49 (1) § 1.

以此種階層式分析法作為考量使用例外情形之基礎，在訴諸第 49 條第 1 項第 2 段例外情形前，須考慮是否得使用第 45 條或第 46 條所規定之傳輸方法或第 49 條第 1 項第 1 段規定之特定例外情形之一。依據前言第 113 點，第 2 段所規定之例外情形僅得適用於剩餘案件，且須取決於法律明文規定之諸多條件。因此，依據 GDPR³⁹所規範之課責原則，資料輸出者必須能夠證明其無法依第 46 條，對資料之傳輸提供適當安全維護措施，亦無法適用第 49 條第 1 項第 1 段所列舉之任何例外情形。

This implies that the data exporter can demonstrate serious attempts in this regard, taking into account the circumstances of the data transfer. This may for example and depending on the case, include demonstrating verification of whether the data transfer can be performed on the basis of the data subjects' explicit consent to the transfer under Article 49 (1) (a). However, in some circumstances the use of other tools might not be practically possible. For example, some types of appropriate safeguards pursuant to Article 46 may not be a realistic option for a data exporter that is a small or medium-sized company.⁴⁰ This may also be the case for example, where the data importer has expressly refused to enter into a data transfer contract on the basis of standard data protection clauses (Article 46 (2) (c)) and no other option is available (including, depending on the case, the choice of a different “data importer”) – see also the paragraph below on ‘compelling’ legitimate interest.

此意味著，資料輸出者可證明其在考量資料傳輸情況時，在這方面所做的各種認真嘗試。這必須取決於具體情況，例如包括證明資料傳輸是否得依第 49 條第 1 項第 a 款之規定，基於當事人明確同意而為之。然而，在某些情況下，援引其他方法有實際執行之困難。例如，對於中小型的資料輸出者而言，第 46 條規範之某些類型的適當安全維護措施可能不是一個實際可行的選擇。⁴⁰又例如，資料輸入者明確拒絕簽訂依據標準資料保護條款（第 46 條第 2 項 c 款）而訂定之資料傳輸契約，且無其他選擇（依據具體情況而定，包括不同「資料輸入者」之選擇）的情形 – 另請參閱下文關於「必要」正當利益之說明。

³⁹ Article 5 (2) and Article 24 (1)

請參閱第 5 條第 2 款和第 24 條第 1 款。

⁴⁰ For example binding corporate rules may often not be a feasible option for small and medium-sized enterprises due to the considerable administrative investments they imply.

例如，因其意味著大量行政投資，具有約束力之企業守則可能經常不適用於中小型企業。

Compelling legitimate interests of the controller

控管者之必要正當利益

According to the wording of the derogation, the transfer must be necessary for the purposes of pursuing compelling legitimate interests of the data controller which are not overridden by the interests or rights and freedoms of the data subject. Consideration of the interests of a data exporter in its capacity as data processor or of the data importer are not relevant.

依據例外情形之用詞，傳輸係資料控管者為追求其必要正當利益所必須，且該利益不得凌駕於當事人之利益或權利及自由。以資料受託運用者之身分考量資料輸出者之利益或考量資料輸入者之利益皆與此規定無關。

Moreover, only interests that can be recognized as “compelling” are relevant and this considerably limits the scope of the application of the derogation as not all conceivable “legitimate interests” under Article 6 (1) (f) will apply here. Rather a certain higher threshold will apply, requiring the compelling legitimate interest to be essential for the data controller. For example, this might be the case if a data controller is compelled to transfer the personal data in order to protect its organization or systems from serious immediate harm or from a severe penalty which would seriously affect its business.

此外，僅有當利益係「必要」時始具有相關性。此一要件大量限縮例外情形的適用範圍，因並非所有第 6 條第 1 項第 f 款可預見之「正當利益」皆適用於此處。相反的，本條適用更高之門檻，要求必要正當利益對資料控管者為必須。例如，若資料控管者必須傳輸個人資料以保護其組織或系統免受嚴重的立即傷害或足以嚴重影響其業務的嚴厲懲罰，也許適用此一情形。

Not repetitive

非重複性

According to its express wording, Article 49 (1) § 2 can only apply to a transfer that is not repetitive⁴¹.

依據其明確之用詞，第 49 條第 1 項第 2 段僅適用於不重複之傳輸。⁴¹

Limited number of data subjects

有限數量之當事人

⁴¹ For more information on the term « not repetitive » see page 4.

有關「非重複性」一詞更多的解釋，請參閱第 4 頁(譯註：即本翻譯文件第 8 頁)。

Additionally, the transfer must only concern a limited number of data subjects. No absolute threshold has been set as this will depend on the context but the number must be appropriately small taking into consideration the type of transfer in question.

此外，傳輸僅得涉及有限數量的當事人。此處並未設置絕對的門檻，因這將取決於具體情形，但考慮到此傳輸類型具爭議，受影響之當事人數量必須為適當的少數。

In a practical context, the notion “limited number of data subjects” is dependent on the actual case in hand. For example, if a data controller needs to transfer personal data to detect a unique and serious security incident in order to protect its organization, the question here would be how many employees’ data the data controller would have to transfer in order to achieve this compelling legitimate interest.

在實際情況中，「有限數量之當事人」的概念取決於具體個案。例如，若資料控管者為保護其組織，需要傳輸個人資料以檢測特殊且嚴重的安全事件，此處之問題在於資料控管者必須傳輸多少員工資料才能實現其必要之正當利益。

As such, in order for the derogation to apply, this transfer should not apply to all the employees of the data controller but rather to a certain confined few.

因此，為了適用例外情形，該傳輸不得適用於資料控管者的所有員工，而應受限適用於某些少數員工。

Balancing the “compelling legitimate interests of the controller” against the “interests or rights and freedoms of the data subject” on the basis of an assessment of all circumstances surrounding the data transfer and providing for suitable safeguards

在評估資料傳輸的所有情狀並提供適當安全維護措施的基礎上，就「控管者的必要正當利益」與「當事人的利益或權利及自由」做平衡

As a further requirement, a balancing test between the data exporter’s (compelling) legitimate interest pursued and the interests or rights and freedoms of the data subject has to be performed. In this regard, the law expressly requires the data exporter to assess all circumstances of the data transfer in question and, based on this assessment, to provide “suitable safeguards” regarding the protection of the data transferred. This requirement highlights the special role that safeguards may play in reducing the undue impact of the data transfer on the data subjects and thereby in possibly influencing the balance of rights and interests to the extent that the data controller’s interests will not

be overridden.⁴²

基於進一步的要求，必須在資料輸出者所追求之（必要的）正當利益與當事人的利益或權利及自由之間進行平衡判斷。在此方面，法律明確要求資料輸出者評估有關資料傳輸的所有情狀，並依據該評估，提供關於保護所傳輸資料之「適當安全維護措施」。此一要求強調了安全維護措施就減少資料傳輸對當事人的不當衝擊可能扮演之特殊角色，從而可能影響權利和利益的平衡，使資料控管者之利益不致被否決。⁴²

As to the interests, rights and freedoms of the data subject which need to be taken into consideration, the possible negative effects, i.e. the risks of the data transfer on any type of (legitimate) interest of the data subject have to be carefully forecasted and assessed, by taking into consideration their likelihood and severity.⁴³ In this regard, in particular any possible damage (physical and material, but also non-material as e.g. relating to a loss of reputation) needs to be taken into consideration⁴⁴. When assessing these risks and what could under the given circumstances possibly be considered as “suitable safeguards” for the rights and freedoms of the data subject, the data exporter needs to particularly take into account the nature of the data, the purpose and duration of the processing as well as the situation in the country of origin, the third country and, if any, the country of final destination of the transfer.⁴⁵

至於需要被考量之當事人的利益、權利及自由，必須仔細預測和評估可能的負面影響，即資料傳輸對當事人任何類型的（正當）利益所受之諸多可能且嚴重之風險。⁴³在此情形下，特別是任何可能之損害（人身和財物，但也包括例如與喪失聲譽有關之非財物損害）皆須列入考量。⁴⁴在評估此些風險以及在特定情況下可能被視為係提供當事人權利和自由的「適當保障」措施，資料輸出者需特別考量

⁴² The important role of safeguards in the context of balancing the interests of the data controller and the data subjects has already been highlighted by the Article 29 Working Party in WP 217, p. 31.

第 29 條工作小組在 WP217 中已強調安全維護措施在平衡資料控管者和當事人利益方面所扮演之重要角色（第 31 頁）。

⁴³ See Recital 75: “The risk to the rights and freedoms of natural persons, of varying likelihood and severity (...)”.

請參閱前言第 75 點：「自然人的權利及自由產生不同可能性與嚴重性的風險 (.....)」。

⁴⁴ See Recital 75: “The risk to the rights and freedoms of natural persons, of varying likelihood and severity, may result from personal data processing which could lead to physical, material or non-material damage.”

請參閱前言第 75 點：「個人資料運用可能導致自然人的權利及自由產生不同可能性與嚴重性的風險，恐造成人身、財物或非財物的損害」。

資料的性質、資料運用目的和持續時間以及傳輸原始國、第三國和最終目的地國家（如果有的話）的情況。⁴⁵

Furthermore, the law requires the data exporter to apply additional measures as safeguards in order to minimize the identified risks caused by the data transfer for the data subject.⁴⁶ This is set up by the law as a mandatory requirement, so it can be followed that in the absence of additional safeguards, the controller's interests in the transfer will in any case be overridden by the interests or rights and freedoms of the data subject.⁴⁷ As to the nature of such safeguards, it is not possible to set up general requirements applicable to all cases in this regard, but these will rather very much depend on the specific data transfer in question. Safeguards might include, depending on the case, for example measures aimed at ensuring deletion of the data as soon as possible after the transfer, or limiting the purposes for which the data may be processed following the transfer. Particular attention should be paid to whether it may be sufficient to transfer pseudonymized or encrypted data.⁴⁸ Moreover, technical and organizational measures aimed at ensuring that the transferred data cannot be used for other purposes than those strictly foreseen by the data exporter should be examined.

此外，法律要求資料輸出者採取額外措施作為保障，以盡量減少傳輸對當事人帶來的已識別風險。⁴⁶這是法律所規定之強制性要求，因此可認為在沒有額外安全維護措施的情形下，當事人之利益或權利及自由得在任何情況優於控管者在傳輸中之利益。⁴⁷有鑒於此種安全維護措施之性質，該措施之要件在很大程度上需取決於系爭特定資料傳輸，而無法制定適用於所有情況之一般要件。依據個案，安

⁴⁵ Recital 113.

請參閱前言第 113 點。

⁴⁶ While in the context of an “ordinary” balancing test foreseen by the law such (additional) measures might not be necessary in each case (see Article 29 Working Party Working document on Draft Ad hoc contractual clauses “EU data processor to non-EU sub-processor” (WP 214), p. 41), the wording of Art. 49 (1) § 2 suggests that additional measures are mandatory in order the data transfer to comply with the “balancing test” and therefore to be feasible under this derogation.

雖然在法律可預見之「一般」平衡判斷的背景下，並非在每種情形皆需要此些（額外的）措施（請參閱第 29 條工作小組關於「歐盟資料受託運用者對非歐盟轉承包受託運用者」之特定目的契約條款草案工作文件（WP 214），第 41 頁），第 49 條第 1 項第 2 段之用詞闡明，為適用此例外情形，必須採行其他措施，使資料移轉符合「平衡判斷」。

⁴⁷ While in the context of an “ordinary” balancing test foreseen by the law such (additional) measures might not be necessary in each case (see 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, WP 217, p. 41), the wording of Art. 49 (1) § 2 suggests that additional measures are mandatory in order the data transfer to comply with the “balancing test” and therefore to be feasible under this derogation.

雖然在法律可預見之「一般」平衡判斷的背景下，並非在每種情形皆需要此些（額外的）措施（請參閱第 29 條工作小組意見 06/2014，依據第 95/46/EC 號指令第 7 條規定關於資料控管者之正當利益概念，WP217，第 41 頁），第 49 條第 1 項第 2 段之用詞闡明，為適用此例外情形，必須採行其他措施，使資料移轉符合「平衡判斷」。

全維護措施可能包括確保在傳輸後將儘快刪除資料或限制傳輸後資料運用目的之措施。應特別注意傳輸假名化或加密資料是否足夠。⁴⁸此外，應審查旨在確保傳輸之資料不得用於資料輸出者嚴格可預見目的以外之技術性及組織性措施。

Information of the supervisory authority

監管機關之資訊

The duty to inform the supervisory authority does not mean that the transfer needs to be authorized by the supervisory authority, but rather it serves as an additional safeguard by enabling the supervisory authority to assess the data transfer (if it considers it appropriate) as to its possible impact on the rights and freedoms of the data subjects affected. As part of its compliance with the accountability principle, it is recommended that the data exporter records all relevant aspects of the data transfer e.g. the compelling legitimate interest pursued, the “competing” interests of the individual, the nature of the data transferred and the purpose of the transfer.

告知監管機關之義務並非意味著傳輸需得到監管機關之授權，而是一種額外的安全維護措施，藉由監管機關來評估該資料傳輸（若其認為適當之情形）對受影響之當事人的權利和自由可能產生之衝擊。作為遵守課責性原則的一部分，建議資料輸出者記錄和資料傳輸所有相關資訊，例如：所追求之必要正當利益、個人的「競爭」利益、傳輸資料之性質以及傳輸之目的。

Providing information of the transfer and the compelling legitimate interests pursued to the data subject

提供當事人有關傳輸之資訊及所追求之必要正當利益

The data controller must inform the data subject of the transfer and of the compelling legitimate interests pursued. This information must be provided in addition to that required to be provided under to Articles 13 and 14 of the GDPR.

資料控管者必須將傳輸及所追求之必要正當利益告知當事人。除了依據 GDPR 第 13 條和第 14 條要求提供之資訊外，尚需提供此資訊。

⁴⁸For other examples of possible safeguards see Article 29 Working Party Working document on Draft Ad hoc contractual clauses “EU data processor to non-EU sub-processor” (WP 214), p. 41-43

關於安全維護措施的其他可能範例，請參閱第 29 條工作小組關於「歐盟資料受託運用者對非歐盟轉承包受託運用者」之特定目的契約條款草案工作文件（WP 214），第 41-43 頁。