

Formal Comments of the EDPS on a Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to ensure against such liability.

1. Introduction

On 24 May 2018, the European Commission tabled a Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/103/EC of the European Parliament and the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to ensure against such liability (hereinafter “the Proposal”).

The first EU Directive on motor insurance¹ had the dual objectives of protecting victims of motor vehicle accidents (with or without a cross-border element), and facilitating the free movement of motor vehicles between Member States. Since then, five motor insurance Directives strengthened and enhanced its provisions. As a result, they were consolidated into Directive 2009/103/EC (hereinafter “the Directive”)².

Furthermore, in order to assess the effectiveness, efficiency and coherence of the legislation, the Commission Work Programme 2016 conducted an evaluation of the Directive. While it considered that most elements of the Directive remain pertinent to its initial purpose, it also concluded that amendments were necessary to enhance its effectiveness³.

In particular, the Proposal aims to improve the protection of traffic accident victims in cases when the insurer is insolvent, and to improve the recognition of claims history statements⁴ by using the same content and format across the EU. Moreover, the Proposal aims to: introduce insurance checks to combat uninsured driving, to harmonise minimum amounts of cover and to clarify the scope of the Directive.

We welcome that the EDPS was consulted by the European Commission on the Proposal. One of the EDPS tasks is to advise the Commission services in the drafting of new legislative

¹ Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, COM(2018) 336 final, 2018/0168 (COD).

² Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability (Text with EEA relevance), OJ L 263, 7.10.2009, p. 11–31.

³ Explanatory Memorandum to the Proposal, p.1.

⁴ Policy holders, in fact, have the right to obtain a statement of their claims history for the past five years from their insurer and are used to calculate no-claim bonuses.

proposals with data protection implications. We have limited the comments below to the provisions of the Proposal that are particularly relevant from a data protection perspective.

2. Comments

2.1 Insurance checks, applicable data protection law and fundamental rights

Article 4 of the current Directive provides for the Member States the obligation to “*(...) refrain from making checks on insurance against civil liability in respect of vehicles normally based in the territory of another Member State and in respect of vehicles normally based in the territory of a third country entering their territory from the territory of another Member State*”⁵. However, Member States may carry out non-systematic checks on insurances, provided that these are done in a non-discriminatory manner and in the context of a control that is not exclusively aimed at insurance verification.

According to Article 4(1) of the Proposal, checks on insurance can be conducted by the Member States, “*(...) provided that those checks are non-discriminatory, necessary and proportionate to achieve the end pursued (...)*”⁶. In the context of combatting uninsured driving, recital 5 refers to the possibility for Member States’ legislation to set up a system that may be able to process personal data, which might also subsequently be shared with other Member States, even without actually stopping the vehicles (e.g. through number plate recognition technologies).

The same recital also refers to the need to specify the precise purpose of such systems, to refer to the relevant legal basis, to comply with the relevant security requirements and to comply with the principles of necessity, proportionality and purpose limitation, together with the set of an adequate retention period. Additionally, the recital also calls for the principles of personal data protection by design and by default to be applied to all data processing systems used within the framework of the legislation of Member States.

Furthermore, Article 4(2) of the Proposal provides for the “*(...) processing of personal data for the purpose of combatting uninsured driving of vehicles travelling in Member States other than where they are normally based (...)*” in accordance with the General Data Protection Regulation (“GDPR”)⁶ and by laying down suitable measures to guarantee the data subjects’ freedoms and legitimate interests.

⁵ Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against civil liability, Art. 4.

⁶ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (Text with EEA relevance), OJ L 119, 4.5.2016, p. 1–88.

Fundamental rights, enshrined in the Charter of Fundamental Rights of the European Union (hereinafter, “the Charter”), constitute the core values of the European Union⁷. These rights must be respected whenever the EU institutions and bodies design and implement new policies or adopt any new legislative measure. The Charter must be the compass for all EU policies and laws. The EDPS stands ready to assist the EU legislator in ensuring that it does.

The EDPS welcomes the references to data protection law in the Proposal. In particular, we welcome that these references are set forth not only in recital 5 of the Proposal but also in the substantive article in the main body of the Proposal (Article 4(2) of the Proposal).

In this context, the EDPS would also like to stress that any derogation to the fundamental rights must not go beyond what is strictly necessary to achieve its objective and must meet the high standards required by Article 52(1) of the Charter. This Article provides that “*any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*” (*emphasis added*).

In this regard, and in light of guiding the EU legislator and the Member States to a correct applicability of such principles, **the EDPS would like to recall the ‘Necessity Toolkit’, a document issued by the EDPS last year, consisting of a “practical step-by-step legal analysis of the necessity test applied to the processing of personal data”**⁸.

In particular, we note that recital 5 contains very concrete indications for the Member States to implement the Directive by taking into account the data protection principles and requirements. However, given the fact that personal data are likely to be processed in this context, we also consider that it would not be enough to refer to national law in a recital and that all relevant elements in relation to the implementation of checks at national level must be set out in the operative part of the legal text. Moreover, we underline that any IT system or tool which is put in place to implement EU legislation and that processes personal data, as in this case, should have a clear legal basis under EU law, and not be listed in a recital⁹. As a result, **we recommend to set out the elements currently included in recital 5 in a**

⁷ Article 2 of the Treaty on the European Union (TEU) states that “*The Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*”. In addition, Article 6(1) TEU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which has the same legal value as the treaties, and Article 6(3) TEU states that “*fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*”.

⁸ EDPS Necessity Toolkit on assessing the necessity of measures that limit the fundamental right to the protection of personal data, 11 April 2017, https://edps.europa.eu/sites/edp/files/publication/17-06-01_necessity_toolkit_final_en_0.pdf.

⁹ See EDPS Opinion on the Commission Proposal for a Regulation of the European Parliament and of the Council on administrative cooperation through the Internal Market Information System ('IMI') of 22 November 2011, p. 3 https://edps.europa.eu/sites/edp/files/publication/11-11-22_imi_opinion_en.pdf.

substantive provision of the Proposal in order to guarantee the protection of personal data through a solid legal basis under EU law.

The EDPS also notes that **Article 4 of the Proposal**, in addition to the already-existing ‘non-discriminatory’ principle, **introduces the elements of ‘necessity’ and ‘proportionality’** to be taken into account when performing insurance checks on vehicles. We welcome the addition of these two principles, given the importance of guaranteeing a fair balance between the purpose of the measures adopted and the protection of fundamental rights.

2.3 History statements issued by other insurance undertakings or other bodies

Article 16 of the Proposal introduces some amendments concerning ‘statements relating to third party liability claims’. In particular, in relation to third parties liability claim requests, Article 16(b) of the Proposal provides for insurance undertakings or any body “*(...) which may have been appointed by a Member State to provide compulsory insurance or to supply such statements (...)*”¹⁰ to do so by form of a claims history statement.

Article 16(b) of the Proposal also empowers the European Commission to adopt implementing acts specifying the content and form of the claims history statement, which will contain information such as: (i) identity of insurance undertakings issuing the claims history statement; (ii) the identity of the policyholder; (iii) the vehicle insured; (iv) the period of cover of the vehicle insured; and (v) the number and value of the declared third party liability claims during the period covered by the claims history statement.

The EDPS takes note that the information contained in the claims history statement would constitute personal data, given the fact that the identity of the policyholder together with the details related to the vehicle and the insurance would be present on such form.

As a result, the EDPS recommends that the European Commission consult the EDPS in line with Article 28(2) of Regulation 45/2001¹¹ before adopting the implementing act.

2.4 Information centres

Article 23 of Directive 2009/103/EC currently provides for specific information centres in order for an injured party to seek compensation. In particular, each Member State is under an obligation to establish an information centre which is responsible to provide specific

¹⁰ Supra note 2, Art. 16.

¹¹ Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of personal data by the Community institutions and bodies and on the free movement of such data. This regulation will soon be replaced with a new instrument, currently in the final stages of the legislative process, that will render the consultation of the EDPS on relevant implementing and/or delegated acts mandatory.

information set out in Article 23 to “*(...) any party involved in any traffic accident caused by a vehicle covered by insurance (...)*”¹² with the conditions set out in the Directive.

The EDPS notes that Article 23(6) of Directive 2009/103/EC refers to Directive 95/46/EC¹³ as regards the processing of personal data resulting from such activities. Therefore, given the link between the sharing of information and data protection concerns, **we encourage to update the reference to the applicable data protection law in force today, i.e. the GDPR.**

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¹² Supra note 2, Art. 23(5).

¹³ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23.11.1995, p. 31–50.