

NEW BILL OF LAW TO LEGITIMATE PROCESSING OF HEALTH DATA IN THE INSURANCE SECTOR

On 23 December 2019, the Luxembourg government issued a new bill of law n°7511 ("Bill 7511") amending the law of 7 December 2015 on the insurance sector ("Insurance Law") to remedy the lack of lawful ground on which insurance and reinsurance companies can base the processing of personal health data.

Key issues

- Processing of personal health data in the insurance sector
- Absence of appropriate legal basis in the Luxembourg data protection law
- Introduction of an Article 181bis in the Insurance Law
- Article 9 of the GDPR

CONTEXT

While Article 7, paragraph 3, of the repealed law of 2 August 2002 on the protection of personal data provided that the processing of personal health data was lawful to the extent that insurance companies were subject to the obligation of professional secrecy, this provision has not been reiterated in the law of 1 August 2018 on the organisation of the national data protection commission and the general regime on the protection of personal data. In the absence of a specific legal basis to be relied upon, insurance and reinsurance companies were left with no other choice than to rely on the insured persons' consent in order to process their personal health data. The appropriateness of the use of consent by insurance and reinsurance companies is however debatable since insurance and reinsurance contracts are standard terms and conditions which are often not negotiated with the insured person (adhesion contracts) which leads the *Commission Nationale pour la Protection des Données* (CNPD) to think that consent is not freely given.

This Bill 7511 was eagerly awaited by the Luxembourg Insurance and Reinsurance Association (ACA), which represents the insurance and reinsurance sector to the public authorities.

BILL 7511

In order to remedy to this situation, the Luxembourg legislator contemplates to introduce a new Article 181bis in the Insurance Law and suggests to use Article 9, paragraph 2 (g) of the General Data protection Regulation (EU) 2016/679 (GDPR) to legitimate the processing of personal health data by insurance and reinsurance companies, on the ground that these processing are "*necessary for reasons of substantial public interest*". The Luxembourg legislator indeed considers that the coverage of the risks related to health, age or death of insured persons by insurance and reinsurance companies participates to the welfare of the general public and society and is therefore in the public interest.

According to the draft Article 181bis, the processing of personal health data by insurance and reinsurance companies shall only be lawful when said processing is necessary for the performance of precontractual measures in insurance or reinsurance or for the performance of insurance or reinsurance contracts, provided that insurance or reinsurance companies comply with the relevant legal provisions on professional secrecy and consider to implement various "appropriate measures" such as the designation of a data protection officer, the drafting of data protection impact assessments, the use of anonymisation or pseudonymisation techniques, etc. If one or more of the said appropriate measures are not implemented, insurance and reinsurance companies will have to document and justify internally the reasons why.

This being said, Bill 7511 still needs to go through the Luxembourg legislative process and may be subject to further amendments before the final vote by the Luxembourg Parliament. We already foresee that discussions will revolve around the possibility for insurance and reinsurance companies to bypass insured persons' consent.

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