

## Insurance Europe contribution to the 3rd Council of Europe consultation on the Modernisation of Convention 108

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### Introductory remarks

Insurance Europe (formerly CEA), the European insurance and reinsurance federation, welcomes the opportunity to contribute to this third consultation on the Modernisation of Convention 108, launched by the Council of Europe (CoE).

Insurance Europe participated in the second CoE consultation this year and would like to comment on the following points of the new proposals on the Modernisation of the Convention 108 (27 April 2012) which were already addressed during the meeting between the CoE and the private sector stakeholders on 2 May.

Having in mind the on-going process of revision of the EC Directive 95/45 on data protection, Insurance Europe wishes to reiterate its expectation that there will be no significant discrepancies between the future modernised CoE Convention 108 and the future EU regulation and directive.

Insurance Europe also wishes to reiterate its request to be provided with the draft of the Explanatory Report as this would facilitate our understanding of the provisions contained in the proposal.

### **Article 3 – Scope**

- *Par.1ter "Any Party may decide to apply this Convention to information on legal persons".*

Insurance Europe strongly opposes the possibility for any Party to decide applying the Convention to information on legal persons. They do not have fundamental rights as natural persons and are protected by other legal means.

### **Article 5 – Legitimacy of data processing and quality of data**

- *Par.1 "Data processing shall be **proportionate** in relation to the **legitimate purpose** pursued and reflect a fair balance between the public or private interests, rights and freedoms at stake".*

Insurance Europe highlights that where the processing of personal data is based on consent, contract or specific public authorisations, there is no need for an additional examination of proportionality.

It should also be noted that the existing EU legislation requires the insurance industry to collect certain data in order to carry out its business. For example the EU anti-money laundering (AML) legislation requires insurers to verify the accuracy of certain personal data, eg the identity of the policyholder/beneficiary, the origin or the destination of the funds. It is vital that the interpretation and application of these new provisions do not hinder the fulfilment of existing regulatory requirements imposed on insurers.

Moreover, as part of anti-fraud measures, insurers need to collect, process and share certain relevant data. We support measures that ensure appropriate consumer protection, however the legislative framework must recognise the need for organisations to share information for such purposes.

Detecting fraud protects honest consumers. It is important that efforts to combat fraud (which are in the overriding interests of individual consumers and of society as a whole) are supported and explicitly recognised in the development and application of the law rather than being restricted.

Furthermore, as part of the underwriting and claims settlement process, insurance companies need comprehensive information and data about the risk to be insured. Being able to access, process and store relevant personal data is central to insurers' ability to provide consumers with appropriate products at fair prices.

- *Par.2a) "Each Party shall provide that data processing can be carried out only if the data subject has **freely given his/her explicit specific and informed consent**".*

Insurance Europe believes the requirements of and for consent must be relevant and suitable to the purposes for which the consent is obtained. Requirements should not act as a barrier to consumers accessing insurance or prevent the insurer from delivering necessary services to the consumer.

Based on insurers experience across member states, Insurance Europe understands that consumers do not encounter problems with the current rules on consent. Therefore, Insurance Europe opposes any changes to the existing rules of consent.

Insurance Europe is concerned about the introduction of **data subject's right to withdraw consent** in the Explanatory Report. This would hinder the execution of the contract, lead to an unauthorised cancellation and conflict with other pieces of legislation.

For instance, based on insurance contract law, the insurer and the consumer fix the terms of the contract at the beginning of their contractual relationship. Some contracts permit cancellation during a policy period under specific circumstances. Such circumstances should be distinguished from the consumer's right to withdraw consent which would lead to an unauthorised cancellation of the contract.

Moreover, insurers need to store data for regulatory, legal or anti-fraud purposes. For example, based on Directive 2005/60/EC on anti-money laundering and terrorist financing (AML), insurers should store data for **at least 5 years after** the end of the business relationship with specified natural or legal persons. According to the abovementioned legislation, insurance companies are also obliged to maintain data and information for a certain period, because of the public authorities' controls.

Therefore, Insurance Europe suggests the **data subject's right to withdraw consent** should be appropriately designed to take into account situations where data must be retained and in some instances processed for regulatory, anti-fraud or legal purposes.

- *Par.3c) "adequate, relevant, not excessive **and limited to the strict minimum** in relation to the purpose for which they are processed".*

Insurance Europe encourages redrafting the paragraph so that it reads "**minimum necessary**".

#### **Article 6 – Processing of sensitive data**

- *Par.1 "The processing of certain categories of personal data shall be prohibited, whether such data are sensitive:
  - a) *By their nature, namely genetic data, data related to health or sexual life, data related to criminal offences or convictions, or security measures;**

- b) *By the use made of them, namely biometric data, data whose processing reveals racial origin, political opinions [or trade union membership], religious or other beliefs, or:*
- c) *Where their processing presents a serious risk to the interests, rights and fundamental freedoms of the data subject, notably a risk of discrimination.*

If the Consultative Committee includes genetic or biometric data in the "special category of data", then it must be ensured that characteristics such as gender and age, which are visible to everyone, and also family history, are not part of them. Otherwise the definition will be incompatible with the provisions of other pieces of national or European legislation.

Insurance Europe would like to underline that the Explanatory Report includes a broad definition of *genetic data*, ie *characteristics acquired during early prenatal development* which are not in fact caused by genetic conditions but by external conditions such as lack of oxygen to the foetus during pregnancy. Moreover, Insurance Europe is concerned that the reference to "*hereditary characteristics*" is too vague and wide.

The prohibition to process data referring to hereditary characteristic could have detrimental consequences for insurers, as they will be no longer able to use them as risk factors for their underwriting. Inability to use data effectively would result in consumer detriment in the form of higher prices and/or under insurance. This could also lead to the withdrawal of some products from the market, resulting in less consumer choice.

Insurance Europe suggests that the *biometric data* definition should be restricted to biometric detection data such as retina scans and finger prints. Data on physical attributes should not be included.

#### **Article 7 – Data Security**

- 2. *"Each Party shall provide that the controller shall notify, without delay, at least the supervisory authorities within the meaning of Article 12 bis of this Convention of any violation of data security which may seriously interfere with the right to the fundamental rights and freedoms of the data subject.*

*The Explanatory Report will specify that the controller should be encouraged to also **notify where necessary** the data subjects.*

Insurance Europe welcomes the CoE approach on data security and agrees that the supervisory authorities and data subjects should be notified only about breaches that pose a significant risk of harming data subjects.

If the data subject is notified for every breach of data, ie those posing significant risk and others that do not, important notifications might be overlooked. This could lead to consumers' apathy, making them more vulnerable in circumstances where there is a serious data privacy breach.

For greater clarity of the concept of "*seriously interfere*", the obligation to report security breaches to the authority should only concern breaches related to sensitive data and data with significant effects for the data subject concerned. Insurance Europe suggests that the explanatory note of the Report of the 24<sup>th</sup> Meeting of the Bureau of the Consultative Committee (28-30 June 2011) should be added to the Explanatory note on the Convention, to confirm this.

Insurance Europe would like to underline insurance companies and other financial institutions have to notify the data breaches only to supervisory Authorities within the meaning of Article 12 bis of the Convention and to sectorial supervisory Authorities.

#### **Article 8 – Rights of the data subject**

- a) *Any person shall be entitled on request not to be subject to a decision significantly affecting him/her or producing legal effects relating to him/her, based solely on the grounds of an automatic processing of data without having the right to express his/her views.*
- d) *To obtain knowledge of the reasoning underlying in the data processing, the results of which are applied to him/her;*

*Explanatory Report: this right can, in accordance with Article 9, be limited where this is necessary in a democratic society, in order to protect "legally protected secrets".*



Insurance Europe believes that the data subject should have the right to access data. It is worth noting that following an access request, insurers have an obligation to review the information to ensure the redaction of any non-disclosable data, or data relating to third parties or legal professional privilege. Therefore, Insurance Europe asks for any legislation to be flexible enough to reflect the need of insurers to redact certain information.

Careful consideration must be given not to introduce any requirement to disclose information while such disclosure could be in breach of competition law. In the case of the insurance industry, the legislative framework must not make it possible for insurers to reveal their underwriting criteria or processes to other insurers as this would be in breach of competition law. For these reasons, Insurance Europe would propose the ***deletion of Article 8d.***



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