Position Paper

Insurance Europe comments on consent

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Introduction

Insurance Europe participated in the Fab Lab workshop organised by Article 29 Working Party (WP) in April 2017 and had the opportunity to exchange views on implementation concerns with the WP, as well as with the European Commission (EC) and other stakeholders.

As a follow-up to the Fab Lab workshop, Insurance Europe would like to share with the WP its recommendations for a proper consultation process on its draft guidelines and provide additional feedback on consent, ahead of the publication of the WP guidelines by the end of 2017.

The WP must improve the current dialogue with stakeholders, through the organisation of proper public consultations on its draft guidelines, in line with the European Commission Better Regulation agenda. In order to strengthen the transparency and efficiency of the process, the WP should implement immediately the following improvements:

- The WP should **systematically make all the questions on all topics available to all stakeholders** to be discussed at the workshops **at least six weeks ahead of each workshop**. This would enable stakeholders to get appropriately prepared for the discussions and provide qualitative input on the sector specific implementation issues.

- The WP should **allow stakeholders to participate in several or all sessions of the workshop** as all topics featuring the agendas may be relevant to their sectors. For example, the topics of profiling, consent and breach notification are all key to insurance and an extensive exchange of views on all these topics at the workshop in April would have been mutually beneficial for the WP and the industry. This cannot be achieved only through participation in the plenary session that follows the break.

Insurance is a highly-regulated sector, and the General Data Protection Regulation (GDPR) is one of the many new pieces of EU legislation that insurers will have to comply with by 2018. For example, insurance consumer protection rules will change significantly as a result of the Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs) and the Insurance Distribution Directive (IDD), which are both to be completed by additional Level 2 and Level 3 measures in the coming months.

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For the new regulatory framework to be successful, it is crucial to ensure that stakeholders have sufficient time to provide input and that the industry has sufficient time to prepare for implementation. The technical work for new consumer protection rules mentioned above always goes through and appropriate consultation process as part of a dialogue with stakeholders and the European Insurance and Occupational Pensions Authority (EIOPA).

Insurance Europe invites urgently the WP to adopt a similar process when developing the GDPR Level 3 measures. This includes:

- making the consultation schedule publicly available sufficiently in advance;
- consulting stakeholders systematically and at least once on initiatives before they are final, including draft guidelines, and conducting an impact assessment;
- ensuring an appropriate consultation period of at least 12 weeks;
- publishing the input of stakeholders, where authorised by the concerned stakeholders;
- providing reasoned feedback on the input received; and
- clearly differentiating drafts from final adopted documents.

Insurers and data processing

Data is at the heart of an insurer's relationship with consumers. This means that data protection is a fundamental part of providing insurance. Insurers process data, for instance, for the calculation of fair premiums, to provide customers with insurance products tailored to their needs and risk profiles and for the payment of claims.

Insurers use **most** of the six legal grounds under Article 6 of GDPR to lawfully process data:

- *Consent* [Article 6(1a) and Article 9(2a)] for processing sensitive data. For example, health-related data for medical insurance is processed to ensure that the consumer receives appropriate cover at a fair price for the risk that he/she poses or to reimburse all or part of healthcare costs where an individual requires medical treatment covered by the insurance contract.
- *Contract* [Article 6(1b)], to process data both at the pre-contractual stage to give consumers an insurance quote for a requested product and during the performance of the contract, ie for benefits payment in a property insurance contract.
- *Legal obligations* [Article 6(1c)], to process data in compliance with rules imposed by the anti-money laundering directive and Solvency II.
- *Legitimate interests* [Article 6(1f)] to process data for fraud prevention and detection purposes.

Consent and processing of sensitive data in the insurance context

In view of the upcoming guidelines on consent, Insurance Europe would like to give more information about the use of consent in insurance and seek the WP clarifications that would bring more legal certainty. In particular:

- Under Article 8(2a) of the current Data Protection Directive 95/46/EC **consent is the only legal basis** insurers have to process **special categories of data for risk assessment** and to offer an insurance contract. This is also the case under Article 9 (2a) of GDPR.
- Insurers can also use Article 9(2f) when processing sensitive data, but **only for the establishment, exercise and defence of legal claims**.

Heath data processing is fundamental for a number of insurance policies, eg health or life insurance. The insurer needs health data to price and underwrite according to the level of risk presented by future policyholders (data subject) and to process claims. Without this information, the insurer cannot provide the requested services, ie insurance contract and reimbursements. The performance of the contract is therefore dependent on the insured's consent.

Consent is not the appropriate legal basis for processing sensitive data for underwriting and risk assessment in the insurance context. This is even more relevant and important under the new provisions of GDPR, which strengthen the legal basis of consent:

According to Recital 32 of GDPR, *"consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him".* Recital 42 states that *"consent should not be regarded as* ***freely given*** *if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment".*

Recital 43 mentions that *"consent is presumed to be freely given if it does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case, or if the performance of a contract, including the provision of a service, is* ***dependent*** *on the consent despite such consent not being necessary for such performance".*

Finally, based on Article 7(4) *"when assessing whether consent is freely given, utmost account shall be taken of the fact that whether, among others, the performance of a contract, including the provision of a service, is made conditional on the consent to the processing of data* ***that is not necessary for the performance of the contract".***

Practical consequences

The provisions outlined above indicate that one of the fundamental elements for consent to be valid is that it must be freely given. In the insurance context, a narrow interpretation of these provisions can seriously challenge the validity of the consent given by policyholders to insurers for the processing of their sensitive data, especially when the following elements are taken into consideration:

- Consent is the only legal basis for processing sensitive data for underwriting, risk assessment and performance of the insurance contract.
- Therefore, entering into or the performance of contract is dependent on the insured's consent. This condition could render consent invalid, meaning that insurers would no longer be able to use consent for the processing of sensitive data.

Additionally, if the insured person decides to withdraw consent for processing his/her sensitive data, this may have an adverse impact on the performance of the insurance contract.

Necessary clarifications from WP 29

The points outlined above, raise serious concerns over the practical consequences a narrow interpretation of the provisions on the validity and the withdrawal of consent could have on insurers and policyholders.

It is therefore extremely important for the WP to ensure that the planned guidelines take stock of the policymakers' intention when drafting the relevant provisions and discussions during the trialogue negotiations. In particular, in Article 7(4) of GDPR, policymakers made an important distinction: conditional consent is considered to be freely given if the processing of the data is necessary for the performance of the contract.

For insurers, it is of great significance to have a clarification in the guidelines stating **that consent given for the processing of health data is inextricable to the risk assessment both at precontractual stage but**

also later, during the performance of the contract and should not be deemed invalid or not freely given.

This would bring much needed legal certainty, since the only legal basis for processing sensitive data for underwriting and risk assessment purposes is consent.