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SPECIALISED CONSUMER CREDIT PROVIDERS IN EUROPE

Eurofinas observations on the Commission's Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (COM(2012) 11 final)

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ABOUT EUROFINAS

Eurofinas, the European Federation of Finance House Associations, is the voice of the specialised consumer credit providers in the EU. As a Federation, Eurofinas brings together associations throughout Europe that represent finance houses, universal banks, specialised banks and captive finance companies of car, equipment, etc. manufacturers. The scope of products covered by Eurofinas members includes all forms of consumer credit products such as personal loans, linked credit, credit cards and store cards. Consumer credit facilitates access to assets and services as diverse as cars, education, furniture, electronic appliances, etc. It is estimated that together Eurofinas members financed over 320 billion Euros worth of new loans during 2010 with outstandings reaching 820 billion Euros at the end of the year.

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INTRODUCTORY OBSERVATIONS

Eurofinas, the voice of consumer credit providers at European level, takes note of the publication of the European Commission's Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (COM(2012) 11 final).

We believe the Commission Proposal provides a good starting point to further discussions and debate on the EU framework for the protection of personal data. Although we appreciate that this Proposal is a horizontal instrument applicable across sectors, we feel that a number of aspects are ill-suited for financial services, and in particular consumer credit.

We would like to draw your attention to a number of key concerns for the industry that Eurofinas represents. These concerns should be read in light of the specificities of our industry as well as the work the Federation has recently conducted together with ACCIS on fraud and consumer lending resulting in the release of a report on fraud prevention and data protection (available here).

SPECIFIC OBSERVATIONS

1. Chapter II – Article 5 – Principles relating to personal data processing

Data minimisation

Article 5 of the Proposal introduces the principle of 'data minimisation', whereby personal data must be limited to the minimum necessary.

Consumer credit providers use many different types of data out of necessity on a daily basis, both on- and off-line, in the consumer credit industry.

Credit providers represented by Eurofinas need to use personal data in order to:

i) satisfy regulatory requirements and
ii) assess objectively the creditworthiness of their customers.

The legislation in force - such as the Consumer Credit Directive,[1] the Capital Requirements Directive[2] and the 3rd Anti-Money Laundering Directive[3] - place an obligation upon consumer credit providers to use data when conducting a creditworthiness assessment, for risk analysis and for identification purposes (*know your customer*). National legislation often also provides in extensive detail what data must be collected.

We believe that without further clarifications, the introduction and subsequent interpretation of the principle of data minimisation would present an obstacle to consumer credit providers for adhering to the aforementioned legislation and for the carrying out of sound and responsible lending practices. This would also contradict existing EU legislation such as the Consumer Credit Directive and proposals such as the Mortgage Credit Directive Proposal,[4] which aim to ensure sound lending practices.

[1] *Directive 2008/48/EC of the European Parliament and of the Council of 23 April on credit agreements for consumers and repealing Council Directive 87/102/EEC.*
[2] *Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast).*
[3] *Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.*
[4] *Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property (COM(2011)142final).*

Further processing

Article 5(b) and Article 6(4), as they are currently worded, appear to be contradictory with regard to further processing for purposes incompatible with the purpose for which the data was collected. To clarify the relation between the two Articles and increase legal certainty, Eurofinas considers that Article 5(b) should be rephrased so as to specify that personal data must not be further processed in a way incompatible with the purposes for which it has been collected, **unless specific provisions of the regulation provide otherwise**.

2. Chapter II – Article 6 - Lawfulness of processing

Criteria for lawfulness

Article 6 of the Proposal broadly retains the requirements for data processing to be considered lawful contained in the 1995 Data Protection Directive. However, experience in practice, as set out in the Eurofinas/ACCIS report on fraud prevention and data protection (available here), has shown that these provisions often do not permit the processing of data for fraud prevention and detection purposes.

Detecting and preventing fraud in consumer lending is of paramount importance. Not only for the credit provider in question but also to protect consumers from, for example, falling victim to a loan fraudulently being taken out in their name.

Eurofinas therefore takes the view that fraud prevention and detection should be explicitly recognised as a legitimate purpose for data processing.

In addition, we would like to remark that in its report, the Expert Group on Credit Histories (EGCH), set up by DG MARKT in 2008,[5] also notes the differing national interpretations of the current data protection rules. This is particularly the case in respect of anti-money laundering, authorised purposes and authorised actors.

Basis provided for in law

Article 6(3) states that where a basis for processing is provided for in the law of a Member State, it "must meet an objective of public interest or must be necessary to protect the rights and freedoms of others, respect the essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued".

We fear that whilst it is the responsibility of the Member States to ensure that their national legislation meets the above requirements, data controllers would bear the risks when processing data in accordance with a potentially non-conformist law. This should be avoided to increase legal certainty for controllers and processors.

3. Chapter II – Article 7 – Conditions for consent

Eurofinas welcomes, in principle, the introduction of clear rules on consent.

Specified purposes

The introduction of "explicit" consent (Article 4(8)) for "specified purposes" (Article 7(1)), could constitute a significant change for the consumer credit industry, depending on how these aspects are interpreted in practice. In some Member States, consumers give explicit consent for the processing of their data for general purposes. If

[5] *Report of the Expert Group on Credit Histories, May 2009, DG Internal Market and Services, available at: http://ec.europa.eu/internal_market/consultations/docs/2009/credit_histories/egch_report_en.pdf*

explicit consent were to be required for each separate purpose, this would be time-consuming, resource-intensive and costly.

Significant imbalance

With regard to paragraph 4 of this Article we would like to remark that the proposed wording may create uncertainty as to what could be understood under "a significant imbalance". It is our understanding that what can be considered as "free" consent will be subject to differing national interpretations. It is essential that this provision is not interpreted as an automatic presumption of an imbalance between the positions of the consumer and business within every relationship between the two parties.

This could to some extent be resolved by explicitly clarifying that where consent cannot provide a legal basis due to an imbalance, the controller may process the data if this is subject to another legal basis, in accordance with article 6 of the Proposal.

Withdrawal of consent

Article 7(3) provides that consumers may withdraw their consent at any time. This provision could have a detrimental impact on the data which consumer credit providers need to process to continue to administer the loan and maintain records held by credit reference agencies, reducing their ability to making responsible lending decisions. In our view, this provision should be amended to allow, where consent has been withdrawn, for the continued processing in accordance with another legal basis, as set out in Article 6 of the Proposal. This would permit the processing of data necessary for continuing the contractual relationship that may exist between the controller and the subject, as well as allowing for the fulfillment of any obligation on the part of the controller incurred at the request of or under a contract with the data subject.

4. Chapter II – Article 9 – Processing of special categories of personal data

Fraud databases

In some Member States credit and financial institutions can set up databases which contain data on fraud committed against consumer credit providers. Processing and sharing of this data with other providers is permitted in order to allow credit providers to prevent fraud and minimise risks.

Due to the restrictions in article 9 of the Proposal on the processing of data related to criminal convictions and similar security measures, it is unclear whether these databases, whose existence is essential to protect both consumers and businesses, can be maintained in the future. In our view, this should be addressed so that these databases can continue to exist and operate.

5. Chapter II – Article 12 – Procedures and mechanisms for exercising the rights of the data subject

Provision free of charge

Eurofinas supports the rights of access to data, rectification and completion of inaccurate and incomplete data for data subjects. Both contribute to improved quality of the data used by lenders to make sound lending decisions.

The Proposal establishes that information and actions taken at the request of subjects shall be free of charge. Regarding the right of access for data subjects (Article 15), as well as rectification and completion (Article 16) we would like to remark that the provision of data held within a database has a cost.

Thus if credit databases are forced to give consumers access to their credit data 'free of charge', any administrative costs incurred would likely be borne by the lenders who consult the credit data. Ultimately, lenders would recover

any extra expenditure by passing these costs to consumers through (*inter alia*) product fees and/or interest rate adjustments.

In addition it should also be recognised that requesting an appropriate (not for profit) contribution by consumers for data access is critical in deterring fraudsters from obtaining high volumes of consumers' credit data. If data access upon request were to become free of charge then consumers would face an increased risk of frauds (e.g. 'account takeover') with its attendant detrimental consequences.

Eurofinas therefore considers that data controllers should be permitted to request an appropriate (not for profit) contribution from the consumer.

6. Chapter III – Article 14 – Information to the data subject

Categories of data

Article 14 sets out the information data controllers shall provide to data subjects. This article has been substantially expanded compared to the provisions currently contained in the 1995 Directive. The Federation would like to warn against over-burdening businesses and over-loading consumers with information and therefore asks that an appropriate balance be struck between the rights and duties of both parties.

7. Chapter III – Article 17 - Right to be forgotten and to erasure

Right to be forgotten

Eurofinas welcomes that the Proposal does not introduce an absolute right to be forgotten. Access to historic data is critical by lenders for portfolio management, managing cases of delinquency, developing future underwriting strategies and for fulfilling their legal obligations. In particular, data is key for evaluating the creditworthiness of the consumer.

When deciding whether or not to grant a loan to an applicant borrower, consumer credit providers assess a large range of data to assess the creditworthiness of their customers and satisfy regulatory requirements. We wish to stress that if insufficient data is available due to the customer having requested the erasure of his data, this will render the credit provider in question unable to perform the required verifications and risk assessment. The lender will consequently be unable to grant a loan. At the least, consumers should be warned regarding the potential consequences of exercising their right to be forgotten in this context.

In any case, the relevant provisions on the storage of data prevent data controllers from storing data for longer than required and national law often lays down specific storage limits.

It should also be considered whether the exceptions currently contained in the proposed Article 17(3) adequately take into account the operational reality of businesses and the important role data plays therein.

8. Chapter III – Article 18 – Right to data portability

Credit data

With regard to data portability in the field of cross-border access to and exchange of credit data, we would like to draw your attention to the report of the EGCH.[6]

[6] *Report of the Expert Group on Credit Histories, May 2009, DG Internal Market and Services, available at: http://ec.europa.eu/internal_market/consultations/docs/2009/credit_histories/egch_report_en.pdf*

Eurofinas feels that the system currently proposed in Article 18 of the Proposal would be open to abuse, as an ill-intended applicant borrower may alter the data in between receiving, for example, his credit history from one processor and presenting it to a lender. Additional difficulties are that the data may be supplied in a different language and/or use differently defined terms.

Regarding credit data, Eurofinas agrees with the EGCH that it should be left to each individual lender to decide which data access model offers the most convenient and cost-effective solution to data portability.

Disclosure

Careful consideration should also be given as to whether or not this provision could require organisations to disclose trade secrets or information on other customers. In this context the obligation to bank secrecy should also be taken in account.

We are also concerned that data portability may increase the risk of disclosure of personal data to third parties. This may be in conflict with other obligations of the controller, such as for example security of processing (Article 30 of the Proposal).

Implementing acts

We strongly oppose any standardisation of IT solutions and technical systems used by controllers to process data. The aim of the Proposal is to introduce a new European framework for data protection that ensures protection of individuals' rights and the free movement of data (Article 1), not to standardise processing systems.

We would also like to add that the imposition of technical requirements to enable personal data to become portable, comes at a significant cost for businesses, which they are likely to pass on to consumers.

9. Chapter III – Article 20 - Measures based on profiling

Profiling

Article 20 of the proposal concerns automated processing. Eurofinas therefore takes the view that the title to this article should reflect this and be re-named to "Measures based on automated processing".

We wish to stress the importance of risk assessment as part of sound lending practices, which can help reduce levels of over-indebtedness. The rules on automated processing should not prohibit or restrict risk assessment as part of lending practices.

10. Chapter IV – Article 22 – Responsibility of the controller

Verification of measures

Article 22(3) of the Proposal would introduce the obligation for the controller to have an independent external or internal auditor carry out a verification of the measures put in place to ensure adherence to the Regulation, if proportionate. We fear that this would introduce an unnecessary duplication of the measures taken by controllers to ensure compliance and that this constitutes an unjustified expense. Questions also arise with regard to the role and responsibilities of this independent auditor, i.e. for measures verified by this auditor, would the auditor be responsible for any breaches and the controller exonerated?

11. Chapter IV – Article 23 – Data protection by design and by default

Design of systems

Article 23 of the Proposal would require controllers to implement technical and organisational measures and procedures, so as to ensure that they comply with the Regulation. In our view, this provision is redundant for ensuring compliance with the Regulation. The current wording is also unclear, imposing an obligation to redesign internal systems to an undefined standard.

As mentioned above under point 8, we strongly oppose any standardisation of IT solutions and technical systems used by controllers to process data, through the adoption of implementing measures. The aim of the Proposal is to introduce a new European framework for data protection that ensures protection of individual's rights and the free movement of data (Article 1), not to standardise processing systems, as proposed in Article 23(4).

12. Chapter IV – Article 31 – Notification of a personal data breach to the supervisory authority

Notification period

The foreseen time period for notifying the supervisory authority (24 hours) of all the information required in Article 31(3) is impractically short, in particular in the context of a global data transfer.

Duplication of notification to supervisory authorities

In some Member States, credit and financial institutions shall notify the Financial Services Authority where substantial disruptions in services provided to the customers and in payment and IT systems occur. Where such an obligation already exists in national law, we feel that this should not be duplicated by an additional obligation to also notify the data protection supervisor.

13. Chapter IV – Article 32 – Communication of a personal data breach to the data subject

Adverse effects

With regard to the communication of personal data breaches to data subjects where this is likely to affect the personal data or privacy of the data subject, Eurofinas would like to note that the establishment by the Commission at a later stage of the requirements for these circumstances is likely to create substantial legal uncertainty. Data subjects should be informed where there could be a significant impact on them and we therefore feel that the current article is disproportionate.

Please also see our concerns on delegated acts below (point 16).

14. Chapter IV – Article 33 – Data protection impact assessment

Impact Assessments

Data Protection Impact Assessments adds yet another layer of bureaucracy to an already complex legal framework. Should any such obligation be imposed, it is our view that this must be restricted to categories of data processing that are most likely to affect the fundamental rights and freedoms of data subjects.

The Proposal as it stands would oblige data controllers and processors to conduct impact assessments on processing operations which have been laid down by law, such as the creditworthiness assessment. Data processors cannot and should not be asked to make the assessment as to whether or not a legal obligation placed

upon them poses “a high degree of specific risks”. This is a consideration for the legislator and, at European level, through the opinion of the European Data Protection Supervisor, who advises the Institutions on legislation that affects privacy.

Consultation of representatives

The Proposal requires the controller to seek the views of data subjects or their representatives on the intended processing. We fear this may be impossible to implement in practice and that data subjects’ representatives may not always have the expertise or resources to respond to such imposed requests for their views.

15. Chapter X – Article 79 – Administrative sanctions

Level of sanctions

The Proposal introduces severe administrative sanctions which supervisory authorities can impose on data controllers. We feel that the sanctions should be proportionate to any breach of the provisions of the Regulation. The high level of the sanctions proposed may also stifle business innovation.

It would also be more appropriate to amend the wording of Article 79 from the “supervisory authority **shall** impose” to the “supervisory authority **may** impose”. This would allow each authority to take into account all circumstances of each individual case.

As a counterbalance to the sanctions, it is crucial that the obligations and duties of controllers and processors are clear.

16. Chapter X – Article 86 – Exercise of the delegation

Delegated acts

Eurofinas has serious concerns regarding the extensive power for the Commission to adopt delegated acts. This entails that the provisions of the Regulation would be liable to substantial changes over time, likely resulting in substantial business as well as legal uncertainty. The limited involvement of stakeholders in this process is also a concern.

We would like to recall that in accordance with the provisions of the Treaty delegated acts can only be applied to “non-essential” aspects of the Regulation, rather than, as in the Proposal, on all essential aspects of the Regulation.

Eurofinas therefore objects to the provisions of the Regulation being altered at a later stage by delegated acts in general and in particular on the following issues:

- Lawfulness of processing (Article 6(5));
- Right to be forgotten (Article 17(9));
- Measures based on profiling (Article 20(5));
- Design (Article 23(4));
- Communication of personal data breach (Article 32(5));
- Data protection impact assessment (Article 33(6)).