

Response to EDPB draft guidelines on processing personal data in the context of connected vehicles and mobility related applications

Our reference:	COB-DAT-20-023	Date:	23 March 2020
Referring to:	Guidelines 1/2020 on processing personal data in the context of connected vehicles and mobility related applications		
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Pages:	7	Transparency Register ID no.:	33213703459-54

Introduction

Insurance Europe welcomes the European Data Protection Board's (EDPB) draft guidelines on processing personal data in the context of connected vehicles and mobility related applications, under the General Data Protection Regulation (GDPR), and invites the EDPB to clarify the issues below to provide the necessary legal certainty to insurers.

Importantly, Insurance Europe calls upon the EDPB to acknowledge in the final guidelines how insurance telematics works in practice and also the legal obligations that insurers are subjected to when providing this type of insurance products. In this regard, Insurance Europe urges the EDPB to consider the comments on the draft guideline sections on the local processing of personal data and the case study on pay as you drive insurance.

- **Comments on the section on privacy and data protection risks:** The EDPB states in para.44 that *"drivers and passenger may not always be adequately informed about the processing of data taking place in or through a connected vehicle"*. According to the EDPB, this is because *"the information may be given only to the vehicle owner who may not be the driver, and may also not be provided in a timely fashion"*. These statements are true in the case of built-in systems in vehicles. However, this situation of information asymmetry or lack of control over the data does not necessarily arise in the case of usage-based insurance.

In usage-based insurance, the customer often must install a dongle in their car or an app on their phone. Consequently, customers will know if their insurer is collecting data or not. Moreover, if the car is sold, this would not create a situation of lack of control, since the insurance policy of the previous owner is terminated automatically.

Recommendation: The EDPB should clarify in the final guidelines that there is no information asymmetry or lack of control over data in cases where an application for use-based insurance has been installed.

■ **Comments on the interplay between the ePrivacy Directive and the GDPR:**

- **Creation of additional requirements going beyond the GDPR:** According to the ePrivacy Directive access to information that is stored in terminal equipment does not require consent if one of the exemptions in Art.5(3) of the Directive applies. In this regard, the draft guidelines suggest in para.18 that in cases where an exemption of the Directive applies *“the processing of personal data including personal data obtained by accessing information in the terminal equipment is based on one of the legal bases as provided by Art.6 GDPR”*. This statement creates a new obligation for data controllers. Following para.18, a legal basis under Art.6 GDPR would be required in cases where an exemption under Art.5(3) of the ePrivacy Directive applies to process data from the terminal equipment. The creation of such obligation is contrary to recital 173 and Art.95 GDPR.

Recommendation: The EDPB should clarify that para.18 explains that only further processing after gathering the data from the terminal equipment requires a legal basis under Art.6 GDPR. Insurance Europe recommends the following wording in para.18: *“In such cases, if there is **further processing** of personal data that has been obtained by accessing information in the terminal equipment, one of the legal bases as provided in Art.6 GDPR should apply”*.

- **Further processing of personal data:** The EDPB says in para.50 that when data are collected under Art.5(3) of the ePrivacy Directive, further processing cannot be carried out on the basis of Art.6(4) GDPR – the compatibility test – since it would undermine the data protection standard of the ePrivacy Directive.

Recommendation: The EDPB should further explain in para.50 why, in its view, further processing on the basis of Art.6(4) GDPR undermines the data protection standard in the ePrivacy Directive. The EDPB should also provide the legal grounds on which it bases this statement.

■ **Remarks on consent:**

- **Quality of the user’s consent:** Para.46 notes that *“data controllers need to pay careful attention to the modalities of obtaining valid consent from different participants, such as car owners or car users”*. However, the EDPB acknowledges, in para.49, that in practice consent might be difficult to obtain for drivers and passengers who are not related to the vehicle’s owner. To save this hurdle, the guidelines should stress that other legal bases under Art.6 GDPR can be considered as an alternative to consent. Furthermore, the guidelines should clarify that consent should not be required from passengers if they cannot be identified. In this context, it would be impossible to obtain consent. It would require obtaining data on the passengers’ identity, something that would lower the level of data protection.
- **Further processing of personal data – telemetry data:** The guidelines state in para.52 that *“telemetry data collected for maintenance purposes may not be disclosed to insurance companies without consent for the purpose of offering behaviour-based insurance policies”*. The statement in itself is correct, however, the EDPB should clarify that telemetry data which is necessary for the performance of a telematics insurance contract can be processed on the grounds of Art.6(1) (b) GDPR. Otherwise para.52 may be misunderstood in a way

that the processing of telemetry data in the context of driving behaviour-based insurance policies always requires consent.

- **Transmitting personal data to third parties:** The EDPB recommends in para.95 that *“the data subject’s consent be systematically obtained before their data are transmitted to a commercial partner acting as a data controller”*. This recommendation is in practice unfeasible. Moreover, it is contradictory to the EDPB’s statement in para.93, where the guidelines note that *“the data controller may transmit personal data to a commercial partner, to the extent that such transmission is based on one of the legal bases stated in Art.6 GDPR”*.

Recommendation: The EDPB should revise the draft guidelines to ensure that the final text recognises the existence and practical use of all legal bases in Art.6 GDPR to process personal data from connected vehicles. In particular, Insurance Europe calls the EDPB to acknowledge that in the context of motor insurance telematics, the most adequate legal basis to process personal data is Art.6(1) (b) GDPR–performance of a contract.

■ **Geolocation data - Incompatibility of the EDPB’s principles with insurance telematics:**

The draft guidelines note in para.61 that the collection of geolocation data is subject to compliance with a number of principles, such as (i) geolocation activation only when the user launches the functionality that requires the vehicle’s location to be known and not to activate geolocation by default and continuously when the car is started. The EDPB also suggests (ii) the option to deactivate geolocation at any time.

- **Impact on the principle of fairness in insurance telematics:** Motor telematics insurance can only be considered fair if drivers can remedy incorrect ratings concerning their driving behaviour. For example, traffic jams commonly require abrupt acceleration and braking, and such behaviour would under normal circumstances be considered bad driving. Without continuous geolocation to verify the traffic situation, drivers would be unable to prove proper driving behaviour, and consequently end up unfairly paying a higher premium for their motor insurance policies. In the context of telematics and usage-based insurance policies, automatic and continuous geolocation should therefore be allowed to ensure a fair premium for the user.
- **Incompatibility with national contract law:** The benefits of motor insurance telematics have been widely recognised in Italy, where this type of insurance policy is encouraged by the administration and has increasingly become the preferred insurance policy of younger drivers, instead of traditional motor insurance. Italian national law establishes that insurance undertakings may, for example, collect data for the purposes of establishing liability in the event of an accident or for calculating the premium rate. It also establishes that the policyholder shall be prohibited from removing, tampering or otherwise rendering inoperative the installed device (black box). In the event of a breach by the policyholder the premium reduction shall not apply to the residual duration of the contract.

Another example is the Spanish mandatory ruling guide on MTPL insurance issued by the Insurance Supervision Authority. The guide prohibits the interruption of coverage of the mandatory insurance for time slots or time breaks. In practice, this means that it is impossible for an insurance company providing pay as you drive (PAYD) insurance or pay how you drive (PHYD) insurance to deactivate geolocation, if the policyholder wishes to continue being charged based on mileage or driving behaviour.

Recommendation: The EDPB should revise the principles suggested in para.61 of the draft guidelines and propose recommendations compatible with the principle of fairness in telematics insurance and with national contract law and sectorial mandatory guidance concerning telematics insurance.

■ **Comments on the section on local processing of personal data:**

- **Service providers and manufacturers:** The EDPB states in para.73 that *“if the GDPR does not apply to the processing of personal data by a natural person in the course of personal or household activity, it does apply to controllers or processors, which provide the means for processing personal data for such personal or household activities”*. This phrasing is potentially misleading, since it implies that producers and providers of products/services are required to comply with the GDPR obligations of data controllers and processors, when instead they are simply encouraged to implement the principles of privacy by design and default to the devices offered. According to the GDPR, controllership is restricted to particular data processes and therefore the mere provision of applications/software cannot transfer the obligations of GDPR data controllers and processors upon the service provider.

Recommendation: The EDPB should clarify in para.73 that producers and/or service providers of hardware and software applications are not to be considered data controllers and/or processors as defined in the GDPR. The final guidelines should clearly state that these providers are simply encouraged by the GDPR to apply the principle of privacy by default and by design to the marketed devices.

- **Data subject’s control over their data:** The draft guidelines state in para.74 that *“the data subject should be able to control how their data are collected and processed in the vehicle”*. Insurance Europe agrees with the EDPB’s concerns; however, some of the statements proposed in para.74 could only apply in accordance with the terms and conditions of the insurance contract. For example, the paragraph notes that *“data subjects should be able to delete permanently any personal data before the vehicles are put up for sale”*. In this regard, the EDPB should clarify that only personal data stored in the vehicle application/mobile phone can be deleted. Data provided for the performance of the contract may be subjected to a different retention period.

More importantly, the statement in para.74 contravenes how insurance telematics works in practice. This is because data retention is often required after the expiration of a contract and/or where a data subject may request its deletion to enable the insurer to (i) handle/defend claims (deleting all data could fuel fraudulent claims); (ii) respond to complaints. Again, this is not only critical for the functioning of the product as such, but also a requirement to comply with conduct regulation rules.

Recommendation: The EDPB should clarify in para.74 that the deletion of data prior to the sale of a car, can only be done in relation to the data stored in the vehicle application. Moreover, the EDPB should acknowledge in the final guidelines how insurance telematics works and the legal obligations to which insurers are subjected to, and how aspects of those obligations can impede the deletion of data.

- **Hybrid processing:** The draft guidelines state in para. 75 that *“while it is not always possible to resort to local data processing for every use-case, hybrid processing can often be put in place”*. Moreover, the guidelines note in para.75 that the data is to be processed inside the vehicle or by the telematics service provider, generating scores that should be transmitted to the insurer at predefined intervals, ensuring compliance with the principle of data minimization.

To ensure an adequate performance of PAYD policies, it must be possible to transmit the score to the insurance undertaking at shorter intervals. It should be noted that transmission intervals are contractually agreed with the policyholder. Importantly, being able to transmit at short intervals means that the driver can see how they have driven after each ride, something that has a positive impact on road safety. If only long intervals between the transmission of the score values are allowed, insurance customers would be deprived of the spontaneous evaluation experience, which is a feature they value and demand.

Moreover, the EDPB has formulated the principle of data minimization in para. 75 too narrowly. It is unclear in the paragraph who can be considered a telematics service provider. It is currently not apparent, if the term "*telematics service provider*" encompasses vehicle manufacturers or the providers of the electronic communication services through which the data are transmitted. It might also mean that according to the EDPB the telematics infrastructure must be provided by an independent third party, which is not always possible. Unless the EDPB clarifies who can be considered a telematics service provider, companies might not be able to properly conduct "*hybrid processing*" as envisioned by the EDPB.

Additionally, it should also be possible for raw data to be transferred to a processor commissioned by the insurer. The processor could process the data into a score and transfer it to the insurer. This would also be an effective way to ensure data minimization.

Recommendation: The EDPB should clarify that short transmission intervals are allowed between the data score and the insurer. This will enable the customer to see how they have driven after each ride. Moreover, the EDPB should introduce a more flexible approach to data minimization, allowing a better understanding of who can be the processor of the data originated in the telematics device.

■ **Comments on the section on data controller & processor information obligations:**

- **Layered approach:** The EDPB suggests in para.84 that the information directed to data subjects may be provided in two layers. First level information, this would include the most relevant information for data subjects such as, identity of the data controller, the purpose of the processing, a description of the data subject's rights and any additional information on the processing which has the most impact on the data subject. The second layer of information would include information that could be relevant at a later stage.

Insurance Europe believes that, as proposed by the EDPB, the layered approach is counteracted by the amount of information to be included in the first layer. For an effective layer approach, it should be sufficient to inform data subjects about their rights under the GDPR within the first layer and to include all other information in the second layer.

Recommendation: The EDPB should revise para.84 to simplify the content of the information to be included in the first layer in order to achieve an effective layered approach.

- **Information fatigue:** The guidelines state in para. 83 that, when crossing borders, information on a change of data controllers should be provided. Even though this is used as an example in the draft guidelines, the EDPB should also stress that data controllers can comply with their information obligations by providing the recipients or categories of recipients of the personal data (Art.13 (e) GDPR). Otherwise, drivers would face information fatigue at a moment where attention should be focused on driving.

Recommendation: The final guidelines should reflect that a change of data controllers when crossing borders can be informed via Art.13 (e) GDPR – recipients or categories of recipients of the personal data.

- **Comments on the section on the rights of the data subject – disabling data collection:** The EDPB notes in para.88 that “*drivers should be enabled to stop the collection of certain types of data, temporarily or permanently, at any moment, except if a specific legislation provides otherwise or if the data are essential to the critical functions of the vehicle*”. As explained in the section above on geolocation data, disabling data collection can negatively disrupt the provision of telematics insurance. Telematics insurance contracts rely on the concept that risks are correctly assessed by analysing driving behaviour. If the driver is able to temporarily stop the collection of data, it would not be possible to determine fair insurance premiums.

Recommendation: The EDPB should clarify in par.88 that disabling data collection may be incompatible with an insurance policy based on telematics.

- **Comments on the case study on pay as you drive (PAYD) insurance:**

- **General remarks:** The draft guidelines regularly refer to usage-based insurance tariffs, where individual driving behaviour is assessed, as PAYD insurance policies. This is how the general public knows the product. In contrast, the insurance industry which offers these products has traditionally referred to insurance policies that are based on individual driving behaviour as PHYD insurance. The term PAYD insurance has been reserved for insurance products where the mileage covered is the main element taken into consideration. Driving behaviour is not used in PAYD insurance policies for calculating the premiums.

Recommendation: In order to avoid misunderstandings, the final guidelines should be adjusted to refer to insurance policies based on driving behaviour as PHYD insurance.

- **Definition of PAYD insurance:** The EDPB notes in para.103 that to provide PAYD insurance, “*the insurer will require the driver to install a built-in telematics service that tracks the miles covered and the driving behaviour of the policy holder*”. This description of PAYD insurance is not accurate. The insurer does not always require the policyholder to install a built-in device in the car. Insurance companies can also offer PAYD insurance through the installation of an application into the policyholder’s smartphone.

Recommendation: The EDPB could clarify in para.103 that there are different solutions used by insurers to provide PAYD policies.

- **EDPB’s interpretation of insurance telematics & the definition of information society services:** The EDPB interprets in para. 105 that telematics insurance is *not an information society service* explicitly requested by the subscriber or user. Following this interpretation, insurance companies cannot rely on the legal exemption in Article 5 (3) of the ePrivacy directive to process data. Insurance Europe believes that this interpretation may have been reached too quickly. A deeper legal analysis should be taken into consideration before assuming that insurance telematics does not fall under the definition of information society service as defined in Directive 2015/1535, especially after the ECJ rulings in the Uber Spain and the Irish Airbnb cases (C-434/15, Case C-390/18 respectively), where the Court ruled differently on the services falling under the category of information society service.

Recommendation: Insurance Europe suggests that the EDPB deletes in para.105 any references inferring that insurance telematics is not an information society service.

- **Limitations to access raw data:** The draft guidelines recommend limiting insurers' access to raw data in para.108 to prevent the creation of precise profiles of the driver's movements. This limitation is also suggested in para.74. The insurance industry understands the concerns raised by the EPDB, however, access to raw data remains essential to provide fair pricing for PAYD insurance. More importantly, the insurer needs access to at least one identifier (eg name, VIN) to be able to provide the insurance cover.

Furthermore, the EDPB's interpretation on insurers' access to raw data can have a serious negative impact on competition and innovation in the motor insurance market, and impact insurers' ability to comply with regulatory requirements:

- The EDPB's view suggests a uniform approach to risk scoring. This is a concern as it would lead to a market where risk is viewed exactly the same by all insurers, with the consequent impact on free competition and European competition Law and policy;
- It would result in the lack of direct access to raw data for insurers which would restrict the ability to create accurate risk models and algorithms, with the consequent negative effect on the quality of the insurance product;
- If a scoring algorithm has been developed by a third party, the insurer will be required to understand the raw data that has been used to create that score to ensure that it is meeting its obligations from a regulatory, contractual and data protection perspective (eg, to ensure fair customer outcomes) and;
- Raw data must be regularly audited and reviewed for accuracy and relevance - this is necessary to comply with both data protection and financial services regulations. The inability to access raw data impedes insurers from complying with legal obligations.

Recommendation: Insurance Europe calls on the EDPB to provide further guidance on the bases to grant access to raw data from the telematics device used to offer PAYD. Moreover, the final guidelines should acknowledge that insurance companies need access to at least one identifier to know to which policyholder and the data score is being referred to, in order to be able to deliver the service and charge the correct individual. Insurance companies also need access to raw data to ensure competition in the market and to comply with different legal obligations.

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