ARTICLE 29 DATA PROTECTION WORKING PARTY

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Contribution of the Article 29 Working Party to the public consultation of DG MARKT on the report of the Expert Group on Credit Histories

Adopted on 1 December 2009

I. General comments

The Article 29 Working Party welcomes the opportunity given by the European Commission to comment on the report of the Expert Group on Credit Histories open for public consultation.

The Article 29 Working Party notes that the Expert Group on Credit Histories (EGCH) has been given a mandate by the European Commission to identify solutions that optimise circulation of consumers' credit data within the EU. The Working Party acknowledges that, in the course of carrying out this mandate, the EGCH has also discussed the right to privacy and other consumer protection considerations. In this connection, the Working Party notes and welcomes that the EGCH has decided not to recommend the establishment of a central EU credit data system nor alignment of all Member States on one existing or new credit data model.

The Article 29 Working Party wishes to make it clear that the approach taken by the EU/EEA data protection authorities to such matters is based on the Data Protection Directive (Directive 95/46/EC) and the different legislative frameworks in each Member State transposing that Directive.

The EGCH report addresses important matters, such as harmonisation of regulations roundtable discussions and cooperation between data protection authorities. The Article 29 Working Party therefore urges the Expert Group to adopt a firm and clear position and to obtain formal commitments from all parties involved on the matters which require regulatory measures.

The recommendations made by the Expert Group in the report mainly reflect the concerns of the financial sector, since the majority of the members of the Expert Group represent financial institutions. The members of the Article 29 Working Party therefore believe that this contribution and the reactions of consumers' representatives to the report of the Expert Group should also be taken into consideration.

The report encourages further liberalisation of processing of private credit profiles. The trend in most Member States is to consider such processing a form of 'blacklisting' or profiling. The recurrent references to 'local data protection laws' is not enough, especially as many Member States have not (yet) enacted detailed and balanced provisions on the data protection aspects of credit information. Moreover, the Expert Group's report needs to be improved on provision of precise and specific guarantees with regard to data protection rules.

II. Specific comments

1. Rights of the data subjects

The Article 29 Working Party considers that the report gives insufficient consideration to the rights of the data subjects. The Article 29 Working Party therefore considers it necessary to make the following recommendations:

1.1 The right to information

In the experience of those Member States which have already developed more detailed rules on protection of data subjects with regard to credit data, the most important right of data subjects would be a complete right to information. This means that data subjects must be informed about every entry concerning them in a credit information register. Recognition (or implementation) of such a right of data subjects has considerably reduced the number of complaints to the national data protection authorities in those Member States.

Data subjects should know exactly whom to address in the event of disputes and requests relating to processing of their personal data in credit registers. Therefore, pursuant to Directive 95/46/EC, the identity and country of establishment of the data controller of credit information registers or his representative must be indicated in every case.

The Article 29 Working Party recalls that the Directive requires that data subjects must be informed of the purpose for which data on them are collected. Upon entering a contract, they should be informed that:

- their credit histories are going to be consulted in order to assess their financial solvency; or
- if they fail to fulfil their financial obligations, their financial data could be disclosed to a negative file.

The Article 29 Working Party recommends that data subjects should also be informed by the lender when a payment is rejected (in the event of negative filing).

Regarding the understanding of credit reports by consumers, the members agreed that knowledge and awareness should be promoted, along with the capability to understand such reports. This is necessary to ensure fair and lawful processing.

1.2 The right of access

As regards data subjects' right of access, the Article 29 Working Party makes the following comments:

- Directive 95/46/EC stipulates that it should be possible to exercise this right without excessive costs or delay. Some members even consider that it should be free of charge and that data subjects should be entitled to exercise this right whenever new data are added to their credit histories.
- The rights of access and of rectification must be enforceable against any credit bureau that has received credit data.
- In the case of credit bureaus which have websites, a balanced measure could be to allow data subjects to exercise their rights via the Internet, free of charge. In the specific case of Internet access, requesting a contribution from the consumer would in any case mean limiting the rights granted by the Data Protection Directive.
- Data subjects may also be able to exercise their right of access via consumer protection associations.

- Meanwhile, emphasis should be placed on the form and content of the data communicated. Directive 95/46/EC requires that the controller must communicate the data undergoing processing and any available information as to the source in an intelligible form and that data subjects have the right to obtain knowledge of the logic involved in any automatic processing of data concerning them (Article 12).

2. Register content

2.1 Categories of data

The Data Protection Directive states that data may be processed only if they are necessary and proportionate to the purpose of the processing. There should be a clear definition of categories of personal data which may be collected in different types of credit reports and which could be transferred.

The personal data which may be processed are not defined in the Expert Group's report. This lack of precision could have serious consequences as it increases the risks of:

- data being used beyond the lawful purposes of processing and beyond the principles of the Directive. For instance, data could be processed for the purpose of giving credit information to non-financial institutions such as telecommunications companies, public utilities, etc. This is further processing for a purpose incompatible with the original objective; and
- having excessive data in registers. Creditors must be encouraged to delete profile data when they are not necessary. Directive 95/46/EC requires that data processed must be adequate, relevant, accurate and not excessive in relation to the purposes for which they are processed and must be processed no longer than necessary.

The discussion within the Expert Group on the content of certain registers highlighted the diversity in Member States' domestic requirements with regard to non-credit data, fraud data, credit scores and customer identification functions (inclusion of national ID numbers in certain cases). Some Member States allow none of these categories to be included in credit registers under their jurisdiction.

In the case of non-credit data, the report reflects the restrictions existing in some Member States on the processing of 'judicial information' by any party other than under official authority or by the data controller in the course of his or her own litigation. Similarly, in the case of credit scores, the Data Protection Directive contains clear requirements setting restrictions on automated decision-making[1]. The Article 29 Working Party has expressly stressed the need to comply with the requirements laid down in Article 15 of Directive 95/46/EC[2]. On this point the Article 29 Working Party would tend to agree with the position of some of the experts who feel that credit data should be limited to what is allowed by local regulations and should not, under any circumstances, be excessive in relation to the purpose(s).

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1 Directive 95/46/EC, Article 15.

2 Working Document on Blacklists, WP 65, pages 5 and 12; available at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp65_en.pdf.

2.2 The purpose of data collection

The Expert Group's report draws no distinction between the types of data processed nor the purpose of collection. This goes against the Article 29 Working Party's Working Document on Blacklists (WP 65, page 3), in which a distinction is drawn between 'styled solvency and credit information' and records which 'provide information on the breach of monetary obligations'[3]. Some specific legislation, for instance, differentiates between the two types of processing, in accordance with the Working Document on Blacklists.

Negative files relating to non-fulfilment of financial obligations do not require the data subject's consent, but collection of financial solvency information does. For instance, if data are collected for the purpose of assessing solvency in credit applications, the same data cannot be used automatically for other purposes, even if they form part of the activities of financial institutions, such as anti-money-laundering procedures.

A clear distinction should also be drawn between use of credit data for commercial purposes and for regulatory purposes. In some countries, for example, the national credit register serves no function connected with identification of customers and anti-money-laundering purposes. The Article 29 Working Party recommends that access to credit registers should be limited to the credit sector and not extended to entities from other sectors, such as utilities providers (electronic communications). If this were not the case, credit referencing and blacklisting would ultimately overlap. It would also become extremely difficult to determine which data are relevant and not excessive for the purposes sought by this processing, contrary to Article 6(1)(a) and (b) of Directive 95/46/EC.

The Article 29 Working Party considers legitimate recommendation 5 in the Expert Group's report regarding application of national law where the data are collected for authorised purposes, when authorised purposes are defined by law.

2.3 Data quality control

In many Member States, protection of borrowers' rights is given priority, notably in the form of specific measures to ensure that borrowers' personal data contain no erroneous, inaccurate or irrelevant information.

Data quality control mechanisms are essential when it comes to processing credit data. Therefore, the report should explain more clearly the idea of data quality control mechanisms, by illustrating how such mechanisms will help to prevent wrongful registration of individuals. One issue is, for example, the use of different alphabets in the languages of the Member States. The register systems must therefore support an agreed transcription method.

[3] Working Document on Blacklists, pages 5 and 11available at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp65_en.pdf.
"The former serve to assess a person's economic and financial capacity to assume a future credit commitment. The latter store data on compliance with or breach of monetary obligations with the aim of establishing whether an individual has failed to meet previous obligations. These entail a negative rating for subsequent credit, of course"'.

3. Creditors' access to data

The Expert Group recommends that national data protection authorities work towards greater convergence or harmonisation of the interpretation of data protection rules and of their practices to facilitate cross-border exchanges of credit data[4]. This recommendation is welcomed, but does not appear a realistic solution, given the substantial differences between national laws. Besides, credit registers are not only a data protection matter and fall under different laws even at national level. Furthermore, this recommendation seems to operate on the basic assumption that cross-border sharing of an individual's credit data is justifiable under all circumstances. This is clearly not the case.

The Expert Group considers it necessary to engage in discussions to determine exactly which data are needed in the context of cross-border transfers of credit histories. Only the data absolutely necessary should be transferred in order to keep disclosure to future creditors in line with the principles of proportionality and limitation of purpose enshrined in the Directive[5]. These conditions are meant to safeguard the rights of data subjects. In addition it is recalled that access to credit histories data by creditors and its further processing shall comply with both data protection laws of the requesting organisation (e.g. credit institution) and of the requested organisation (e.g. credit registry).

Roundtable discussions will not be sufficient and regulatory measures on use of credit profiles should be imposed instead. This is already the case in some Member States, where establishment and use of the national credit register is provided for by a specific law. The data protection authorities should be involved in drafting these laws to ensure that they take account of data protection concerns.

The Article 29 Working Party is not in favour of the recommended possibility for creditors to have access to credit data for the whole lifecycle of a credit and beyond[6]. This directly conflicts with the principles behind the Directive. Data relating to credit history must be retained only for as long as necessary and proportionate in line with national requirements. This would not allow such data to be stored indefinitely for credit purposes or even at all for unrelated purposes. The Article 29 Working Party refers to its Working Document on Blacklists (WP 65) which states that the principles relating to data quality contained in Article 6 of the Directive must be observed[7].

As a guarantee of data quality, any changes to, deletion or blockage of data in the country of origin should also be repeated in every credit bureau receiving the data.

Under the Data Protection Directive, information about lapsed debts may not be processed and should be deleted after the retention periods applicable in the country of origin. For that reason, the Article 29 Working Party is not in favour of the recommended possibility for creditors to have access to credit data beyond the credit lifecycle. A fixed term should be set for use of credit profiles.

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4 Expert Group report, recommendation 3.
5 Directive 95/46/EC, Article 6.
6 Expert Group report, recommendation R8.
7 Working Document on Blacklists, pages 5 and 11; available at: http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2002/wp65_en.pdf.

5. Other remarks

In addition to the general comments made in this document, the Article 29 Working Party considers also necessary to make the following remarks.

Responses to Specific Recommendations

R.2: The EGCH recommends that creditors be given free choice between all access models available to them, depending on the business case and having regard to data protection rules. The EGCH considers that the indirect access model may be the most suitable, as a first step in generating a cross-border market.

The Article 29 Working Party point outs that one difficulty with relying on an indirect access model is that individuals could be placed under pressure to provide their credit record for purposes other than credit purposes, e.g. employment checks, etc.

R.18: The EGCH recommends handling at EU level, in cooperation with national Data Protection Authorities, the problem of data holder's identification taking into account the impact, in terms of costs, benefits and data protection, of any proposal.

The Article 29 Working Party agrees that this is a key requirement, as mistaken identity of individuals can lead to inappropriate disclosures of credit information or to decisions based on wrong information. Equally, the measures put in place to identify individuals and their credit data correctly must be proportionate to the purpose.

R.21: Some EGCH experts recommend that consumers should have an easy way to obtain redress in a cross-border context for the damage suffered due to wrong credit data or to its inappropriate use and/or any other breach of their rights.

The Article 29 Working Party agrees that this is a key requirement and recommends that any move to allow an easier flow of credit data across borders must be matched by a comprehensive and easily accessible system of redress. Directive 95/46/EC gives every individual the right to an administrative and judicial remedy for any breach of the rights guaranteed to him or her by the national law applicable to the processing in question. In addition, Directive 95/46/EC also provides that any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to the Directive is entitled to receive compensation from the controller for the damage suffered (Article 23).

Done at Brussels, on 1 December 2009

For the Working Party
The Chairman
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