

BRE-JBZ

From: Kaai, Geran
Sent: vrijdag 3 april 2015 15:57
To: Verweij, Ellen
Subject: FW: Legitimate Interests
Attachments: 56408713_1_UKMATTERS(Council LEGITIMATE INTERESTS 10 March 2014).pdf

Follow Up Flag: Follow up
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From: Barnard, Johan
Sent: woensdag 19 maart 2014 11:56
To: Kaai, Geran
Cc: BRE-FIN
Subject: FW: Legitimate Interests

From: BRE-FIN
Sent: woensdag 19 maart 2014 11:55
To: Barnard, Johan; Janssen, Reijer; Sorber, Michiel; Beaufort, Kees; Klein, Anke; Wehmeyer, Annemarie
Subject: FW: Legitimate Interests

From: BRE
Sent: woensdag 19 maart 2014 11:27
To: BRE-FIN; BRE-EA
Subject: FW: Legitimate Interests

From: [REDACTED] L [mailto:[REDACTED]]
Sent: woensdag 19 maart 2014 11:20
To: BRE
Subject: Legitimate Interests

Dear Mr Kaai,

We are contacting you on behalf of Experian (www.experian.co.uk), the leading global credit reference bureau, who would like to highlight to you their on-going concerns relating to the Data Protection Regulation.

One of these primary concerns relates to the use of legitimate interests as a basis for consent in credit reference activities. Currently the fundamental part of processing of credit information is carried out under the basis of legitimate interests, as explicit consent is not appropriate for guaranteeing accurate and reliable credit monitoring and processing.

Under the basis of explicit consent, permission could be withdrawn at any time, and this would render lenders unable to carry out the important activities needed to prevent against over indebtedness, excessive lending and financial mismanagement.

Experian support an approach that allows processing for legitimate interests on the same basis as all other grounds specified at Article 6(1), and which allows for an express extension of the wording to clarify the legitimacy of processing by third parties, where the balance required for this condition has been considered and is validly met.

Experian therefore **ask you to retain the Council position concerning Article 6(1)(f) and 17(1)(c) during the negotiation phase** and then into the trilogue process.

We are pleased to attach a paper which provides more detail concerning the issues which would be raised both for consumers and the financial services industry if the Council changes its position concerning the use of legitimate interests as a basis for consent.

Should you have any questions concerning the basis of consent and the need to retain the current provisions concerning legitimate interests please do not hesitate to contact us directly.

Kind regards

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EU Regulatory Director

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EXPERIAN: CORE OUTSTANDING ISSUES

LEGITIMATE INTERESTS (ARTICLE 6)

Concerns with the Commission's proposals: The legitimate interests condition is of fundamental significance to credit reference agencies (CRA's) across the EU. Much of the processing carried out by CRAs is undertaken for the legitimate interests of the users of their services. Similarly, lenders who contribute data to the shared databases operated by CRAs will often rely on the legitimate interests of the CRAs when they do so. The long-established network of data sharing which underpins many CRA services is therefore heavily dependent on words allowing third party processing being included in the draft Regulation (as they are currently included in Directive 95/46/EC).

By using the words "a controller" in Article 6(1)(f), rather than repeating the provisions of the current legislation (Article 7(f) in Directive 95/46/EC), there is a material risk that credit reference agency services will be adversely affected. This is a material risk where the words "a controller" are construed as meaning that Legitimate Interests can only be relied upon by one (or the originating) data controller, rather than allowing for the long-established network of data sharing explained above. Experian believes that the removal of these words leading to this construction may not have been intentional, as the wording "a controller" is ambiguous in this respect.

Concerns with the European Parliament's proposals (voted in October 2013):

- The additional test at **Article 6(1)(f)** to meet the "reasonable expectations of data subjects". This is subjective and open to dispute.
- We have concerns with proposed **Articles 19(1) 19(2), 19(3), 17(1) and 17(3)** where these propose statutory restrictions on use of the Legitimate Interests condition that lead to any consumer objection as requiring erasure, and no more use of that data. (There is an apparent conflict between the provisions of Articles 19(2) & (3) in the LIBE Report)

Risk to CRA services: If the DPR is written to allow consumers rights to remove accurate negative credit report data, this will fundamentally impact on CRAs services which are trusted by lenders to provide complete and accurate data records. This is likely in practice to cause significant detriment to consumers.

Why can't all CRA processing rely upon consent? This is primarily because it is generally accepted (and will become law if the Commission's proposal at Article 7(3) is accepted) that where consent is relied upon as a condition for processing, it can be withdrawn at any time. This renders consent unworkable as the basis for processing credit files, as these files can only be trusted by lenders if known to be accurate and complete. This trust would not exist if individuals could selectively withdraw consent in respect of individual pieces of data. Some Member States have adopted specific provisions in their current national data protection legislation that cover forms of processing which require derogation from consent (e.g. Spain). Others have approved Codes or written information from or supported by data protection authorities which identify where there are grounds for reliance on the legitimate interests' condition for processing.

Examples of EU data protection supervisory authorities who have determined that a derogation from consent or reliance on the legitimate interests ground for processing is appropriate:

- In **Spain**, there is specific legal provision in its national Data Protection Act¹ that permits processing of data that is shared with creditors regarding payment or non-payment of monetary debts. The Spanish Data Protection Authority has provided a written Instruction that supports the interpretation that consent is not required for this type of processing².

¹ Article 29.2 of Organic Act 15/1999, 29th December (LOPD)),

² https://www.agpd.es/portalwebAGPD/english_resources/regulations/common/pdfs/Instruccion_1_1995-translation.pdf (see third paragraph)

- In **Italy**, the data protection authority has issued a provision on balancing of interests, where data is collected by CRAs without consent, issued at the same time as the Italian Code of Conduct entered into force (November 2004)³.)
- In the **Netherlands**, the data protection authority has approved a self regulatory trade association guideline, which has been officially published⁴. This includes a list of data processing (article 3.1) which offer the legitimate basis for processing (article 3.2).
- In **the UK**, the Information Commissioner's Office has carefully considered the basis for credit reference agency data processing, and has published its view that the legitimate interests condition for processing covers the sharing of account data with credit reference agencies, and that it is in the interests of other creditors to make informed lending decisions⁵.

Justification for supporting the Council position: We support an approach that allows processing for legitimate interests on the same basis as all other grounds specified at Article 6(1), and which allows for an express extension of the wording to clarify the legitimacy of processing by third parties, where the balance required for this condition has been considered and is validly met.

Recommendation to Council:

We support the Council's position on Articles 6(1)(f), 19 and 17(1)(c) and ask for Council to protect and hold this position in Trilogue negotiations.

In particular, we ask for Council to hold its position in limiting the scope to Article 19(2) only to personal data processed for direct marketing purposes.

³ <http://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/export/1671380> (in particular , please see Sections 3 and 4)

⁴ http://www.cbpreweb.nl/downloads_gedragcodes/gedr_NVH_stcr-2011-15899.pdf

⁵ http://www.ico.gov.uk/for_organisations/sector_guides/~/_media/documents/library/Data_Protection/Practical_applicationCREDIT_%20AGREEMENTS%20-%20DATA_%20SHARING.ashx