

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

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### Introductory remarks

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

Insurance Europe participated in the first CoE consultation last year and is content to see that some of its concerns raised previously have been taken into consideration by the T-PD committee. This being said, Insurance Europe would like to comment on the following points of the new proposals on the Modernisation of the Convention 108.

Insurance Europe notes that EC Directive 95/45 on data protection is currently under revision and hopes there will be no significant discrepancies between the future modernised CoE Convention 108 and the future EU regulation and directive.

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

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

Insurance Europe highlights that this paragraph contradicts the existing principles of the legitimacy of data processing as it is given in Article 5 par.2 (*processing of personal data by consent*). Where the processing of personal data is based on other legal grounds such as national law or a contract, 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 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 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 specific and informed consent**"*

There should be clarity as to the type of consent required and this should not be unnecessarily burdensome for organisations and consumers.

To perform its activities, the insurance industry needs clarity on how the aforementioned conditions can be met. The word *specific* in the provision on consent introduces a layer of uncertainty. Moreover, when a data subject gives its *consent* in an insurance context, this *consent* is given for both the scope and the consequences of the data processing.

For this reason Insurance Europe propose the deletion of the word *specific*. However, if the CoE decides to maintain that the consent has to be *specific*, Insurance Europe would then suggest that the word *specific* is interpreted as *intelligible* in line with the Opinion 15/2011<sup>1</sup> of the Article 29 Working Party.

Finally, if the data subject's right to withdraw his/her consent is included in the Explanatory Report, there should be an exemption for cases where the withdrawal would contradict good faith, create legal hindrances to the fulfilment of a contract, contradict regulatory requirements, or prevent or restrict anti-fraud measures.

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

- *"Personal data may not be processed for the racial origin, political opinions or religious or other beliefs that they reveal. Nor may genetic data, data concerning health or sexual life, biometric data, personal data relating to criminal convictions, as well as personal data recognised by a Party as presenting a serious risk to the rights and interests of the data subject, in particular a risk of unlawful discrimination, be processed.*

*Such data may nevertheless be processed where domestic law provides appropriate safeguards."*

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, such as the proposed EC general data protection regulation.

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. Insurance Europe suggests that the *biometric data* definition should be restricted to biometric detection data, otherwise data on physical attributes needed for the actuarial mathematics will fall under it, creating problems for the insurers.

According to article 6 sensitive data may nevertheless be processed where domestic law provides appropriate safeguards. This means that the processing of health data could be simply and merely forbidden if domestic law does not provide any. This proposal seems to go far further than the EC proposal for a regulation which allows several exceptions like the consent of the data subject.

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<sup>1</sup> Page 17, Opinion 15/2011 on the definition of consent

### **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 protection of personal data.*

*The Explanatory Report will add that the controller should also **notify the data subjects** in case of serious risks.*

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, leading also to consumers' apathy.

Moreover, in order to ensure the right understanding of *seriously interfere*, 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, highlighting that the obligation to report security breaches should not become trivial and should only concern breaches related to a certain volume of data.

Insurance Europe would like to underline that 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 to obtain at reasonable intervals and without excessive delay or expense confirmation of whether personal data relating to him/her are being processed or not, the communication of such data in an intelligible form and all available information on the origin of the data and any other information that the controller is required to provide to ensure the transparency of processing in accordance with Article 7bis.*
- b) *To obtain knowledge of the logic involved in the data processing in the case of an automated decision.*

*The Explanatory Report will explain that the knowledge of the logic involved in the processing cannot be detrimental to legally protected secrets.*

Insurance Europe believes that the data subject should have the right to access data. A right to know the source of data might be relevant to the area of advertising where the data are disclosed repeatedly and where it is difficult for the data subject to identify the body which originally collected the data.

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. Insurance Europe would therefore propose the deletion of Article 8b.



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