

Insurance industry position on e-Privacy Regulation proposal in view of trilogue discussions

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Key Messages

- Insurance Europe calls on the co-legislators to preserve the Council of the EU's approach in article (8)(1)(b) and (c). Only the Council's text would provide the legal certainty insurers need to continue offering innovative insurance products to consumers, such as telematics-based motor insurance. There is, unfortunately, no exemption in the European Commission (EC) and the European Parliament's versions of article 8 that provides for such legal certainty.
- Insurance Europe calls on the co-legislators to safeguard the current interplay between the e-Privacy Directive and the General Data Protection Regulation (GDPR) in regard to the collection and processing of data from the terminal equipment. Currently, the collection of data from the user's terminal equipment is protected under the e-Privacy Directive, with any subsequent processing of personal data falling under one of the legal bases in article 6 of the GDPR. Unlike a fixed list of exemptions, as proposed by the e-Privacy Regulation, the GDPR's principles-based and risk-based approach allows for the needed flexibility to process personal data in situations where relying on the consent is not possible.

Comments on article 8 and impact on innovative insurance products.

■ Fostering innovative products

Some innovative insurance products, such as telematics motor insurance policies, are based on the processing of data from terminal equipment (ie telematics boxes or connected vehicles). Telematics motor insurance products:

- Offer consumers the possibility to customise their insurance policy according to their driving habits: for example, where "pay as you drive" insurance replaces a regular annual automobile insurance payment with one based on the mileage actually driven.
- Strongly benefit consumers by rewarding low-risk drivers with lower premiums and improve road safety.

To provide such innovative services, it is important that the e-Privacy Regulation includes a **legal basis providing sufficient legal certainty** to process data from the terminal equipment.

■ Exemptions under article 8

The current exemptions in article 8 proposed by the Parliament and the EC do not provide a solid legal basis for insurers to process data from terminal equipment and would not enable them to develop innovative products, such as telematics-based motor insurance.

■ Exemption of a “service specifically requested by the end-user” (article 8(1)(c))

Insurance Europe supports the **Council’s version** of this provision, as well as its supporting **recital 21**. Insurance Europe welcomes that the Portuguese presidency of the Council has maintained the term “service” instead of “information society service”, as insurers would likely not fall under the definition of the latter. This provision would provide a solid legal basis which would allow insurers to continue offering innovative insurance products, such as telematics-based motor insurance, where the end-user – eg the car owner – requests it. In contrast, following the example of the e-Privacy Directive and restricting the exemption to “information society services” does not give due consideration to the progressing digitization of society. The e-Privacy Directive entered into force 19 years ago, when many technological innovations (eg connected devices and the Internet of Things) and the services offered in relation to them were not prevalent. As such, its provision on the collection of information from terminal equipment does not stand the test of time.

■ Exemption of consent (article 8(1)(b))

Insurance Europe supports the **Commission and Council’s version** of article 8(1)(b) that refers to “end-user”. The reference to “user” in the Parliament text would make consent requests unnecessarily complex and burdensome for both the insurance company and the policyholder. For example, in the case of the telematics-based motor insurance, under the Parliament’s narrow language, insurers would be required to make sure that third parties, about whom the terminal equipment collects data, also consent to the data processing, regardless of whether the end-user has already given consent to the insurance company. This would make telematics-based motor insurance an **unviable product** as every driver would need to confirm its identity each time a user activates the engine. While policyholders could find it burdensome, insurers would also have to face unforeseen technical and legal challenges as there is no reliable common means to verify with certainty the identity of the driver every time a user starts the car. Moreover, the requirement for identification would needlessly lower the third party’s level of data protection since their driving behaviour will always be attributed to the policyholder for the purposes of the insurance contract.

Additionally, it should be noted that, for the purpose of providing an insurance telematic product, the Council’s version of article 8(1)(c) would provide more legal certainty than consent. In fact, consent does not seem to be a suitable legal basis in the context of a telematics insurance contract:

- To be valid, consent must be freely given. However, if consent is a necessary condition to enter an insurance contract, it can be interpreted as not freely given. Moreover, the European Data Protection Board (EDPB) expressly stated, in its guidelines on consent, that consent is not an appropriate legal basis when data processing is necessary for the performance of a contract.
- In addition, customers could withdraw consent at any point and thus suddenly interrupt the data processing necessary for the performance of the contract. The insurer would therefore not be able to continue to provide insurance telematics coverage due to the missing data. The

result would be the introduction of a right to cancel contracts outside of the established contractual laws.

■ **Interplay between e-Privacy and GDPR**

Insurance Europe recommends safeguarding the current interplay between the e-Privacy Directive and the GDPR when it comes to the collection and processing of data from the terminal equipment. Currently, the collection of data from the user's terminal equipment is protected under the e-Privacy Directive with any subsequent processing of personal data falling under article 6 GDPR.

Unlike a fixed list of exemptions, as proposed by the e-Privacy Regulation, the GDPR's principles-based and risk-based approach allows for the needed flexibility to process personal data in situations where relying on consent is not always possible or feasible. All legal grounds for processing personal data under the GDPR currently provide data subjects with enhanced protection compared to the ePrivacy Directive, including increased transparency, greater control over how personal data is processed, and envisages the use of further safeguards such as encryption or pseudonymisation.

Insurance Europe welcomes the Council's intention to further align the e-Privacy proposal with the GDPR. However, the new articles 8 (1)(g) – (i) needlessly extend the ePrivacy-Regulation's scope of application to areas that are currently clearly subject to the rules of the GDPR. Insurance Europe therefore recommends allowing businesses to continue to rely on the GDPR's legal basis or fully align article 8(1) with the GDPR's rules on compatible processing.

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