~~Guidelines~~ ~~Position Paper~~Guidelines on the application of the contractual necessity basis for processing under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects

Version 16 Oct 2018

Part 1 - Introduction

1. It is a fundamental requirement of EU data protection law that personal data must be processed fairly for specified purposes and on the basis of a legitimate basis laid down by law, in accordance with Article 8 of the Charter of Fundamental Rights of the European Union. In this regard, Article 6 of the General Data Protection Regulation[1] (the GDPR) specifies that processing shall be lawful only on the basis of one of six specified conditions. These conditions are set out in Article 6(1)(a) to (f). The application of data subject rights under the GDPR varies2 depending on the applicable lawful basis for processing under Article 6. It is therefore important that data controllers identify the most appropriate lawful basis for processing under Article 6(1).

2. Article 6(1)(b) GDPR provides a lawful basis for the processing of personal data where *"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"*. The GDPR therefore provides[3] that processing of personal data may be lawful in the context of providing a contractual service, as long as it is 'necessary' for that purpose, and subject to compliance with additional data protection requirements.

3. It is important to recognise that the right to data protection does not exist in isolation, and must be viewed in the context of other rights. Article 16 of the Charter of Fundamental Rights recognises the freedom to conduct a business in accordance with Union law and national laws and practices. Article 11 of the Charter recognises individuals' right to freedom of expression and information, which includes the fundamental right to receive and impart information and ideas over the internet without interference[4]. The EDPB recognises that, in line with Recital 4 of the GDPR, the application of Article 6 of the GDPR must respect, among other things, the freedom for

[redacted]

Commented [A5]: [redacted] The [redacted] has deleted this sentence. We don't agree with its deletion as it is indeed important for data controllers to identify the most appropriate lawful basis.

Commented [A6R5]: [redacted] This phrase implies the strict necessity approach, and so is not included in this paper

Commented [A7]: [redacted] We suggest removing "contractual" and just state that the processing of personal data may be lawful in the context of providing a service. As a matter of fact, in [redacted] any service is provided on the basis of the contract (even if there is no written agreement)

Commented [A8]: [redacted] Why is the reference to CJEU case law omitted that says that interferences with the right to privacy in relation to freedom of expression must be limited to what is strictly necessary?

Commented [A9]: [redacted] Yes, but on the other hand, the CJEU has stated that interferences with the right to privacy in relation to freedom of expression must be limited to what is strictly necessary.

[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)

[2] For example, processing under

[3] Recital 44 states "Processing should be lawful where it is necessary in the context of a contract or the intention to enter into a contract."

[4] See for example case C-484/14 McFadden v Sony Music Entertainment Germany GmbH; Case C-360/10 Belgische Verenigingvan Auteurs, Componisten en Uitgevers CVBA (SABAM) (EU:C:2012:85); Case C-73/07 Tietosuojavaltuutettu (EU:C:2008:727)

business to offer and for individuals to access online services, and that any interference with those fundamental freedoms in order to protect individuals' privacy and personal data should be necessary and proportionate.

4. 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".[5] 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 which are not paid for directly by the persons who receive them[6], such as free online services funded through advertising.

   The development of EU law on information society services reflects the central importance of such services in modern society. Over the past twenty years, many widely used services have migrated online. 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, and instead are financed by the sale of online advertising space, often using individually personalised advertisements. Continual tracking of user behaviour for the purposes of such advertising is a common characteristic of many online services, and can often be carried out in ways the user may not be aware of, and which may not be immediately obvious from the nature of the service provided.

5. [redacted]

   Against this background, and considering the extensive processing of personal data which is now technically possible, the European Data Protection Board[7] (EDPB) considers it appropriate to provide guidance on the contractual necessity basis for processing personal data in the context of online services~~.~~, in order to ensure that this lawful basis is only relied upon where appropriate.

Scope of these guidelines

6. These guidelines are concerned with the application of Article 6(1)(b) to processing of personal data in the context of contracts for online services. They will briefly outline the elements of lawful processing under Article 6(1)(b) GDPR, and will ~~consider~~ focus on this the concept of necessity as it applies to this lawful basis. The guidelines will

[5] See for example Directive (EU) 2015/1535 of the European Parliament and of the Council, and Article 8 GDPR.
[6] 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
[7] Established under Article 68 GDPR

Commented [A10]: [redacted] Differing rights always need to be balanced agains ther, whereas this paragraph goes a long way in suggesting that the freedom to conduct business is a higher-ranking norm that the right to privacy needs to respect unilaterally. In our view, the statements seem to be too biased towards business interests.

In any case, we fully agree with the [redacted] comment regarding the meaning of Recital 4.

Commented [A11]: [redacted] We suggest deleting this paragraph. This is not terpretation of recital 4, which states that "*This Regulation respects all fundamental rights and observes the freedoms and principles recognised in the Charter as enshrined in the Treaties, in particular the respect for private and family life, home and communications, the protection of personal data, freedom of thought, conscience and religion, freedom of expression and information, freedom to conduct a business, the right to an effective remedy and to a fair trial, and cultural, religious and linguistic diversity*". In other words, this recital is meant to merely state that article 6, as it is drafted in the GDPR, respects all fundamental rights, including the freedom to conduct a business.

[redacted]

[redacted]

Commented [A17]: [redacted] The [redacted] has deleted this part of the sentence, but we suggest keeping it, as this is the exact objective of the paper.

Commented [A18R17]: [redacted] This sentence implies a strict necessity approach, and accordingly is not incorporated in this version

then go on to consider the application of conceptdata protection law and principles more generally in the context of online services.

7. Although Article 6(1)(b) can only apply in the context of a valid contract with the data subject, these guidelines do not express a view on the validity of contracts for online services generally, which is outside the competence of the EDPB and may vary depending on the applicable national law.

8. Although detailed consideration of the wider legal context is outside the scope of these guidelines, the EDPB notes that any processing that is necessary to deliver a service or product on the basis of contractual terms will also need to comply with the requirements of contract law and consumer protection laws in order to be considered fair and lawful. Some general observations on this broader legal context are set out below.

9. These guidelines apply to processing in the context of both online services which are paid for by the individual user, and online services which are remunerated indirectly by other funding mechanisms.

10. The Article 29 Working Party ("WP29") has previously commented on the elements of this lawful basis as contained in Directive 95/46/EC. Generally, this guidance remains relevant under the GDPR, and is restated below for clarity.

~~Part 2 – Lawful processing of personal data in the context of contracts~~

Part 2 – The elements of Article 6(1)(b)

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

11. The first part of Article 6(1)(b) is tied to the performance of a valid contract with a data subject. As such, it would not be possible to rely on this lawful basis where there is no contract in existence with the data subject, for example, where a data controller records the behaviour of internet users across different websites in the absence of a contractual relationship with the data subject.

~~11.~~ As WP29 has previously observed,[8] the concept of the performance of a contract does not include contractual elements outside of the normal execution of the agreement (e.g. processing relating to dispute resolution between the parties, or processing resulting from breach of contract by one of the parties).

12. It is also the view of the EDPB that where data processing is *merely referenced* in a contract this of itself is not enough to bring the processing in question within the scope of this legal

Commented [A19]: [redacted] We don't agree with such extension of the scope of this paper, which is not to tackle the GDPR principles and data protection law applied to online services, we should concentrate on the contract legal basis.

Commented [A20R19]: [redacted] It was agreed at the initial meeting in April that the paper would include discussion of relevant principles from Article 5. All previous versions have included discussion of principles

Commented [A21]: [redacted] We suggest adding "in the context of a valid contract or contractual steps", as this is the scope of article 6 (1) (b).

Commented [A22]: [redacted] We note that the distinction between the legal basis of art 6.1.b. on the one hand, and the concept of a service agreement between the data subject/consumer and the company that offers the service on the other hand, is often blurred in this paper. This is important. The paper must clarify that not everyting that is written in the agreement can be based on 6.1.b. some aspects may need a different legal ground in article 6. Some other aspect may not comply with the GDPR at all.

Commented [A23R22]: [redacted] Not all DPAs agree with the strict necessity approach described – the GDPR itself does not mandate such an approach

Commented [A24]: [redacted] Inaccurate – the legal basis is not contractual terms, but rather art. 6(1)(b), which makes reference to the performance of contract and a necessity assessment. Important distinction in our view.

[redacted]

Commented [A26]: [redacted] In the new version this paragraph has been deleted. We think that the previ... [2]

Commented [A27R26] [redacted] It is accepted that this paper would depart from statements in other WP papers. ... [3]

Commented [A28]: This section contradicts earlier advice and guidance of WP29. (e.g. Opinion 06/2014 ... [6]

Commented [A29R28]: The objective of this version is to demonstrate an alternative approach to 6(1)(b) whic ... [7]

Commented [A30]: [redacted] We have an issue with the fact that the following sections clearly contradicts pre ... [5]

Commented [A31R30]: [redacted] This paper would dispute the assertion made in the ab guidelines that what is ... [4]

Commented [A32] [redacted] We feel that the fairness principle has been somewhat disregarded in the follo ... [9]

Commented [A33R32]: [redacted] We note this point, however we are also concerned tha t may be exceed our rem ... [8]

Commented [A37]: [redacted] We believe that the previous opinions of WP29 (especially opinion 06/2014, but ... [10]

Commented [A34]: [redacted] As previously stated, we believe that the breach of contract is part of the ... [11]

Commented [A35]: [redacted] The October version has this paragraph deleted. W k however that this is ve ... [12]

Commented [A36R35]: [redacted] This paragraph is only appropriate if we wish to follow a "strict" necessity ... [13]

basis. Instead there is an onus on a data controller (through the principle of accountability under Article 5.2) to be able to demonstrate how the processing in question is necessary so the contract in question can be fulfilled. Therefore where a controller seeks to rely on the contractual necessity ground in Article 6(1)(b), they should distinguish between processing operations which on the one hand are genuinely necessary in order that a contract can be performed with the data subject, and processing which, on the other hand may be necessary for *other business purposes*, but are peripheral to the performance of the contract.

13. Contracts for digital services may incorporate agreements and policies to regulate advertising, payments or cookies, amongst other things. The EDPB's position is that express contractual terms designed to artificially expand the categories of personal data that the controller needs to process under the contract, beyond what might be reasonably envisaged by the user of the service, should not be inserted into contracts simply for the purposes of attempting to bring processing within 6(1)(b).

Steps prior to entering into a contract

~~12.~~14. Article 6(1)(b) may apply 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 (for example, in order to provide a quote~~).~~). In an online context, this provision may be of relevance in situations where, for example, a data subject provides their postal address to see if a particular service provider operates in their area, or processing which is carried out as part of a registration process for an online service.

~~13.~~15. 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.

Example 1

A social media company creates a function that allows its users to invite non-members to join the service. Where such an invite is sent, the company collates all the information it holds on the person invited (the invitee) in order to assemble a preliminary profile of their connections to other users. Since the invite has been sent at the request of a third party (the original user sending the invite), the data subject profiled (the invitee) has not asked the data controller to take any steps, and therefore the company cannot legitimately rely on Article 6(1)(b) as its basis for this pre-contractual processing.

Performance of a contract with the data subject

~~14.~~16. Article 6(1)(b) also applies where processing is necessary for the performance of a valid contract with a data subject. As such processing must take place in the

Commented [A38]: [redacted] The October version had these two paragraphs deleted. We would like to maintain these two paragraphs, they make it clear that the data subject needs to be aware that the processing is going to take place during the performance of the contract. In addition, as our [redacted] colleagues had suggested, we think it is very important that the concept of necessity is evaluated from the perspective of the user. Following this idea, we should be more precise in the rest of the paper that necessity is not only appreciated on an objective perspective but also on a subjective one.

In addition, the question of the definition of the perimeter of the service should also be addressed, as it will significantly impact on the assessment of the necessity to perform the contract.

Commented [A39R38]: [redacted] Again, this paragraph clearly implies a the alternative "strict" approach, which is not consitent with the objective of this paper

[redacted]

Commented [A41]: [redacted] One of the main ideas of article 6 1) b) is that the pre-contractual steps must have been taken at the initiative of the data subject, we would therefore like to keep the words "on the initiative" of the data subject.

Commented [A42]: [redacted] Nuancing needed? The information provided in the registration process may actually be necessary for the performance of the contract rather than being a pre-contractual step taken at the data subject's request.

Commented [A43]: [redacted] We need to be more accurate in this illustration and provide an example of a data that would be deemed necessary to process in the context of a registration process for an online service (for example an email address).

Commented [A44]: [redacted] We agree with the addition of this paragraph, but w[redacted]est putting "marketing as a whole", i.e. deleting unsolicited.

Commented [A45] [redacted] We note that the examples in this version have changed completely. We will not comment with track changes at this stage, as the general direction and scope of the paper should be agreed on first. It will be obvious from our comments to this paper that we prefer to continue work on the previous version of the document.

Commented [A46R45]: [redacted] Examples in this version have been revised to reflect th[redacted]ange in approach

Commented [A47]: [redacted] We would go even further and say that the company cannot legitimately rely on article 6 (1) (b) for the building of a profile, in particular if this profile is meant to be used for targeted advertisement.

context of a contractual relationship with a data subject. This would not apply, for example, where a data controller records the behaviour of internet users across different websites in the absence of a direct contractual relationship with the data subject monitored.

Necessity

17. The ordinary meaning of the term "necessary" includes "needed to achieve a certain desired effect or result" and "required".[9]

18. Necessity of processing is a prerequisite for both parts of Article 6(1)(b), and acts as an objective condition for lawfulness. At the outset, it is important to note that the concept of necessity in data protection law is not a standalone assessment of what is required by 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.[10] Therefore, while necessity of processing requires an assessment of processing activities in light of the terms of a contract, it also involves consideration of the right to protection of personal data,[11] as well as the requirements of data protection principles, referred to below. Necessity must be justified on the basis of objective evidence and is the first step before assessing the proportionality of a limitation or restriction which is being placed on fundamental right under EU law. Necessity implies the need for a combined, fact-based assessment of the effectiveness of the measure for the objective pursued and of whether it is less intrusive compared to other options for achieving the same goal.[12]

~~15.~~ When considering necessity within the context of Article 6(1)(b), the WP29 has previously stated that it *"must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract"*.[13] The EDPB notes that necessity in this sense can be seen as a binary assessment; either processing is necessary for the performance of the contract, or it is not. The comments above as to the objective assessment required in relation to whether a measures is necessary or not should be borne in mind here. A controller should therefore be able to demonstrate how a *specific contract with a data subject* cannot, as a matter of fact, be performed/ fulfilled/ satisfied by one or both of the parties if the processing of the *specific categories of personal data in question* does not occur. The important issue here is the nexus between the particular categories of personal data concerned and subject matter of the contract. The processing of the specific categories of personal data must be essential to the ability to perform the terms of the contract in question. On the other hand, data processing that is peripheral to the performance of the contact may still be legitimate, but under one of the other lawful grounds such as consent or legitimate interest, notwithstanding the fact that the contractual necessity basis does not apply.[14]

Commented [A48]: [redacted] We need to add an explanation on what the GDPR me[redacted]y contract. As explained in the Guidelines on consent "it is important to determine what the scope of the contract is what data would be necessary for the performance of that contract, and that "*There needs to be a direct and objective link between the processing of the data and the purpose of the execution of the contract".*

The opinion 16/2011 on behavioural advertising states that the fact that some data processing is covered by a contract does not automatically mean that the processing is necessary for its performance. It also states that "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".

Commented [A49]: [redacted] We agree with this addition, but we suggest deleting the word "direct".

Commented [A50]: [redacted] We note that 90% of our work on analysing this concep[redacted] the previous version has been deleted, including relevant ECJ case law, draft examples and the specific sections on elements that typically occur in the social media/online services sector, such as OBA. Therefore, we reiterate our second comment above.

Commented [A51R50]: This paper is not intended to be an iteration of the previous paper – it is intended to demonstrate a fundamentally different interpretative approach, for comparative purposes

Commented [A52]: [redacted]: This entire section has been deleted in the version sent by the [redacted] We don't agree with the deletion of this entire section, and we would like to reiterate our suggestion that necessity should also be appreciated from the data subject's point of view.

~~16.~~19. Necessity of processing is a prerequisite for both parts of Article 6(1)(b). This criterion acts as an objective condition for lawfulness of processing.

~~17.~~20. In some cases, the concept of necessity requires that there is no less intrusive alternative available to the processing in question. For example, in *Schecke*[15], the CJEU held that, when examining the necessity of processing personal data, the data controller needed to take into account alternative, less intrusive measures.[~~16~~] However, in other cases[17], the CJEU has held that processing may be considered "necessary" if it contributes to the more effective performance of certain legislative obligation.

~~18.~~21. Accordingly, consideration of what is necessary for the performance of a contract under Article 6(1)(b) may be determined to an extent by a factual assessment of the agreement that was entered into between the parties, in order to identify processing operations which are required to give effect to that agreement. This approach recognises that legal and natural persons are entitled to freely enter into contractual agreements which specify (or implicitly require) processing of personal data, subject to the clear obligations of data protection law.

Description of the service in the contract

~~19.~~22. In some cases, written contractual terms may clearly specify that processing of personal data us required as an element of performance of the contract. However, it is not required for the purposes of Article 6(1)(b) that each granular processing operation must be specified in contractual terms. In many cases, processing which is necessary for the performance of a contract will not be expressly stated in contractual terms between the parties, and instead must be considered in the wider context of the agreement entered ~~into~~into, including an assessment of what is reasonably necessary in order to perform the underlying agreement. Processing does not have to be essential in order to perform the agreement. It is sufficient that the processing is a targeted and proportionate way to give effect to the agreement between the parties, or that the processing is an efficient way to perform the contract.

~~20.~~23. Processing which manifestly lacks a connection to the matters agreed between the parties to a contract cannot be carried out under Article 6(1)(b). Moreover, contractual terms which are described in vague or opaque terms may not be sufficient for the purposes of Article 6(1)(b), if it is not possible to predict the processing which may result from the terms used. Vague contractual terms ~~may also~~ conflict with the purpose limitation principle, as discussed further in Part 3 of these guidelines.

~~21.~~24. In the context of online services, the EDPB notes that many companies are now funded by the sale of online behavioural advertising, based on the tracking and profiling of service users. In order for such processing to fall within the scope of Article

[15] CJEU, Joined Cases C 92/09 and C 93/09,Schecke, Eifert v Hessen, 9 November 2010, para 86.

[~~16~~] ~~CJEU, Joined Cases C 92/09 and C 93/09,*Schecke, Eifert v Hessen*, 9 November 2010, para 86. This was repeated by the CJEU in the Riga Police case where it held in the 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".~~

[17] CJEU, Case C-524/06, Heinz Huber v Bundesrepublik Deutschland, 18 December 2008, para 62.

Commented [A53]: [redacted] We believe this is a wrong quote of the case. The CJEU in Huber stated "what is at issue is a concept [necessity] which had its own independent meaning in Community law and which must be interpreted in a manner which fully reflects the objective of that Directive as laid down in Article 1 thereof". This quote, which was a part of the previous concept, is a general explanation of the concept of necessity and should ... [17]

Commented [A54R53]: [redacted] There does not appear ... [18]

Commented [A55]: [redacted] Makes it look like the ... [16]

Commented [A56R55]: The CJEU held here that c ... [15]

Commented [A57]: [redacted] This case-law refers to p ... [14]

Commented [A58R57]: [redacted] see point above

Commented [A59]: [redacted] We don't understand th ... [19]

Commented [A60R59]: [redacted] This wording refers to ... [20]

Commented [A61]: [redacted] Data subjects do not ... [21]

Commented [A62R61]: [redacted] See above comment

Commented [A63]: [redacted] We don't agree with the ... [22]

Commented [A64R63]: [redacted] This is necessary – 6(... [23]

Commented [A65]: [redacted] Controllers cannot fr ... [24]

Commented [A66R65]: [redacted] We agree with your ini ... [25]

Commented [A67]: [redacted] See our comment above. ... [28]

Commented [A68]: [redacted] We don't agree with this ... [27]

Commented [A69R68]: [redacted] This is noted – The [redacted]

Commented [A70]: [redacted] Again, here you are s ... [31]

Commented [A71]: [redacted] WP29 stated in opinion ... [30]

Commented [A72]: [redacted] The fact that it is specifi ... [29]

Commented [A73]: [redacted] We don't agree with this ... [32]

Commented [A74R73]: [redacted] Transparency obligatio ... [33]

Commented [A75]: [redacted] Yes it does, otherwis ... [35]

Commented [A76R75]: [redacted] "Essential" in this insta ... [36]

Commented [A77]: [redacted] We don't agree with this ... [34]

[redacted]

Commented [A79]: [redacted] ??? Disagree. This under ... [38]

Commented [A80R79]: [redacted] This construction is dir ... [39]

Commented [A81]: [redacted] But according to you ... [44]

Commented [A82R81]: [redacted] This would depend on ... [45]

Commented [A83]: [redacted] No, this is misleading. Th ... [43]

Commented [A84R83]: [redacted] This comment is descr ... [42]

Commented [A85]: [redacted] Does this mean that ... [41]

Commented [A86R85]: [redacted] No - We do not consid ... [40]

Commented [A87]: [redacted] This shows how this versi ... [46]

[redacted]

6(1)(b), the terms of the agreement entered into between the parties must clearly indicate that behavioural tracking, monitoring, profiling or personalisation constitutes an element of the contract. When entering into such a contract, it should be clear from the terms agreed that the user's personal data will be processed for the purposes of serving them individualised advertisements. In the absence of clearly described terms, Article 6(1)(b) may not provide a lawful basis for processing. Further to this, data subjects must be provided with detailed information to meet GDPR transparency obligations in relation to processing of their personal data. This includes the express obligation under Article 13(2)(e) to provide information (at the time that personal data are obtained from a data subject) on whether the provision of personal data is a contractual requirement. Transparency requirements are discussed further in Part 3 of these guidelines.

Example 2

An online social network provider states in its user agreement that the user agrees to monitoring of their behaviour the purpose of "personalisation".

The service provider subsequently processes the user's personal data for an increasing number of purposes which were not clearly brought to the attention of the user at the time of entering into the initial agreement, including a project to research patterns of commuter behaviour, conducted on behalf of local government authorities.

In this case, the terms agreed between the user and the company are vague, and do not support the conclusion that processing for research purposes is reasonably necessary to perform the contract entered into between the parties.

~~22.~~25. It must also be noted that the data protection principles, set out in Article 5 of the GDPR operate as overriding legal obligations in the context of Article 6(1)(b), which cannot be set aside on the basis of a contractual arrangement between a data controller and a data subject. Further to this, data controllers cannot avoid positive obligations of data protection law by simply inserting contractual terms limiting their obligations (for example the right to erasure under Article 17(1)(c)).

~~23.~~26. Data subjects have the absolute right under Article 21(2) to object to processing of their data for direct marketing purposes, irrespective of contractual terms agreed between parties. The EDPB also notes that, in line with e-privacy requirements, the existing WP29 opinion on behavioural advertising[18], and Working Document 02/2013 providing guidance on obtaining consent for cookies[19], controllers must obtain data subjects' prior consent to place the cookies necessary to engage in behavioural advertising.

[18] Opinion 2/2010 on online behavioural advertising (WP 171, 22 June 2010)
[19] Working Document 02/2013 providing guidance on obtaining consent for cookies (WP208, 2 October 2013)

Commented [A88]: [redacted] Disagree. We believe this is not the case. Behavioural tracking, monitoring, profiling, personalisation are normally not necessary for the performance of a contract. In case a controller wishes to engage in these kinds of data processing operations, it requires a different legal ground. For example consent. This is not a matter of unduly limiting contract law, as is suggested in this paper, no, it is in fact a matter of applying the six grounds of article 6 correctly.

Commented [A89R88]: [redacted] This view appears to be based on prior statements of the WP and implies that processing must be absolutely necessary from the ... [50]

Commented [A90]: [redacted]: Disagree. This reduces the GDPR to a pro forma instrument. As long as you remember to include all kinds of requirements and provisions in a contract, which the data subject is in no position to ... [49]

Commented [A91R90]: While we note your comments in relation to the imbalance between users and providers, we are not satisfied that this is properly within the remit of data protection law to address market imbalances i ... [48]

Commented [A92]: [redacted] We suggest deleting this paragraph. The terms not only need to indicate that behavioural tracking etc... will take place, but these processing must be a necessary element of the con ... [47]

Commented [A93]: [redacted] We suggest deleting this sentence. For the time being, there is no individualised advertisement without cookies or trackers falling within the scope of the ePrivacy directive. This is clearly not in ... [51]

Commented [A94]: [redacted] In addition, the data controller should explain *why* the processing of personal data is necessary for the performance of the contract. ... [52]

Commented [A95]: [redacted] This examples seems to relate more to transparency and purpose specification. Those principles, although essential, cannot make up for the lack of lawfulness

Commented [A96] [redacted] We don't agree with this example. Does this mean that "monitoring of their behaviour" can be based on the contract? How to deal with the right to object in such case? ... [53]

Commented [A97]: [redacted] We agree that the legal obligation of article 4 (1) (b) cannot be set aside by contractual arrangements, but we don't understand the necessity of stating that the data protection princip ... [54]

Commented [A98R97]: [redacted] We can clarify the text here if necessary – the point isn't that 6(1)(b) is set aside, the point is to ensure that positive obligations of data protection law are observed, notwithstanding contra ... [55]

Commented [A99]: [redacted] The same logic applies to Article 6; a contract cannot circumvent the obligation to have a legal basis. Note that article 6(1)(b) does no ... [56]

Commented [A100R99]: We agree with this analysis, but we differ in relation to the scope of Article 6(1)(b), The [redacted] considers that it is not limited to "core" function ... [57]

Commented [A101] [redacted] We believe this is not relevant for this paper. Focus s d be o the notion of necessity in article 6.1.b., as agreed.

Example 3

A social media company records details of data subject activities on its platform, in order to personalise content made available to the user, and in order to direct personalised advertising to the user. The company mentions in its terms of service that it will monitor the user's online activity in order to personalise advertising and other content. Notwithstanding this, the company's online privacy policy does not clearly outline the types of processing it carries out (or the persons to whom it discloses user information) in order to create a profile of the user. Further to this, the company retains details of past user activity on an indefinite basis.

In this case, the company may have a lawful basis to monitor user behaviour, to the extent that it is reasonably necessary to perform the contract entered into. Notwithstanding this, the company has failed to comply with data protection principles relating to transparency and data retention.

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

27. Article 6(1)(b) is not the only lawful basis which might be relevant to processing in the context of online services. In particular, in some circumstances it may be more appropriate to rely on consent under Article 6(1)(a), or legitimate interests under Article 6(1)(f). [redacted]

~~24.~~28. Controllers may be obliged to obtain consent where required for compliance with e-privacy laws; for example, for some types of electronic marketing messages and for the placement of cookies.

~~25.~~29. [redacted]

[redacted]

Commented [A103]: [redacted] Contrary to everything we believe in (sorry, but it's true), as well as previous A29WP guidance.

As stated above: According to the GDPR, the processing must be necessary for the performance of a contract. In other words, it must not be possible to provide a contract or service without the processing. Is it possible to provide social media accounts without tracking and profiling? Yes, in fact it is. Therefore, tracking or profiling is not necessary for the performance of that contract.

Commented [A104R103]: [redacted] This interpretation of necessity is overly strict in the view of the [redacted]. In effect this would read necessity under 6(1)(b) **only in relation to those parts of the contract which benefit the data subject**. While we appreciate that this is based on a reading of the fairness principle, we are concerned that it is not supported directly by the text of the GDPR, and accordingly we do not support this view. We also question the conclusion that since it would be possible to provide a service without monitoring users, etc, that this inevitably means that such processing cannot be regarded as necessary. This approach to necessity excludes from consideration contractual terms which relate to persons other than the data subject.

Commented [A105]: [redacted] We suggest removing this example, as this refers again to social media.

In addition, the monitoring of user behaviour cannot be held as reasonably necessary to perform the contract. This has never been the interpretation of Article 29 working party and it cannot be one of the EDPB. For instance, it has stated in the guidelines on legitimate interest that necessity "*must be interpreted strictly and does not cover situations where the processing is not genuinely necessary for the performance of a contract".* It has also stated that contractual necessity *"is not a suitable legal ground for building a profile 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*

Commented [A106]: [redacted] This not only applies to cookies but to all targeting technologies in general.

[redacted]

[redacted]

[redacted]

[redacted]

~~26.~~30. 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, it may as an alternative be appropriate to obtain consent for processing, or to rely on another appropriate legal basis, such as legitimate interests, if applicable.

[redacted]

[redacted]

~~28.~~32. In relation to the processing of special categories of personal data, in the Guidelines on Consent, WP29 also observed that "*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".*

[redacted]

Part 3 - Consideration of data protection principles in the context of online services

[21] See Article 29 Working Party Guidelines on the right to data portability (WP242)

Lawfulness and fairness

29.33. Article 5(1)(a) GDPR provides that personal data must be processed lawfully, fairly and transparently in relation to the data subject. Lawfulness, in the case of contracts for online services, may be substantially defined by applicable national contract law. It is beyond the scope of these guidelines to address the requirements of contract law generally, and the EDPB notes that Article 6(1)(b) is not limited to contracts concluded on the basis of the law of an EU member state (as set out in the jurisdiction/ governing law clause in a contract). Notwithstanding this, many contracts for online services will be still be subject to rules of EU private international law including provisions governing choice of law[22], choice of jurisdiction[23], and consumer protection.

30.34. For example, in a case where EU law is applicable to a consumer contract, data controllers should be aware of the requirements of Directive 93/13/EEC on unfair terms in consumer contracts (the "Unfair Contract Terms Directive"). The Unfair Contract Terms Directive regulates consumer contracts which are not individually negotiated (as is the case for the most online services). A contractual term may be 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. The Unfair Contract Terms Directive mandates the use of plain, intelligible language. Processing of personal data which 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.

31.35. Another example of a factor which may dictate whether a processing is lawful under Article 5((.(1))()(i)(a) relates to where the data subject is a child. In such a case (and aside from complying with the requirements of the GDPR, including the "specific protections"[24] which apply to children) the controller must ensure that it complies with the relevant national laws on the capacity of children to enter into contracts if the controller is purporting to enter into a contractual arrangement with a child.

32.36. In every case, a controller should not process personal data in reliance upon Article 6(1)(b) unless they can demonstrate that both the processing takes place in the context of a valid contract[25] with the data subject and that processing is necessary in order that the *particular contract* with the data subject can be performed. Where there is doubt as any of (a) the actual existence of a contract (b) the validity of a contract under the law in question or (c) whether the processing is actually necessary for the

[22] Regulation (EC) No 593/2008 of the European Parliament And Of The Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
[23] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)
[24] 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.
[25] The requirement for a valid contract includes circumstances where processing is carried out on a pre-contractual basis.

purpose of performing the contract, the controller should consider another lawful basis for processing.

[redacted]

[redacted]

[redacted]

[redacted]

Purpose limitation and data minimisation

~~37.~~41. Article 5(1)(b) of the GDPR contains a 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. Article 5.1(c) provides for data minimisation as a principle, i.e. that processing must be limited to what is necessary in relation to the purposes for which personal data are processed. The purpose limitation principle is of key importance to processing on the basis of contractual necessity.

~~38.~~42. Contracts for online services are not typically negotiated on an individual basis, which enables the controller to substantially define the purposes of processing. In addition to this, technological advancements have made it possible to collect, store and analyse large volumes of information on user behaviour and preferences, which may be applied for novel purposes as the service is developed and updated.

~~39.~~43. In the context of online services, providers often add features and functionality to existing services. In doing so, controllers should not exceed the purposes which were outlined in the agreement with the user at the outset. While variation in a contract may be covered by specific contractual terms, the purpose limitation principle nevertheless prohibits function creep in the provision of online services. Data controllers must also ensure that subsequent processing of personal data by third parties does not exceed the purposes which were agreed between the parties to the contract (subject to such processing having been clearly included as a contractual term, or otherwise being necessary for the performance of the contract).

~~40.~~44. WP29 has previously stated[29] that the *"purpose of the collection must be clearly and specifically identified: it must be detailed enough to determine what kind of*

[29] Article 29 Working Party Opinion 03/2013 on purpose limitation (WP 203~~), page~~)

[redacted]

Commented [A119]: [redacted] This sentence was deleted in the October version. However, we suggest keeping it, as purpose limitation is of utter importance to processing on the basis of contractual necessity.

Commented [A120]: [redacted] We suggest deleting this paragraph, we don't see the relationship between the "individual basis" and the impossibility to "substantially define the purposes of processing"

Commented [A121]: [redacted] It is not made clear which parties referred to here. The contract with third parties or the contract with data subject? We don't really understand what is meant here, and suggest deleting it.

[redacted]

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'."

45. Depending on the objectives of a contract for online services, certain types of processing may be not be objectively necessary for the performance of the contract with the data subject. The EDPB comments below on common processing operations conducted in the context of online services, against the background of Article 6(1)(b).

Processing for "service improvement"

In the context of online contracts and Article 6(1)(b), purpose limitation is tied to the contractual terms agreed between the parties, which must include a sufficiently detailed description of the terms agreed between the parties.

46. 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, where 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.

47. The EDPB is not satisfied that Article 6(1)(b) would be an appropriate legal 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 cannot be regarded as forming part of the routine performance of the contract with the user.

Processing for online behavioural advertising

48. Online behavioural advertising, and associated tracking and profiling of data subjects, is a characteristic activity of online services, which often provide a source of revenue to fund online services. WP29 has previously stated its view on such processing, stating[30]:

"[contractual necessity] is not a suitable legal ground for building a profile of the user's tastes and lifestyle choices based on his clickstream on a website and the

[30] Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC (WP 217), p. 17.

Commented [A123]: [redacted] The October version had this paragraph deleted, we would like to keep it, as well as the comments of the EDPB.

Commented [A124R123]: [redacted] The below examples have been removed because they rely on the strict necessity approach, which is not advance in this version of the paper. They have been retained in the alternative version of this paper.

Commented [A125]: [redacted] The statement according to which "purpose limitation is tied to the contractual terms agreed between the parties" is highly questionable – the contract has no effect and cannot contradict the purpose limitation principle. We suggest deleting it.

Commented [A126]: [redacted] This entire part was deleted, but we believe that it is necessary to keep as it is directly relevant to article 6 (1) b) legal basis, and gives examples of what would be "necessary".

Commented [A127R126]: The below examples have been removed because they rely on the strict necessity approach, which is not advance in this version of the paper.

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."

49. The EDPB notes that processing of personal data by tracking, profiling and targeting of users for online advertising purposes is not equivalent in terms of necessity to processing monetary payments by users for services. For example, there is a categorical difference in this regard between processing an individual's payment details at their request (and on a one-off basis), and engaging in constant surveillance of users to facilitate the broader requirements of a business model.

50. The EDPB's position is that the delivery of personalised advertising does not constitute a necessary element of online services from the perspective of a user, i.e. that a data subject would not reasonably expect it to occur as a consequential necessity of their contractual agreement with the service provider. Further to this, the EDPB does not accept that Article 6(1)(b) can provide a lawful basis for online behavioural advertising simply because such advertising ultimately funds the provision of the service. Although such processing may support the delivery of a service, it can only be regarded as separate to the performance of the contract between the user and the service provider, and therefore not necessary with regard to the contract at issue.

51. [redacted]

52. The EDPB also notes that tracking and profiling of users may be carried out for the purpose of identifying individuals with similar 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 necessary to track and compare users' characteristics and behaviour for purposes which relate to advertising, and which are not necessary for the performance of the contract with the user.

Personalisation for content delivery purposes

53. The EDPB acknowledges that personalisation of content may but does not always constitute an essential or expected element of an online service, which may be regarded as necessary for the performance of the contract with the service user. Whether such processing can be regarded as an intrinsic aspect of an online service will depend on the nature of the service provided. Where personalisation of content is not 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 necessary to use the service, data controllers should consider an alternative legal basis where applicable.

[redacted]

Commented [A130]: [redacted] We don't agree with the deletion of these paragraphs. This is the heart of our paper, the fact that online behavioural advertising is not necessary for the performance of a contract.

Commented [A131R130]: The below examples have been removed because they rely on the strict necessity approach, which is not advance in this version of the paper.

[redacted]

[redacted]

[redacted]

Page 3: [1] Commented [A25] **Author**

[redacted]

Page 3: [2] Commented [A26] **Author**

[redacted]: In the new version this paragraph has been deleted. We think that the previously commented elements by the Article 29 Working party are still relevant, we would like to keep this paragraph.

Page 3: [3] Commented [A27R26] **Author**

[redacted] It is accepted that this paper would depart from statements in other WP papers. Notwithstanding this, we are of the view that the alternative position is unduly restrictive, in a way that is difficult to reconcile with the text of the GDPR, [redacted]

Page 3: [4] Commented [A31R30] **Author**

[redacted] This paper would dispute the assertion made in the above guidelines that what is necessary in order to perform a contract is limited to what is to be provided to a data subject – this paper adopts the approach that any lawful contractual term may be relevant for the purposes of 6(1)(b) – not just those terms which relate to the controller's obligations.

Further to this, we do not accept that the principle of fairness requires a automatic prohibition contractual terms which pertain to personal data of users. Fairness in such circumstance could be acheived by correct application of transparency and the purpose limtiation principle.

Page 3: [5] Commented [A30] **Author**

[redacted]: We have an issue with the fact that the following sections clearly contradicts previous A29WP guidance on the matter. There is no reference to Opinion 06/2014, which notably states (p. 16–17):

The provision 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 data processing is covered by a contract does not automatically mean that the processing is necessary for its performance. For example, Article 7(b) is not a suitable legal ground for building a profile 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. 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.

Page 3: [6] Commented [A28] **Author**

This section contradicts earlier advice and guidance of WP29. (e.g. Opinion 06/2014). Therefore, we refer to our second comment to this draft: this version of the text may be a dead end.

Page 3: [7] Commented [A29R28] **Author**

The objective of this version is to demonstrate an alternative approach to 6(1)(b) which has been supported by a number of DPAs. The paper outlines in greater detail the application of 6(1)(b), and all views should therefore be considering by the subgroup.

Page 3: [8] Commented [A33R32] **Author**

[redacted] We note this point, however we are also concerned that it may be exceed our remit to say that all processing conducted in the context of monitoring etc is unfair if carried out on the basis of 6(1)(b). This approach introduces a very broad implied limitation on 6(1)(b) which is not supported by the text of the GDPR

Page 3: [9] Commented [A32] **Author**

[redacted] We feel that the fairness principle has been somewhat disregarded in the following sections. Not sure if the suggestions made are fair from the perspective of data subjects.

Page 4: [10] Commented [A37] **Author**

[redacted]. We believe that the previous opinions of WP29 (especially opinion 06/2014, but also the guidelines on sent WP259, which refers to opinion 06/2014 , adopted by the EDPB in May this year) are still relevant and should be reflected in the concept.

Page 3: [11] Commented [A34] **Author**

[redacted] As previously stated, we believe that the breach of contract is part of the contractual execution and should therefore be included in our scope. We don't agree with the deletion.

Page 3: [12] Commented [A35] **Author**

[redacted] The October version has this paragraph deleted. We think however that this is very important to keep, especially the example which actually is the reason why we started drafting this paper.

Page 3: [13] Commented [A36R35] **Author**

[redacted] This paragraph is only appropriate if we wish to follow a "strict" necessity approach, it would not be appropriate otherwise

Page 6: [14] Commented [A57] **Author**

[redacted] This case-law refers to public sector activities, and the sovereign powers of the state, insofar as it concerns decentralized registers allowing the authorities to undertake their duties attributed by law. There is not transposable to online services performed by the private sector, all the more that this decision refers to another legal basis (article 7(e) of the Directive: "processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed".

Page 6: [15] Commented [A56R55] **Author**

The CJEU held here that certain processing could be regarded as necessary if it "contributes to the more effective application of that legislation" – We consider this an important clarification which can be applied by way of analogy in this case, even if only to demonstrate that the Court has not adopted absolute necessity as the relevant standard

Page 6: [16] Commented [A55] **Author**

[redacted]: Makes it look like the EDPB is willing to equate usefulness and efficacy with necessity, which is not the case.

Page 6: [17] Commented [A53] **Author**

[redacted] We believe this is a wrong quote of the case. The CJEU in Huber stated "what is at issue is a concept [necessity] which had its own independent meaning in Community law and which must be interpreted in a manner which fully reflects the objective of that Directive as laid down in Article 1 thereof". This quote, which was a part of the previous concept, is a general explanation of the concept of necessity and should be the basis of the paper. Therefore, necessity requires a consideration of the right to protection of personal data as well as an assessment of processing activities in light of the terms of a contract.

The quote in this concept is a specific application of processing for compliance with a legal obligation which is not relevant.

Page 6: [18] Commented [A54R53] **Author**

[redacted] There does not appear to be direct judicial guidance on how a strict construction is to be applied in respect of 6(1)(b), and so the paper refers to CJEU findings in relation to other lawful bases, which are of clear interpretative relevance – the reference to Huber here illustrates an important point – necessity, although generally subject to a narrow construction does not always mean the absolutely least intrusive means of processing – this was clearly demonstrated by the Court's decision, and represents an important clarification of the concept of necessity in general

Page 6: [19] Commented [A59] **Author**

[redacted] We don't understand the necessity of putting "to an extent". We suggest deleting it.

Page 6: [20] Commented [A60R59] **Author**

[redacted] This wording refers to the later paragraphs which state you cannot contract out of obligations

Page 6: [21] Commented [A61] **Author**

[redacted]: Data subjects do not *freely* enter into these contracts. There is a take-it-or-leave it situation, and contracts are often unbalanced.

Page 6: [22] Commented [A63] **Author**

[redacted] We don't agree with the necessity to write "implicitly require".

Page 6: [23] Commented [A64R63] **Author**

[redacted] This is necessary – 6(1)(b) does not require processing to be set out in granular detail, it would not be necessary or possible for all processing to be expressly specified in a contract

Page 6: [24] Commented [A65] **Author**

[redacted] Controllers cannot freely specify processing of personal data in the contract. This document does not concern what services business can provide nor how they define their services in a contract, which is largely a matter of contractual freedom. It does, however, concern under which circumstances it is lawful to collect personal data, which is regulated by an EU regulation. EU regulations takes precedence. For that reason, a contract in itself cannot legitimise the processing of personal data; rather, the processing must have a basis in art. 6 GDPR. A contract cannot legitimately try to undermine or circumvent an EU regulation, its wording, spirit or system.

Art. 6(1)(b) states that processing must be necessary for the performance of a contract – i.e., can this contract/service be still provided without the processing? This is conceptually different from stating that a contract can stipulate data processing requirements. (Example to follow in a later comment.)

The approach suggested will circumvent other legal bases. If anything could be freely specified in a contract, controllers would not need to collect consent nor perform balancing tests. (Remember that in many/most (?) jurisdictions, terms of service may constitute valid contracts.)

Also, this could be read as condoning the use of personal data as counter-performance, which we do not support.

Page 6: [25] Commented [A66R65] **Author**

[redacted] We agree with your initial summary here, but we disagree with the conclusion in relation to what is required by Article 6(1)(b) – in our view, this lawful basis is intended to facilitate processing that results from a contractual agreement. We do not agree that this was only intended to cover "core" parts of a contract, or only such elements of performance which are to the benefit of a data subject – in our view, these strict

constructions of 6(1)(b) exceed the plain language of the text. The relevant recitals on 6(1)(b) could easily have provided for a "core functions" approach and yet no such construction was adopted. In the absence of clear guidance to the contrary, we are of the view that all elements of contractual performance may validly be considered under 6(1)(b)

Page 6: [26] Commented [A69R68] **Author**

[redacted] This is noted – The [redacted] is not satisfied that such a restrictive position can be legally sustained, or that matters such as systemic market inequalities within the remit of data protection law to address in the manner suggested

Page 6: [27] Commented [A68] **Author**

[redacted] We don't agree with this sentence, which does not take into account the fact that most of contracts with online services are non-negotiable. This statement skips the fact that in online service, the natural person are forced to accept whatever is in the agreement – cf. debates relating to the unfair business practices

Page 6: [28] Commented [A67] **Author**

[redacted] See our comment above. We believe the first step must be to identify the key elements of the contract. The second step is to take is the assessment whether processing activities are necessary for the contract, mostly from the perspective of the users.

In this concept the most important element of article 6 (1) (b) necessity has been totally undermined. [redacted]

Page 6: [29] Commented [A72] **Author**

[redacted] The fact that it is specifically mentioned in the contract is irrelevant. The WP29 opinion on behavioural tising clearly states that "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".

Page 6: [30] Commented [A71] **Author**

[redacted] WP29 stated in opinion 06/2014 that where data processing is merely referenced in a contract this of itself is not enough to bring the processing in question within the scope of this legal basis. Since the GDPR didn't change the lawful basis of processing where it is necessary in the context of a contract, we believe the view of WP29 is still relevant and should be the starting point in the concept.

Page 6: [31] Commented [A70] **Author**

[redacted]: Again, here you are stating that controllers can specify that processing of personal data can be required as an element of performance of the contract. This seems to accept monetisation of personal data and circumventing the other legal bases (see comments made above).

We think that this interpretation undermines the system and spirit of the GDPR.

Page 6: [32] Commented [A73] **Author**

[redacted]: We don't agree with this sentence. This is not in line with the transparency principle, how can we expect a data subject to be aware of the "wider context of the agreement" and to carefully assess what is "reasonably necessary" into the agreement? How do you articulate this statement with the obligation clarified in Recital 39 "In particular, the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data."

Page 6: [33] Commented [A74R73] **Author**

[redacted] Transparency obligations should be addressed in a separate privacy notice, a contract would not be an appropriate place to provide such information in any event. It is not required by 6(1)(b) that all processing be specified expressly in a contract, that is what is being addressed in this sentence

Page 6: [34] Commented [A77] Author

[redacted] We don't agree with this approach, which is definitely too wide; it could include fraud, marketing, data transmission to third parties (needed to fund the website), etc.)

Page 6: [35] Commented [A75] Author

[redacted] Yes it does, otherwise it is not really 'necessary'.

Page 6: [36] Commented [A76R75] Author

[redacted]: "Essential" in this instance is qualified by the next sentence. We do not support a construction of 6(1)(b) which requires processing to be

Page 6: [37] Commented [A78] Author

[redacted]

Page 6: [38] Commented [A79] Author

[redacted] ??? Disagree. This undermines the meaning of ´necessary´ as explained in CJEU case law.

Page 6: [39] Commented [A80R79] Author

[redacted] This construction is directly based on the current ICO online guidance – we accept that it departs from the WP approach to date, however we are of the view that, even allowing for a narrow construction of 6(1)(b), **absolute** necessity is not the standard required by law.

Page 6: [40] Commented [A86R85] Author

[redacted] No - We do not consider that the use of the qualifier "manifestly" is confusing here -particularly in light of the preceding paragraphs

Page 6: [41] Commented [A85] Author

[redacted] Does this mean that "processing which lacks connection to the matters agreed" are ok?

This statement also goes against the principles laid down in article 5

Page 6: [42] Commented [A84R83] Author

[redacted]: This comment is describing the alternative approach here, which is not the objective of this draft paper. The point of this sentence is that a "reasonable" necessity standard is nevertheless limited to the issues agreed between the parties - it is not an unlimited basis for processing. This is an important point

Page 6: [43] Commented [A83] Author

[redacted] No, this is misleading. The focus is not on what is a valid contract. The focus must be on distinguishing what data processing operations are necessary to perform the contract so that that can be based on art. 6.1.b. and, on the other hand, the data use that is NOT strictly necessary for the performance of the contract. For the latter, the controller must either seek a different lawful basis, or must consider altering his actions to ensure compliance with the GDP R.

Page 6: [44] Commented [A81] Author

[redacted] But according to your logic, this can easily be resolved by just specifying the processing of personal data in the contract, right? This shows why the approach suggested, in our view, is not appropriate nor legally accurate.

Page 6: [45] Commented [A82R81] **Author**

[redacted] This would depend on the initial contract, the nature of the data, and the nature of the processing. We are reluctant to read restrictions into the law which are not provided for in the text, and we note that even if a controller can redefine a service, they would have to comply with data protection principles when processing subsequently.

Page 6: [46] Commented [A87] **Author**

[redacted] This shows how this version of the paper has completely turned upside down the perspective of the vious version. In an EDPB position paper, this should not be the starting point. We object against this entire paragraph 19 and support the views expressed by [redacted] earlier.

Page 7: [47] Commented [A92] **Author**

[redacted] We suggest deleting this paragraph. The terms not only need to indicate that behavioural tracking etc... will take place, but these processing must be a necessary element of the contract. Stating the opposite contradicts every papers of the WP29 and EDPB on the matter

Page 7: [48] Commented [A91R90] **Author**

While we note your comments in relation to the imbalance between users and providers, we are not satisfied that this is properly within the remit of data protection law to address market imbalances in the manner suggested. In our view, it goes beyond the plain meaning of 6(1)(b) to imply references to "core functions", and so the strict approach (as developed to date) is not clearly supported in law

Page 7: [49] Commented [A90] **Author**

[redacted] Disagree. This reduces the GDPR to a pro forma instrument. As long as you remember to include all kinds of requirements and provisions in a contract, which the data subject is in no position to negotiate, and that market powers cannot correct due to oligopolies, controllers can do as they like and there is no need for consent or a balancing of interests. How then do we make sure that data subjects do not have all aspects of their lives monitored? How do we ensure that that derogations from the right to privacy are proportionate? This seems to be contrary to the fairness principle.

According to the GDPR, the processing must be necessary for the performance of a contract. In other words, it must not be possible to provide a contract or service without the processing. Is it possible to provide social media accounts without tracking and profiling? Yes, in fact it is. Therefore, tracking or profiling is not necessary for the performance of that contract.

Page 7: [50] Commented [A89R88] **Author**

[redacted] This view appears to be based on prior statements of the WP and implies that processing must be absolutely necessary from the perspective of the data subject. The Irish DPC is concerned that this approach is not supported by the GDPR itself

Page 7: [51] Commented [A93] **Author**

[redacted]: We suggest deleting this sentence. For the time being, there is no individualised advertisement without cookies or trackers falling within the scope of the ePrivacy directive. This is clearly not in line with the previous opinion of the WP29 on ePrivacy which state that "*These mechanisms in effect lead to the denial of access for those users that do not accept cookies, also when it concerns tracking cookies with a commercial purpose, with high privacy risks for users*".

Page 7: [52] Commented [A94] **Author**

[redacted] In addition, the data controller should explain *why* the processing of personal data is necessary for the performance of the contract.

The Guidelines on consent clearly state that the purpose of personal data processing should not be disguised not bundled with the provision of a contract service which these personal data are not necessary.

In addition, there might be a typo here, it was probably meant to write “on whether the processing of personal data is a contractual require”.

Page 7: [53] Commented [A96] **Author**

[redacted] We don’t agree with this example. Does this mean that “monitoring of their behaviour” can be based on the contract? How to deal with the right to object in such case?

In addition, this consent would not even be valid, insofar as it must clearly state that the monitoring of their behaviour will take place for personalized advertisement. The wording should as a minimum include the element of "personalized advertising", as stated in page 5 of the Opinion 16/2011 on Behavioral advertising.

It should also explain that this monitoring will take place via tracking technologies.

Furthermore, all the examples seem to relate to social networks. The SMSG is currently developing a paper on targeted advertisement of social media users. We believe that we should therefore limit our examples on social media and keep for example the example of the online ride sharing application which was present in the previous version of the paper.

Page 7: [54] Commented [A97] **Author**

[redacted] We agree that the legal obligation of article 4 (1) (b) cannot be set aside by contractual arrangements, but we don’t understand the necessity of stating that the data protection principles of article 5 override article 6. We could simply write: “the legal obligations of article 6 (1) (b) cannot be set aside on the basis of a contractual arrangement between a data controller and a data subject”.

Page 7: [55] Commented [A98R97] **Author**

[redacted] We can clarify the text here if necessary – the point isn’t that 6(1)(b) is set aside, the point is to ensure that positive obligations of data protection law are observed, notwithstanding contractual terms. This statement would appear to be common to both approaches, however this draft differs insofar as the extent to which contractual terms will be appropriate in relation to 6(1)(b)

Page 7: [56] Commented [A99] **Author**

[redacted] The same logic applies to Article 6; a contract cannot circumvent the obligation to have a legal basis. Note that article 6(1)(b) does not state that contractual terms in themselves can serve as bases for processing – there is a necessity element there.

Page 7: [57] Commented [A100R99] **Author**

We agree with this analysis, but we differ in relation to the scope of Article 6(1)(b), The [redacted] considers that it is not limited to "core" functions, it should be capable of applying to all aspects of an agreement between parties.

Page 8: [58] Commented [A107] **Author**

[redacted]