

Insurance Europe comments on the Article 29 Working Party's draft guidelines on automated individual decision-making & profiling

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Introduction

Insurance Europe welcomes the Article 29 Working Party's (WP) draft guidelines on automated individual decision-making and profiling under the General Data Protection Regulation (GDPR). However, it invites the WP to clarify the issues below to provide the necessary legal certainty to market operators, such as insurers.

Insurance Europe participated in the profiling session of the fab lab workshop organised by the WP in April 2017 and provided the WP with [additional feedback](#), explaining how the insurance market operates and highlighting that the guidelines should not go beyond the Level 1 text of the GDPR.

Understanding how insurance works

Insurance Europe welcomes the inclusion of insurance-specific examples in the draft guidelines, such as the examples (i) of the pricing of a motor policy to explain future processing (p.15) and (ii) of how transparency of processing should function in practice, by using an example of how pricing is decided for a smart-motor insurance policy (p.17).

However, it is concerned that the example of the pricing of a motor policy to explain future processing (p.15) does not reflect the reality of the insurance sector. Most insurers have not yet developed — nor do they currently offer — the technology suggested therein. Moreover, if the example is considered as a benchmark, it would trigger difficulties for certain insurers, especially SMEs, which would struggle to meet such innovative standards, thus hindering their participation in the insurance market.

Recommendation: Insurance Europe suggests the deletion of the following wordings in the example on p.15 of the draft guidelines: *"To illustrate the significance and envisaged consequences of the processing it explains that dangerous driving may result in higher insurance payments and provides an app comparing fictional drivers, including one with dangerous driving habits such as fast acceleration and last-minute braking". "It uses graphics to give tips on how to improve these habits and consequently how to lower insurance premiums".*

■ Concerns over references to unfair, discriminatory and exclusionary profiling

Insurance Europe is concerned about the WP's interpretation of *unfair, discriminatory* and *exclusionary* profiling. The draft guidelines state that profiling may be unfair and create discrimination by, for example, denying people access to insurance or by offering some consumers less attractive deals (p.18).

Furthermore, the draft guidelines note that an automated decision-making process that results in differential pricing could also have a significant effect if a prohibitively high price effectively bars someone from certain goods or services (p.11). Finally, the draft guidelines suggest that a decision based on the processing of data can, at its most extreme lead, to the exclusion of or discrimination against individuals (p.10).

Insurance Europe believes that these three examples of *unfair, discriminatory* and *exclusionary* profiling provide a misleading description of the nature and functioning of the insurance sector.

Insurance consists of transferring the risk of financial losses as a result of specified but unpredictable events from an individual to an insurer in return for a premium. If the specified event occurs, the individual can claim compensation or a service from the insurer.

Insurance is therefore a means of reducing uncertainty. In return for buying an insurance policy for a smaller, known premium, the possibility of a larger loss is removed. By pooling premiums and insured events, the financial impact of an event that could be disastrous for one policyholder is spread among a wider group. Risk pooling is key, as it spreads the cost of losses between a number of policyholders.

The price of insurance should be such that the individual is prepared to pay the smaller, known premium in return for not having to pay the unknown — and potentially very large — financial cost should the insured event occur. **Each policyholder should pay a fair premium according to the risk of loss that they bring to the pool. Premiums are calculated according to the risk of loss, with the risk ascertained on the basis of profiling.**

Profiling processes are used in insurance underwriting to determine the fair premium that policyholders should pay according to the risk of loss they bring to the pool, while, at the same time, that risk is spread among all other policyholders. Therefore, all policyholders are included in the pool — thus avoiding unfair discrimination — and contribute to the general pool by paying a fair premium according to the risk they bring.

Furthermore, potential risks of unfair discriminatory profiling in insurance are already heavily regulated and prevented by existing laws. For example, the GDPR (Article 9) clearly prohibits the processing of special categories of data to avoid unfair discrimination, among other reasons. Similarly, there is already legislation in place, including at [EU level](#)¹, addressing possible risks of unfair discrimination in the provision of and access to goods and services, such as insurance.

Recommendation: Insurance Europe suggests that the WP reconsiders the examples in the draft guidelines that illustrate *unfair, discriminatory* and *exclusionary* profiling, and underlines that in some sectors, such as insurance, differentiation by profiling should be distinguished from unjustified and unfair discrimination.

■ Concerns over the WP's interpretation of "Necessity of a contract" (Article 22 (2) (a))

Insurance Europe believes that the WP is proposing an interpretation of "necessity" (p.12) that is too narrow and that would result in imposing an extremely high burden on insurers to the detriment of consumers.

If insurers had to prove, on every occasion, as suggested by the WP, the "necessity" for (i) solely automated processing (eg claims handling), or for (ii) solely automated processing, including profiling (eg, online travel

¹ The Equal Treatment in Goods and Services Directive 2004 (2004/113/EC)

insurance) to enter into or to conclude a contract with a data subject, the nature and functioning of the insurance business would be constantly challenged.

In addition, insurers would face great difficulties in pursuing their economic activity. This would be to the detriment of consumers as, for instance, they would not be able to access insurance services within a reasonable timeframe and would suffer from delays in claims processing. In case of claims-handling in motor insurance where the data is obtained to evaluate the claims, based on which a solely automated decision is used to calculate the exact amount of compensation, proving “necessity” at every step would severely delay the claims process and payment, to the detriment of the consumer.

Importantly, the WP’s narrow interpretation of necessity would prevent insurers and consumers from fully accessing the benefits of new technology². For example, an insurance company may offer online motor insurance through a mobile phone app, where the consumer can obtain coverage simply by sending a picture of the car and providing the requested data via an app. In this case, the premium is automatically calculated and the contract is entered into when the payment is effective. This is an example of solely automated decision-making that falls under Article 22 (2) (a). As a safeguard, the data subject has the right to obtain human intervention and ultimately to contest the decision pursuant to Article 22 (3). In this case, if the proposed narrow interpretation of necessity is adopted, insurers will not be able to prove that the calculation of the premium based on solely automated processing is necessary for the performance of the contract, and thus policyholders will be deprived of innovative insurance products.

New technological processes help insurers to offer more innovative products which meet consumers’ evolving demands and needs. This is the case of telematic devices installed in motor vehicles, which can provide an accurate account of the events if there is an accident (eg via the submission of geo-location information of the vehicles involved in the accident), allowing insurance undertakings to reduce the time to process claims. Additionally, insurance undertakings, by accessing a customer’s location (eg ski trip or beach holidays) can offer on-time accident or property insurance coverage³.

The [Report by the European supervisory authorities \(ESAs\) on automation of financial advice](#) notes that “*the phenomenon of automation in financial advice is an innovation with growth potential that requires the attention of regulators to better understand and harness its potential benefits*”⁴. Automated decision-making may be used in insurance to, for example, enable insurers to take faster decisions while preventing human default, thereby benefiting consumers.

Therefore, Insurance Europe believes that the WP’s narrow interpretation of “necessity” would jeopardise the functioning of the insurance industry and would prevent it from making use of new technologies, which would be to the detriment of consumers. This narrow interpretation would also run against the ESAs’ efforts to promote the benefits of the use of new technologies in the financial sector.

Finally, the GDPR provides safeguards for the data subject when the data controller is making use of the Article 22 (2) exemptions, such as the right to obtain human intervention or to contest the data controller’s decision. Consequently, a combined reading of Article 22 safeguards, together with the WP’s narrow interpretation of “necessity”, would prove Article 22 impractical and thus deprived of any functional use.

Recommendation: Insurance Europe suggests that the WP acknowledges in its guidelines that “necessity” should not be challenged when a person enters into a contract with an insurance company, where the insurance company uses (i) solely automated processing, or (ii) solely automated processing including profiling which is necessary for the assessment of his/her risk. This lies at the core of insurance and the need to enter into a contract should not be challenged on every occasion.

² ESAs Joint Discussion Paper on the use of Big Data by Financial Institutions (JC 2016 86), p.25 footnote 76

³ Idem, p.26, footnote 80

⁴ ESAs Report on automation on financial advice, p.14

■ **Concerns over the references to “consent” as a legal basis for the processing of data and special categories of personal data under Article 22 (2) (c) and (4)**

While “consent” will be specifically addressed in future WP guidelines, Insurance Europe would like to express its concerns regarding the impact that the proposed interpretation of consent (p. 20) could have on the insurance sector in the context of the draft guidelines on automated individual decision-making and profiling.

The draft guidelines state that *“Where the data subject has no choice, for example, in situations where the consent to profiling is pre-condition of accessing the controller’s services (...) consent is not an appropriate basis for the processing”*. This statement undermines the applicability of Article 7 (4) GDPR.- *“When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract”*. Under this provision, **consent is considered to be freely given if the processing of the data is necessary for the performance of the contract**.

Therefore, according to Article 7 (4) GDPR, when entering into or concluding a contract is conditional on consent to the processing of data that is necessary for the performance of the contract, consent is freely given and thus considered valid. The WP’s interpretation of consent, combined with the analysis regarding the *necessity* threshold to enter into or conclude a contract, would mean that insurers are *de facto* deprived of a legal basis under the GDPR to carry out any valid processing of health data necessary — for instance — for assessing the risks of coverage and thus provide their services. However, insurance coverage cannot be provided without previously evaluating the risk that will enter the pool. Determining a fair and proportionate risk premium is a key component enabling insurers to safeguard their capital adequacy pursuant to European insurance legislation (Solvency II Directive) and, consequently, to meet their obligations towards their insureds.

Recommendation: Insurance Europe urges the WP to ensure that its guidelines do not prevent the insurance sector from pursuing its core activity, eg providing risk coverage to the benefit of consumers. Therefore, it invites the WP to reconsider, within these draft guidelines and ahead of its guidelines on “consent”, its narrow interpretation of “consent” as a legal basis for the processing of personal data and special categories of personal data in insurance.

Transparency obligations

Insurance Europe welcomes the WP’s further clarifications on how to implement the transparency obligations (Articles 12-14) in the context of automated decision-making, including profiling.

However, it would like to draw the WP’s attention to:

- *“Meaningful information about the logic involved”* (Article 13 (2) (f)): The draft guidelines explain that the controller shall find simple ways to inform the data subject about the rationale behind, or the criteria relied on in reaching, the decision *without necessarily* always attempting a complex explanation of the algorithm used or *disclosure of the full algorithm* (p.14).

Insurance Europe understands and would like to clarify that the WP’s interpretation does not impose on data controllers a requirement to disclose information about the algorithm or internal model used for insurance underwriting purposes, which is an interpretation that it welcomes. Indeed, this information would only be meaningful to competitors but not to consumers, as it includes complex mathematical and actuarial methods of calculating and pooling risk.

Recommendation: Insurance Europe believes that the wording *“without necessarily always attempting a complex explanation of the algorithm used or disclosure of the full algorithm”* creates ambiguity and thus, it invites the WP to explicitly outline that the algorithm shall not be disclosed to the data subject.