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BRE-JBZ

From: Kaai, Geran
Sent: vrijdag 3 april 2015 15:56
To: Verweij, Ellen
Subject: FW: The Proposal for a General Data Protection Regulation - Eurofinas recap of Observations
Attachments: Eurofinas Observations DPR_recap note.pdf; Eurofinas note on credit scoring.pdf

Follow Up Flag: Follow up
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From: BRE-JUS
Sent: woensdag 16 april 2014 12:23
To: Grave, Martijn-de; Ruiter, Mieneke-de; Dam, Caroline-ten; Alink, Marnix; Kaai, Geran; Timmermans, Marieke; Sorel, Alexander; Luijsterburg, Sander; Bos, Nicoline; Zwart, Jan
Subject: FW: The Proposal for a General Data Protection Regulation - Eurofinas recap of Observations

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Van: [redacted]
Verzonden: woensdag 16 april 2014 10:55:56 (UTC+01:00) Brussels, Copenhagen, Madrid, Paris
Aan: BRE-JUS
Onderwerp: The Proposal for a General Data Protection Regulation - Eurofinas recap of Observations

Dear Mr. Kaai,

Please find attached a recap of Eurofinas' observations on the Commission's Proposal for a General Data Protection Regulation (*enclosure 1*).

Eurofinas key concerns include the principle of **data minimisation** as well as the possibility of **profiling/automated decision-making**. In relation to the latter, please also find attached a Eurofinas note on credit scoring and how it is used in making lending decisions (*enclosure 2*).

We remain at your disposal should you be interested in discussing any issue.

Best regards,

[redacted]

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SPECIALISED CONSUMER CREDIT PROVIDERS IN EUROPE

Credit scoring and how it is used in making lending decisions

Eurofinas note

When deciding on whether or not to grant a loan or credit facility to a consumer, a finance company has to assess the creditworthiness of its potential borrower, i.e. it must examine the individual's ability to meet his or her financial commitments to repay the loan.

Credit scoring is a computer-aided system used by most major finance companies and banks throughout the developed economies when considering applications for borrowing. Its use has been judged by regulators in many countries as being beneficial to the consumer, the lender and to the economy. The World Bank in particular supports its use.

To evaluate creditworthiness as objectively and accurately as possible, credit scoring systems carefully and precisely gather and use information about the customer from a variety of sources. The component parts of each system vary for each lender based on its own earlier experience gleaned from customers who pay well or badly. The end result is a scorecard containing a series of factors with associated numeric values but its development and validation uses established statistical principles In operation, the system gives points for each piece of relevant information and adds these up to produce a score. If the customer's score reaches a certain cut off level, the finance company will generally accept the application. If the score does not reach this level, the application may not be accepted without good reason.

Additional rules, reflecting the company's commercial experience and needs, may also be used when deciding whether to lend together with any relevant or up to date information. The score is a very important factor when determining whether or not to grant a loan, but it may not be the only one. Consequently the final decision is taken by considering all the information available.

Every credit or loan application involves a certain level of risk to the finance company, no matter what the quality of the potential borrower is. Credit scoring allows the company to work out a statistically reliable estimate of the risk level for each applicant. If the level of risk is deemed to be too high, the finance provider will not accept such an application. This does not mean that any applicant turned down is a bad payer. It simply means that, based on the available information and the experience with similar applications the finance company has, it is not prepared to take the risk of providing the credit applied for.

It should be noted that lenders are not obliged to accept any application and that each lender applies its own policies and has different scoring systems. Therefore, applications may be assessed differently by different lenders with the result that one company may accept an application while another company may not. Obviously, it is not in the best interests of lenders to turn down good payers or accept those that do not pay. For this reason, those using scoring systems keep them under constant review and check that the cut-off score is where it should be.

Eurofinas – April 2014

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SPECIALISED CONSUMER CREDIT PROVIDERS IN EUROPE

Observations on the Commission's Proposal for a General Data Protection Regulation

Eurofinas recap note

INTRODUCTORY OBSERVATIONS

The review of the EU legal framework on data protection is a priority for the consumer credit industry. Legal certainty is crucial to allow for the processing of customer data for responsible lending and fraud prevention purposes.

Eurofinas, the voice of consumer credit providers at European level, believes 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.

Eurofinas is committed to contribute the Council's on-going efforts to achieve a well-balanced and workable regulatory framework. 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, our original observations on the proposal[1], as well as the work the Federation has conducted together with ACCIS on fraud and consumer lending resulting in the release of a report on fraud prevention and data protection.[2]

SPECIFIC OBSERVATIONS

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

Data minimisation

The proposed principle of data minimisation as provided for the in the draft DPR contradicts current legislative requirements affecting the consumer credit industry. 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:

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[1] *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), March 2012, http://www.eurofinas.org/uploads/documents/positions/Eurofinas%20observations%20-%20final.pdf.*

[2] *Eurofinas & ACCIS, Fraud prevention and data protection, December 2011.*

i) satisfy regulatory requirements and
ii) assess objectively the creditworthiness of their customers to ensure sound lending practices.

The legislation in force - such as the Consumer Credit Directive,[3] the Capital Requirements Directive[4] and the 3rd Anti-Money Laundering Directive[5] - 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.

Article 5(c) should be amended in line with the wording of Directive 95/46/EC which permits "not excessive" processing.

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, 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,[6] 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.

Recital 31 should be amended "In order for processing to be lawful, personal data should be processed on the basis of the consent of the person concerned or some other legitimate basis, **for example to detect and prevent fraud, laid down by law,** either in this Regulation or in **any** other Union or Member State law."

[3] *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.*
[4] *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).*
[5] *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.*
[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*

3. 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.

Article 9(1) should be amended "The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership, and the processing of genetic data or data concerning health or sex life ~~or criminal convictions or related security measures~~ shall be prohibited."

4. 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.

Article 17(1)(a) should be amended "the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed **and when the data controller has no legal or regulatory ground to retain the data**;".

5. 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.[7]

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.

Disclosure

Careful consideration should also be given as to whether or not this provision could require organisations to disclose commercially sensitive information 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).

Article 18 should be deleted.

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

Profiling

Article 20 of the proposal concerns automated processing. The rules on automated processing should not prohibit or restrict risk assessment as part of lending practices. We recall that risk assessments are instrumental to ensure sound lending practices.

In its Report of 12 March 2014[8], the European Parliament introduces a ban on automatic profiling and a requirement for all profiling to contain a "human element". We strongly oppose this ban, which would jeopardise the application of automated decision-making mechanisms used by consumer credit and credit scoring professionals to make prompt, objective and accurate assessments. The data is collected with the consent of the customer and is handled under carefully controlled circumstances. For further information on credit scoring and how it is used in making lending decisions, please see attached note.

A customer may enquire as to the terms and conditions for entering into, for example, a consumer credit contract. In order for the consumer credit provider to provide information on the APRC, it will assess the consumer's creditworthiness, a legal obligation. Requiring a formal request for the entering into a contract to be proven, would essentially render service and goods providers unable to respond to information requests.

Article 20(2)(a) should be amended "is carried out in the course of the entering into, or performance of, a contract, ~~where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or~~ where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention; or".

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[7] *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*

[8] *European Parliament legislative resolution of 12 March 2014 on the 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 (General Data Protection Regulation).*

7. Chapter X – Article 79 – Administrative sanctions

Level of sanctions

The Commission's Proposal introduces severe administrative sanctions which supervisory authorities can impose on data controllers, which the European Parliament proposes to be even further **strengthened.** 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.

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

It would 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.