ILAG

Investment & Life Assurance Group
45 years of The Practitioner Voice

Data Protection Team
Department for Culture, Media & Sport

10 May 2017

Dear Sirs,

Call for views on the General Data Protection Regulation derogations

The Investment & Life Assurance Group (ILAG) is a representative body, with members from across the Life Assurance and Wealth Management Industries.

ILAG members openly share and develop their practical experiences and expertise, applying this practitioner knowledge to the development of their businesses, both individually and collectively, for the benefit of members and their customers.

ILAG is run by practitioners for practitioners, whether by engagement with industry associated bodies or through active consultation.

A list of ILAG members is at the end of this submission.

General comments

Although the General Data Protection Regulation (GDPR) applies across the financial services industry, our comments focus on the provision of employee benefits.

It cannot be the intention of GDPR to prevent employers providing schemes that deliver benefits to their employees and their beneficiaries by making them too onerous to administer or unaffordable.

If the transposition of GDPR into UK regulations introduces significant changes for insurers, advisers, employers, Pension Trustees, employees and their family members to be compliant, then it is inevitable that negative outcomes will arise.

It is vital that an exemption is given for the administration of pension and employee benefits, where these are:

- an agreed schedule of benefit types (which would require industry collaboration to define)
- facilitated or funded by the employer

- for the benefit of the employee or their dependants and beneficiaries
- or are either contractual or non-contractual in nature.

For insurance products, where transfer of data and use of third party data in both scheme and medical underwriting, as well as processing claims, can be essential, GDPR has wider implications.

Gaining explicit consent for each piece of data to be used, rewording and reissuing contracts of employment, as well as numerous other administrative requirements, would severely undermine the appetite for organisations to continue with existing schemes or consider introducing benefit schemes. The burden on business in administering such schemes is already a barrier to the availability of these important benefits.

It is vital that the Department of Culture, Media and Sport and the Information Commissioner's Office work with the financial services industry to guide employers, to avoid unnecessary alarm and potential barriers to business.

We have considered each of the themes within the Paper and have provided comments on those which affect our members.

Key points on the specific themes

Theme 6: Third Country Transfers

Within the industry firms, such as insurers and reinsurers, can have overseas parent companies or operate in multiple countries. This means that customer data may need to pass to a third country.

We understand that transferring data, in this manner, is appropriate for these purposes, where, under GDPR, the organisation the data is transferred to has adequacy under Article 45 (3), or if Article 49 1 (c) applies.

Additionally, employers, benefit administrators and insurers make use of support service providers and administration teams that can be based overseas. This allows specialist support to be provided, keeps costs manageable and the provision of benefits affordable.

Theme 7: Sensitive personal data and exceptions

Under GDPR the only basis for processing special category data will be under Article 9.2(a) 'explicit consent' of the data subject. However, insurers often process special category personal data, for example to price and underwrite according to the level of risk presented.

A derogation, by which Paragraph 9 of Article 9 of GDPR does not apply to processing required to arrange, underwrite and administer insurance products and any associated claims or withdrawals, is necessary.

An exclusion permitting this type of processing will enable providers to continue to deliver competitive and accurate risk pricing. This will ensure that the industry can continue to provide products and services that allow individuals to manage financial risks and provide security.

For the provision of employee benefits, sensitive personal data is usually provided with explicit consent, for which Article 9.2 (a) would apply. However, in certain circumstances employees may not be able to comply, in which case Article 9.2 (c) would apply.

To support industry to continue to deliver the same services to customers, new legislation is required. Within the Data Protection Act, statutory instrument 417 permits the use of familial data for underwriting. Once GDPR takes effect, this statutory instrument will no longer be operative.

To enable underwriting to continue, within current practices, the transposition of GDPR must contain a provision for this additional data processing. Unless statutory instrument 417 is retained under GDPR, medical underwriting will only be able to proceed with the explicit consent of each family member.

The Access to Medical Reports Act (1988) provides protection to individuals wishing to see the information being transferred to an insurer. This process takes place within a 21-day period and the individual can request inaccurate or misleading information to be omitted.

This legislation, alongside the requirement to provide explicit consent on both claim and medical underwriting form, delivers significant protection in the management of personal, sensitive (eg health) data at an individual and employee level.

Where family member data is required (for example claiming for a Children's or Spouse's benefit under a group critical illness scheme) the same protections apply. This means that the exemption must include provision for dependants and beneficiaries.

Theme 12: Processing of Data

Although an employer can accurately maintain the personal data required to provide its insured employee benefits, this also involves the data being passed to a third party or insurer for processing.

Under GDPR, it appears that an employer could determine that it is required to obtain explicit consent from each employee to enable data processing. This would mean that for those where consent isn't obtained benefits would not be provided.

Providing employee benefits on a selective basis, will mean the loss of financial security for many and the potential for an increased strain on the State Benefits system. 'Selection' against the insurer could increase (as can happen with non-compulsory eligibility categories) resulting in a decrease in those benefitting from financial protection through employee benefits. This would also result in higher costs for lower cover as the insured population ages.

For employers, the administrative burden involved with communicating, collecting, managing and maintaining explicit consent records for all employees is likely to result in these types of benefits being, either, withdrawn or not considered.

Under Article 88 of GDPR, the UK is afforded the ability to establish its own specific rules in relation to the processing of employee data when linked to the provision of rights and benefits related to employment.

We suggest that employee benefits, such as group income protection, which supports the retention of disabled people in the workforce, are included within the provision of rights and

benefits related to employment and believe an exclusion from the explicit consent requirements is fundamental.

Considering Article 6.1 (a, c, d, and f) the requirements for explicit consent in relation to the provision of employee benefits are impractical and ambiguous as to the employee benefits they may apply. The impact of transposing these Articles, without additional rules to ensure that employers can continue to provide benefits, which deliver peace of mind and financial security to employees, will be detrimental.

The regulations associated with the implementation of Article 88 must permit the transfer of sufficient personal data from the employer to third parties, for the provision of benefits for the employee, without the need for specific employee consent for each individual benefit.

For the absence of doubt employee benefits could be broadly defined, but not explicitly, as

- Pensions (for example, defined contribution, defined benefit, SSAS, SIPP and EPP)

- Benefits payable and non-financial support given following the death of an employee or partner and dependant(s) (for example, Registered and Excepted group life lump sum schemes, Death in Service Pensions and Partners' Life Assurance)

- Benefits payable and non-financial support given if an employee is affected by injury or ill health (for example, Group Income Protection, Group Critical Illness, Cash Plans, Private Medical Insurance, Permanent Total Disability, especially where associated with Personal Accident and Sickness schemes and Short Term Income Protection)

- Health and Wellbeing schemes. These are often constructed through the engagement of individuals with support providers (usually including a summary of how their data will be used). The support organisation usually collates and uses anonymised data to formulate a wellbeing strategy. The tools and initiatives that an organisation can use to gain this insight into the health challenges of its workforce include: Personal Health Risk Assessments (online and paper), health screening, self-assessment tools, such as mental health toolkits and team resilience questionnaires.

It is also essential that, in this context, sufficient personal data covers the employee and their beneficiaries, whether the benefit is contractual or non-contractual, paid or facilitated by the employer.

We would welcome the opportunity to work with Government to develop a comprehensive list of employee benefits and would be happy to collaborate to ensure the successful implementation of GDPR in the financial services industry.

Yours faithfully,

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