

ASSOCIATION OF CONSUMER CREDIT INFORMATION SUPPLIERS

Response to the proposal for a General Data Protection
Regulation – Perspective of Credit Reporting Agencies



ACCIS RESPONSE TO THE PROPOSAL FOR A GENERAL DATA PROTECTION REGULATION – PERSPECTIVE OF CREDIT REPORTING AGENCIES

OUR POSITION IN A NUTSHELL

Legitimate Interest	Legitimate interest is an important legal basis for credit reporting agencies and it should be allowed for processing (including automated processing – i.e. credit scoring) which is needed to perform creditworthiness assessment, credit risk prevention checks and fight over-indebtedness.
Processing of special categories of data	Gender identity and administrative judgements and sanctions should not be included in the list of special categories of data due to their importance for proper creditworthiness assessment, credit risk prevention checks, including antifraud prevention and identification purposes.
Right to erasure and to be forgotten Right to object	In the case of data collected by credit reporting agencies, consumers should provide a justified reason to erase their data or a reasonable objection to processing, which shall not however override credit reporting agencies’ legitimate interest to process data for creditworthiness assessment and credit risk prevention checks, including antifraud prevention and identification purposes.
Measures based on profiling	Automated profiling performed by credit reporting agencies (i.e. credit scoring) guarantees neutrality in the evaluation of consumers’ credit records. Too restrictive rules on automated processing/profiling would be to the detriment for both consumers and SMEs alike. Mandatory human assessment on all decisions based on automated profiling would stretch waiting times for consumers or make consumer lending at the point-of-sale impossible and increase the risk of bias in the decision-making as well as the risk of fraud.

ABOUT ACCIS

ACCIS, the Association of Consumer Credit Information Suppliers, is an international non-profit trade association bringing together 44 consumer reporting agencies (CRAs) across 28 European countries and 6 associate members from all other continents. As such, ACCIS represents the largest group of credit reporting agencies in the world.

Credit reporting systems sit at the heart of financial systems, their core activity being to act as a third party holder and provider of information about the credit behaviour of consumers and SMEs.

ACCIS Members provide data and solutions designed to support financial organisations, enabling access to credit for consumers and SMEs, and as such, play a critical role in the lives of European citizens. The services provided by CRAs support providers to make lending decisions based on accurate, consistent and verifiable data.

THE IMPORTANCE OF RISK AND CREDIT WORTHINESS ASSESSMENT

In its General Principles for Credit Reporting¹, the World Bank states that “credit reporting systems should effectively support the sound and fair extension of credit in an economy as the foundation for robust and competitive credit markets. In doing so, credit reporting systems should be safe and efficient, and fully supportive of data subject and consumer rights.”

HOW CREDIT INFORMATION WORKS

When applying for credit, consumers and businesses alike provide financial institutions with details about themselves and their financial situation. The lender shares this information with a Credit Reporting Agency (CRAs) and at the same time obtains from the agency additional information on the applicant. Only after merging all relevant information on the applicant, the financial institution will make its lending decision.

The relationship between CRAs and lenders is based on mutual access to information, but the formers act as independent intermediaries from the latter.

Credit reporting agencies do not store sensitive personal data related to race, religion, sexuality, revenues, or criminal records and they do not make any decision related to the final approval of credit by lenders. CRAs simply hold databases of positive data (outstanding and settled credit agreements, possession of credit cards, ...) and negative data (late payments, default), which they update with the information provided by financial institutions.

Although there is no harmonisation at the European level, CRAs’ clients, i.e. the financial institutions who access these databases, are bound by strict rules that regulate the use of this information.

The assessment of risk and creditworthiness plays an important role when it comes to establishing sound lending practices and CRAs can contribute to reducing levels of over-indebtedness and promoting responsible lending. The positive role of credit reporting agencies has also been assessed in a study conducted by Civic Consulting for the Directorate General for Health and Consumers, which affirms that they can contribute to prevent households from over-indebtedness by recording positive credit information, thus providing a more accurate picture of an individual's financial situation.ⁱⁱ However, carrying out an accurate creditworthiness assessment requires adequate breadth and depth of data. Good, comprehensive, accurate and reliable data may be threatened by proposals that call for only the minimum data to be collected and processed and further undermined by proposals providing consumers with the right to forget data they do not like (such as information about previous bad debts).

By contributing to reducing the risk associated with credit decisions, credit reporting agencies provide a useful service not only to financial institutions, but also to consumers and businesses – that is the final users of the credit – as they contribute to lower the cost of credit, facilitate access to credit and prevent over-indebtedness.

This is supported also by the European Commission's Expert Group on Credit Histories in a Reportⁱⁱⁱ which recognises that *“credit data sharing between creditors is considered an essential element of the financial infrastructure that facilitates access to finance for consumers. The use of credit data in assessing borrowers' creditworthiness is key in order to enhance the quality of creditors' loans portfolio and thus reduce risks. It also assists creditors in complying with responsible lending obligations.”*

ACCIS' POSITION ON THE PROPOSAL FOR A GENERAL DATA PROTECTION REGULATION

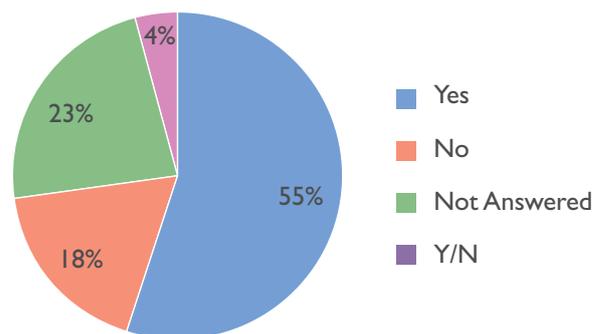
ACCIS supports the proposal to improve and update the European data protection framework, however, has concerns that due to unintended consequences, the credit provision necessary for economic growth may be significantly harmed, at a time when governments are working hard to introduce strategies which support economic growth.

Legitimate interest (Article 6)

55% of ACCIS-Members stated that all or part of their data was shared on the basis of legitimate interests of the data processor and that the data subject is notified that data will be shared if they proceed with the product.^{iv}

Figure 1 ACCIS members working on the basis of legitimate interest^v according to a survey carried out by ACCIS among its members in 2012, covering a number of key questions about the supply, collection and access to data held by credit reporting agencies as well as the legislation that covers credit reporting in the different countries.^{iv}

Is data shared on the basis of legitimate interests of the data processor. The consumer is notified that data will be shared if they proceed with the product.



The legitimate interest is, thus, an important legal basis for credit reporting agencies to collect, store and process information on the consumers' credit situation to help lenders taking responsible lending decisions.

In some countries any processing made by CRAs is considered as *“incompatible further processing”*, because it falls out of the scope for which data was originally collected, that is for the opening or fulfilling of a contract. In this context, in order to be able to process data for services such as ID fraud prevention, ID check, portfolio management, credit transfers, collection and debt settlement, and other purposes that are linked to credit risk prevention and creditworthiness assessment, credit reporting agencies rely on legitimate interest.

Any wording, which allows further processing only by the same controller, would endanger the work of credit reporting agencies, in countries where they mainly operate under this legal ground, as CRAs act as second or further controllers who receive data from their participants (e.g. banks, financial institutions, debt collection services, telecoms, utilities etc.) In fact, credit reporting agencies, which do not collect the data directly from the data subjects would be excluded by the provision.

Further processing based on legitimate interest needs to be wide enough to allow CRAs to perform their work. Otherwise their databases would be drastically reduced and – as a consequence – risk assessment would be less accurate and prices for credit would rise.

ACCIS believes that the Council's position takes due account of this. However further legal clarity is needed particularly when further processing is carried out not "by the same", but by another controller.

ACCIS calls for the inclusion of clear guidelines in the recitals that Art. 6(4) should not hamper legitimate business models as credit reporting agencies or that further processing by CRAs should be defined as "compatible" further processing.

Processing of special categories of data (Article 9)

ACCIS supports the text proposed by the Council in which gender identity and administrative sanctions and judgements are not considered as a special category of data. The term "gender identity" could be construed as having a far broader scope of remit (for example, capturing simply title data – e.g. Mr./Mrs. – or name data where this is indicative of a particular gender). Making all gender-identifying data sensitive would widely affect CRAs' processing, potentially requiring greater protections for title data than for credit or bank information. We believe this is unintended and should refer to trans-gender identifiers, but the Parliament text leaves this open for dispute.

Furthermore, to remove any reference to the gender identity of a consumer would be very difficult considering that in many countries the national number associated with individuals includes reference to gender and that this information would still be inferred by other data, for instance first name.

ACCIS agrees that "data concerning (...) sex life" should not be used to discriminate individuals, however collection of gender data should remain possible.

Court debt judgments and insolvency/bankruptcy data are vital data sets that CRAs process to allow lenders to make informed lending decisions, and so to protect consumers.

The processing of these data contributes to a safer financial environment, lowering credit risk which ultimately benefits consumers and SMEs by lowering the cost of credit.

In many EU countries the importance of these data is recognized by authorities and this information is in fact made available in public registries.

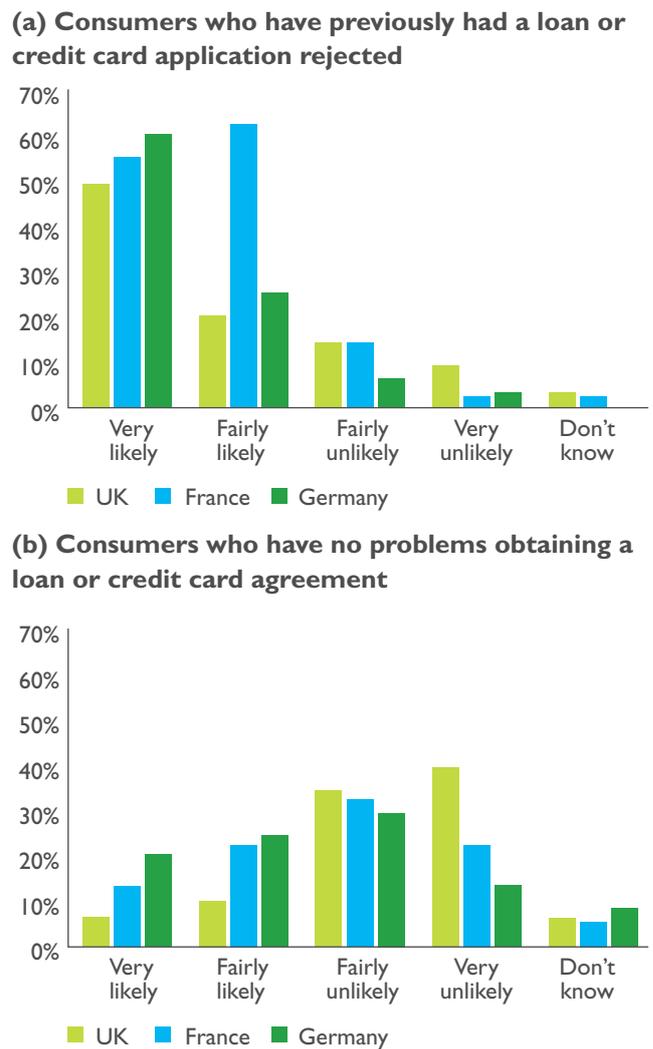
Right to erasure and right to object (Articles 17 and 19)

The Regulation should not put at risk the process of conducting reliable creditworthiness assessment, as it is crucial for sound lending practices. In some situations, e.g. data on social media network, we believe that the data subject should at any time have the right to object as well as to be forgotten. On the other hand Member States already have clear rules regulating how long data can be used for credit reporting. The right to be forgotten in terms of old data in the field of credit risk assessment is therefore already implemented.

It is also important that the ability of the data subject to object to the processing of personal data is based on a justified reason where the data subject does not agree upon data being processed on him or her (for example concerning negative data within a credit reporting agency which are vital to make accurate assessment before granting a loan). A justified reason in such a case would include instances where the data held is wrong, but not where the data is accurate and processed correctly. In our view, it is important that the text of the Regulation does not represent a risk to the process of carrying out a creditworthiness assessment, which is crucial to sound lending practices, by allowing a data subject to selectively delete correct data on their credit file, thus distorting the reliability of the credit information and creating the danger of moral hazard.

We wish to stress that if insufficient data is available due to the subject having requested the erasure of data, this will result in the credit provider being unable to perform the verifications and risk assessment checks required by the Consumer Credit Directive (2008/48/EC).

Figure 2 Consumers who report that they would cancel their credit history^{vii}



Source: Deloitte Consumer survey

Theory and empirical studies^{iv} over the last three decades have demonstrated that the more the lender does not have such data, the more it faces “adverse selection” or “moral hazard” problems in its lending activities, that can lead to an inefficient allocation of credit, for instance to its rationing.

Figure 2 shows that data subjects are more inclined to erase their credit history if they have a negative credit record, which confirms the risk of consumers artificially distorting their credit history, undermining the reliability of credit records.

In order not to jeopardise the work of credit reporting agencies, data subjects should be able to present a **reasonable objection** to the processing of personal data (when data has been stored beyond the period allowed by law or when it is incorrect). However this objection shall not override the credit reporting agency’s legitimate interest to process data for creditworthiness assessment and credit risk prevention checks. Alternatively, the wording of Art. 17 shall expressly recognise creditworthiness assessment and credit risk prevention checks as processes which are not under the provision of the right to erasure except where the data are incorrect.

Thus, ACCIS calls for the introduction of a discretionary element in Article 17 and Article 19 in order to be able to differentiate from, for instance, the realm of social networks – where data subjects should be entitled in any case to the erasure of data upon request – and the credit reporting industry. As such, we would encourage the trilogue to maintain the principle of the burden of proof as it was conceived in the 1995 Directive, since we believe that it would better protect consumers, SMEs and the lending market.

In any case, ACCIS is against the wording adopted by the European Parliament for Article 19(2), which gives data subjects the right to object “*without any further justification*” if the data processing is based on legitimate interest. As explained earlier in this paper, many credit bureaus use legitimate interest as a legal ground for collecting and processing data and their work would be seriously affected by this provision.

A detailed analysis of the Council and Parliament’s texts together with suggested amendments is available in the annex.

More information about the Association is available here: www.accis.eu.

To discuss any elements of the ACCIS Position Paper, please contact secretariat@accis.eu.

Measures based on profiling (Article 20, Recital 58)

The proposed provisions on automated processing/profiling could prohibit or restrict risk assessment as part of lending practices. Too restrictive rules on automated processing/profiling would be to the detriment for both consumers and SMEs alike.

Mandatory human assessment on all decisions based on automated profiling – as proposed by the European Parliament – would stretch waiting times for consumers or prohibit consumer lending directly at the point-of-sale and increase the risk of bias in the decision-making as well as the risk of fraud. It would jeopardise the application of automated decision-making mechanisms needed by consumer credit and credit scoring professionals to make prompt, objective and accurate assessments in a more and more digitalised world. Credit scoring and risk assessments are instrumental to ensure modern and sound lending practices.

Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (Basel III) requires financial entities to perform some credit profiling in order to prevent and mitigate lending risk and CRAs help financial entities to comply with this regulation by providing credit scores. Requiring explicit consent for this kind of profiling could hamper the implementation of this Regulations.

We support the possibility to request human assessment by the consumer if and when he or she thinks that he or she has not been treated fairly or when information is believed to be inaccurate. This guarantees the consumer’s rights and it is already provided for by the current Data Protection Directive 95/46/EG.

ACCIS supports the Council position as long as the necessity of the creditworthiness assessment that CRAs and financial institutions perform in view of entering into a contract with an applicant borrower, is clearly acknowledged and kept in due consideration (as already acknowledged under the 1995 Directive).

Endnotes

- i *General Principles for Credit Reporting*; World Bank; September 2011; p. 23.
<https://openknowledge.worldbank.org/bitstream/handle/10986/12792/701930ESW0P1180ting0pub010028011web.pdf?sequence=1>
- ii *Over-indebtedness of European households: updated mapping of the situation, nature and causes, effects and initiatives for alleviating its impact*; Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC); December 2013; pp. 206-207.
- iii *Report of the Expert Group on Credit Histories*; DG Internal Market and Services; May 2009; p. 2.
http://ec.europa.eu/internal_market/consultations/docs/2009/credit_histories/egch_report_en.pdf
- iv *ACCIS 2012 Survey of Members – An analysis of credit bureaus in Europe*; ACCIS; June 2013; p. 24.
http://www.accis.eu/fileadmin/filestore/newsflash/50923786_2_UKMATTERS_accis_2012_survey_of_members_.pdf
- v *ACCIS 2012 Survey of Members – An analysis of credit bureaus in Europe*; ACCIS; June 2013; p. 24.
http://www.accis.eu/fileadmin/filestore/newsflash/50923786_2_UKMATTERS_accis_2012_survey_of_members_.pdf
- vi List of theory and empirical studies:
- Stiglitz, Joseph E., and Andrew Weiss. 1981. *Credit Rationing in Markets with Imperfect Information*; American Economic Review 71 (3) (June): 393-410.
 - Jappelli, Tullio, and Marco Pagano. 1993. *Information Sharing in Credit Markets*; Journal of Finance 48(5):1693-1718.
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 - *Essays On Consumer Credit Markets*, Mark William Jenkins; Re-distributed by Stanford University, December 2009.
- vii *Economic impact assessment of the proposed European General Data Protection Regulation*; Deloitte; December 2013; p. 26.

ANNEX
ACCIS SUGGESTED AMENDMENTS TO THE PARLIAMENT AND COUNCIL'S TEXTS

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
Lawfulness of Processing > (ARTICLE 6(4))		
Deleted	4. Where the purpose of further processing is incompatible with the one for which the personal data have been collected <i>by the same controller</i> , the <i>further</i> processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. <i>Further processing by the same controller for incompatible purposes on grounds of legitimate interests of that controller or a third party shall be lawful if these interests override the interests of the data subject.</i>	4. Only where the purpose of further processing is incompatible with the one for which the personal data have been collected, the <i>further</i> processing must have a legal basis at least in one of the grounds referred to in [points (a) to (f) of] paragraph 1. Further processing for incompatible purposes on grounds of legitimate interests of the controller or a third party shall be lawful if these interests override the interests of the data subject. ¹

ANALYSIS

Paragraph (f) of Article 6(1), that is further processing allowed on the basis of legitimate interest, should also be included in the grounds allowing for further processing. When the purpose of further processing is justified by the need of a financial institution to obtain accurate data in order to make a responsible lending decision, the processing should be allowed as it responds to the legitimate interest of the lenders. In countries where processing made by credit reporting agencies is considered as “incompatible further processing”, the wording agreed by the Council, which allows only the controller who collected the data to perform further processing for incompatible purposes, would exclude CRAs as they do not collect the data directly from the data subjects. This would jeopardise their ability to provide reliable information on the data subject’s credit behaviour, ultimately hampering access to credit for consumers, since the risks connected to lending will increase, followed by an increase in credit prices.

ACCIS believes that the Council’s position takes due account of the issue. However, further legal clarity is needed with regards to further processing carried out by another controller.

If the Council’s position is not accepted it should at least be stated in the recitals that Art. 6(4) should not hamper credit reporting, or further processing by CRAs should be defined as “compatible” further processing. Our amendment aims at ensuring that the legitimate interest of lenders is taken into consideration and is in balance with the legitimate interest of consumers, while preventing misuse of personal data for further processing that falls completely out of the initial purpose for which data was collected.

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
<p>RECITAL 36. Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority, the processing should have a legal basis in Union law, or in a Member State law which meets the requirements of the Charter of Fundamental Rights of the European Union for any limitation of the rights and freedoms. This should include also collective agreements that could be recognised under national law as having general validity. It is also for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public administration or another natural or legal person governed by public law, or by private law such as a professional association.</p>	<p>RECITAL 36. Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority, the processing should have a (...) basis in Union law or in the national law of a Member State. (...). It should be also for Union or national law to determine the purpose of the processing. Furthermore, this (...) basis could <i>specify the general conditions of the Regulation governing the lawfulness of data processing</i>, determine specifications for determining the controller, the type of data which are subject to the processing, the data subjects concerned, the entities to which the data may be disclosed, the purpose limitations, the storage period and other measures to ensure lawful and fair processing. It should also be for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public authority or another natural or legal person governed by public law, or by private law such as a professional association, where grounds of public interest so justify including for health purposes, such as public health and social protection and the management of health care services.²</p>	<p>RECITAL 36. Where processing is carried out in compliance with a legal obligation to which the controller is subject or where processing is necessary for the performance of a task carried out in the public interest or in the exercise of an official authority, the processing should have a legal basis in Union law, or in a Member State law which meets the requirements of the Charter of Fundamental Rights of the European Union for any limitation of the rights and freedoms.</p> <p>This should include also requirements of supervisory authorities to which the controller is subject.</p> <p>It is also for Union or national law to determine whether the controller performing a task carried out in the public interest or in the exercise of official authority should be a public administration or another natural or legal person governed by public law, or by private law.</p>

ANALYSIS

It is our view that requirements set by supervisory authorities should be captured. It is also our view that there may be circumstances in which a private company can carry out functions which are in the public interest and that this should remain a possibility without being limited to a professional association and/or to health purposes.

² Note from the Latvian Presidency to the DAPIX Working Group on Chapter II of the GDPR (03 February 2015)

Lawfulness of Processing > (Recital 40)

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
Deleted	<p>RECITAL 40. The processing of personal data for other purposes <i>than the purposes for which the data have been initially collected</i> should be only allowed where the processing is <i>compatible</i> with those purposes for which the data have been initially collected. <i>In such case no separate legal basis is required other than the one which allowed the collection of the data.</i> (.) <i>If the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Union law or Member State law may determine and specify the tasks and purposes for which the further processing shall be regarded as lawful. The further processing (...) for archiving purposes in the public interest or, statistical, scientific or historical (...) purposes (...) or in view of future dispute resolution should be considered as compatible lawful processing operations. The legal basis provided by Union or Member State law for the collection and processing of personal data may also provide a legal basis for further processing for other purposes if these purposes are in line with the assigned task and the controller is entitled legally to collect the data for these other purposes.</i> In order to ascertain whether a purpose of further processing is compatible with the purpose for which the data are initially collected, the controller, after having met all the requirements for the lawfulness of the original processing, should take into account <i>inter alia</i> any link between those purposes and the purposes of the intended further processing, the context in which the data have been collected, including the reasonable</p>	<p>RECITAL 40. The processing of personal data for other purposes <i>than the purposes for which the data have been initially collected</i> should be only allowed where the processing is compatible with those purposes for which the data have been initially collected. <i>In such case no separate legal basis is required other than the one which allowed the collection of the data.</i> (.) <i>If the processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller, Union law or Member State law may determine and specify the tasks and purposes for which the further processing shall be regarded as lawful. The further processing (...) for archiving purposes in the public interest or, statistical, scientific or historical (...) purposes (...) or in view of future dispute resolution should be considered as compatible lawful processing operations. The legal basis provided by Union or Member State law for the collection and processing of personal data may also provide a legal basis for further processing for other purposes if these purposes are in line with the assigned task and the controller is entitled legally to collect the data for these other purposes.</i> In order to ascertain whether a purpose of further processing is compatible with the purpose for which the data are initially collected, the controller, after having met all the requirements for the lawfulness of the original processing, should take into account <i>inter alia</i> any link between those purposes and the purposes of the intended further processing, the context in which the data have been collected</p>

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
	<p>expectations of the data subject as to their further use, the nature of the personal data, the consequences of the intended further processing for data subjects, and the existence of appropriate safeguards in both the original and intended processing operations. Where the intended other purpose is not compatible with the initial one for which the data are collected, the controller should obtain the consent of the data subject for this other purpose or should base the processing on another legitimate ground for lawful processing, in particular where provided by Union law or the law of the Member State to which the controller is subject. (...).</p> <p>In any case, the application of the principles set out by this Regulation and in particular the information of the data subject on those other purposes <i>and on his or her rights (...)</i> including the right to object, should be ensured. (...). <i>Indicating possible criminal acts or threats to public security by the controller and transmitting these data to a competent authority should be regarded as being in the legitimate interest pursued by the controller. However such transmission in the legitimate interest of the controller or further processing of personal data should be prohibited if the processing is not compatible with a legal, professional or other binding obligation of secrecy..</i></p>	<p>including the reasonable expectations of the data subject as to their further use, the nature of the personal data, the consequences of the intended further processing for data subjects, and the existence of appropriate safeguards in both the original and intended processing operations. Where the intended other purpose is not compatible with the initial one for which the data are collected, the controller should obtain the consent of the data subject for this other purpose or should base the processing on another legitimate ground for lawful processing, in particular where provided by Union law or the law of the Member State to which the controller is subject.</p> <p>The provision is not intended to hinder legitimate business models such as debt collection or credit information services.</p> <p>In any case, the application of the principles set out by this Regulation and in particular the information of the data subject on those other purposes <i>and on his or her rights (...)</i> including the right to object, should be ensured. (...). Further processing of personal data by the controller, notably transmitting personal data to competent authorities for public security purposes or other purposes pursuant to Art 2(2)(e), which are not required by a legal obligation or any other legal bases in Art. 6(1) (a) to (e) should be regarded as a legitimate interest pursued by the controller. Further processing of personal data should be prohibited if the processing is not compatible with a legal, professional or other binding obligation of secrecy.</p>

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
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ANALYSIS

ACCIS welcomed the changes to Recital 40 suggested by the Latvian presidency in February 2015, where credit reporting agencies have been explicitly mentioned as legitimate business models entitled to process personal data for purposes other than those for which these data were originally collected. Unfortunately the text adopted by the Council does not include this reference anymore. ACCIS strongly believes that the desired wording – which is anyway not binding – would provide guidelines for the interpretation of the provisions related to legitimate interest, recognising the legitimacy and importance of the role played by CRAs in the financial system.

<i>Processing of special categories of personal data (Article 9(1))</i>	<i>Support Council Position</i>
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I. The processing of personal data, revealing race or ethnic origin, political opinions, religion or *philosophical* beliefs, **sexual orientation or gender identity**, trade-union membership **and activities**, and the processing of genetic **or biometric** data or data concerning health or sex life, **administrative sanctions, judgments, criminal or suspected offences**, convictions or related security measures shall be prohibited.

I. The processing of personal data, revealing *racial* or ethnic origin, political opinions, religious or *philosophical* beliefs, trade-union membership, and the processing of genetic data or data concerning health or sex life (...) shall be prohibited.

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
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ANALYSIS

Credit reporting agencies collect this type of information. To remove any reference to the gender identity of a consumer would be very difficult considering that in many countries the national number associated with individuals includes reference to gender and that this information would still be inferred by other data, for instance first name. ACCIS agrees that gender identity should not be used to discriminate individuals, however collection of gender data should remain possible.

Court debt judgments and insolvency/bankruptcy data are vital data sets which are processed by CRAs to allow lenders to make informed lending decisions. The processing of these data contributes to a safer financial environment, lowering credit risks which ultimately benefits consumers by lowering the cost of lending. The importance of these data is recognised by authorities and in fact, in many EU countries this information is made available in public registers. Therefore the processing of such data should be allowed for these particular purposes.

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
<p>The data subject shall have the right to obtain from the controller the erasure of personal data relating to them and the abstention from further dissemination of such data, and to obtain from third parties the erasure of any links to, or copy or replication of, that data where one of the following grounds applies:</p> <p>[...]</p> <p>(c) the data subject objects to the processing of personal data pursuant to Article 19;</p> <p>(ca) a court or regulatory authority based in the Union has ruled as final and absolute that the data concerned must be erased;</p>	<p>The (...) controller shall have the obligation to erase personal data <i>without undue delay</i>, especially in relation to personal data which are collected when the data subject was a child, and the data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay where one of the following grounds applies:</p> <p>[...]</p> <p>(c) the data subject objects to the processing of personal data <i>pursuant to Article 19(1)</i> and <i>there are no overriding legitimate grounds for the processing or the data subject objects to the processing of personal data pursuant to Article 19(2)</i></p> <p>[...]</p>	<p>The (...) controller shall have the obligation to erase personal data without undue delay and the data subject shall have the right to obtain the erasure of personal data concerning him or her without undue delay where one of the following grounds applies:</p> <p>[...]</p> <p>c) the data subject makes a justified and a successful objection to the processing of personal data pursuant to Article 19 and <i>there are no overriding legitimate grounds for the processing or the data subject objects to the processing of personal data pursuant to Article 19(2)</i></p> <p>[...]</p>

ANALYSIS

It is important that the ability of the data subject to object to the processing of personal data is justifiable for data processing where the data subject may not be satisfied with the data processed on him or her (for instance concerning negative data within a credit reporting agency). A justified reason in such a case would include instances where the data held is incorrect but not where the data are correct and processed correctly. In our view, the wording proposed by all three Institutions would represent a risk to the process of carrying out a creditworthiness assessment, which is crucial to sound lending practices, by allowing a data subject selectively to delete correct data on his/her credit file, thus distorting the reliability of the credit information. (See also our comments on Article 19.)

The amendment we propose aims at including in the provision a discretionary element in order to be able to differentiate from, for instance, the realm of social networks – where data subjects should be entitled in any case to the erasure of data upon request – and the credit reporting industry – where data subjects should present a reasonable objection to the retention of data (when data has been stored beyond the period allowed by law or when it is incorrect) in order to have it deleted.

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
<p>1. The data subject shall have the right to object at any time to the processing of personal data which is based on points (d) and (e) of Article 6(1), unless the controller demonstrates compelling legitimate grounds for the processing which override the interests or fundamental rights and freedoms of the data subject.</p>	<p>1. The data subject shall have the right to object, on grounds relating to <i>his or her</i> particular situation, at any time to the processing of personal data <i>concerning him or her</i> which is based on points (...) (e) or (f) of Article 6(1), <i>the first sentence of Article 6(4) in conjunction with point (e) of Article 6(1) or the second sentence of Article 6(4).</i></p> <p><i>The controller shall no longer process the personal data (...) unless the controller demonstrates compelling legitimate grounds for the processing which override the interests, (...) rights and freedoms of the data subject or for the establishment, exercise or defence of legal claims</i></p>	<p>The data subject shall have the right to object, on grounds relating to his or her particular situation, at any time to the processing of personal data concerning him or her which is based on points (...) (e) or (f) of Article 6(1), the first sentence of Article 6(4) in conjunction with point (e) of Article 6(1) or the second sentence of Article 6(4).</p> <p>The controller shall (...) process the personal data (...) unless the data subject demonstrates compelling legitimate grounds relating to his particular situation to object to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;</p>
<p>2. Where the processing of personal data is based on point (f) of Article 6(1), the data subject shall have at any time and without any further justification, the right to object free of charge in general or for any particular purpose to the processing of their personal data.</p>	<p>Where personal data are processed for direct marketing purposes, the data subject shall have the right to object (...) <i>at any time</i> to the processing of personal data <i>concerning him or her</i> for such marketing. <i>At the latest at the time of the first communication with the data subject</i>, this right shall be explicitly <i>brought to the attention of the data subject (...)</i> and shall be <i>presented clearly and separately</i> from any other information.</p>	<p>Support Council Position</p>

ANALYSIS

The inclusion of a provision which may allow data subjects to erase elements of their credit profile (Articles 17, 19) when their data is accurate and being processed under the basis of legitimate interest (Articles 6) would fundamentally undermine the lending system across the EU. Article 19(1) introduces a need for a ‘compelling’ ground for the use of legitimate interest processing, which would create legal uncertainty and ambiguity. If data subjects could choose to request erasure of accurately recorded elements of their credit history, on the basis that their data is being processed under the legitimate interest ground. This would lead to data subjects having incomplete or inaccurate credit files, which would impact both their ability to attain credit and the lenders ability to assess risk. We request that consideration is given, where legitimate interest is used for important processing such as credit reporting, to the fact that data subjects only be able to request erasure of inaccurately recorded data.

We would urge that participants seek clarity in the wording and intention of this article, to ensure a correct implementation. As such we would encourage the trilogue to revert to the principle of the burden of proof as it was conceived in the 1995 Directive (Article 14), which provided for the data subject to demonstrate compelling legitimate grounds for objecting. We believe that in this way consumers will be better protected, without placing disproportionate burdens on the industry. The Parliament’s text of Article 19(2), which gives data subjects the ability to object to processing based on legitimate interest “*without any further justification*”, disrupts the balance of interests enshrined in this article.

As with the analysis in Article 17 above, the ability for the data subject to object to the processing of personal data should be reasoned and justifiable.

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
<p>1. Without prejudice to the provisions in Article 6 every natural person shall have the right to object to profiling in accordance with Article 19. The data subject shall be informed about the right to object to profiling in a highly visible manner.</p> <p>2. Subject to the other provisions of this Regulation, a person may be subjected to profiling which leads to measures producing legal effects concerning the data subject or does similarly significantly affect the interests, rights or freedoms of the concerned data subject only if the processing:</p> <p>a) Is necessary for 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, provided that suitable measures to safeguard the data subject's legitimate interests have been adduced; or</p> <p>[...]</p> <p>5. Profiling which leads to measures producing legal effects concerning the data subject or does similarly significantly affect the interests, rights or freedoms of the concerned data subject shall not be based solely or predominantly on automated processing and shall include human assessment, including an explanation of the decision reached after such an assessment. The suitable measures to safeguard the data subject's legitimate interests referred to in paragraph 2 shall include the right to obtain human assessment and an explanation of the decision reached after such assessment.</p>	<p>The data subject shall have the right not to be subject to a decision (.)based solely on automated processing, including profiling, which produces legal effects concerning him or her or significantly affects him or her.</p> <p>1a. Paragraph 1 shall not apply if the decision: (...)</p> <p>a) is necessary for entering into, or performance of, a contract between the data subject and a data controller (...); or</p> <p>[...]</p> <p>5. (...)</p>	

Recital 58

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
<p>RECITAL 58. Without prejudice to the lawfulness of the data processing, every natural person should have the right to object to profiling. Profiling which leads to measures producing legal effects concerning the data subject or does similarly significantly affect the interests, rights or freedoms of the concerned data subject should only be allowed when expressly authorised by law, carried out in the course of entering or performance of a contract, or when the data subject has given his consent. In any case, such processing should be subject to specific information of the data subject and the right to obtain human assessment and that such measures should not concern a child. Such measures should not lead to discrimination against individuals on the basis of race or ethnic origin, political opinions, religion or beliefs, trade union membership, sexual orientation or gender identity.</p>	<p><i>RECITAL 58 The data subject should have the right not to be subject to a decision evaluating personal aspects relating to him or her (...) which is based solely on automated processing, which produces legal effects concerning him or her or significantly affects him or her, like automatic refusal of an on-line credit application or e-recruiting practices without any human intervention. Such processing includes also 'profiling' consisting in any form of automated processing of personal data evaluating personal aspects relating to a natural person, in particular to analyse or predict aspects concerning performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements as long as it produces legal effects concerning him or her or significantly affects him or her. However, decision making based on such processing, including profiling, should be allowed when authorised by Union or Member State law to which the controller is subject, including for fraud and tax evasion monitoring and prevention purposes and to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract</i></p>	

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
	<p><i>between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention, to express his or her point of view, to get an explanation of the decision reached after such assessment and the right to contest the decision. In order to ensure fair and transparent processing in respect of the data subject, having regard to the specific circumstances and context in which the personal data are processed, the controller should use adequate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure in particular that factors which result in data inaccuracies are corrected and the risk of errors is minimized, secure personal data in a way which takes account of the potential risks involved for the interests and rights of the data subject and which prevents inter alia discriminatory effects against individuals on the basis of race or ethnic origin, political opinions, religion or beliefs, trade union membership, genetic or health status, sexual orientation or that result in measures having such effect. Automated decision making and profiling based on special categories of personal data should only be allowed under specific conditions</i></p>	

EP Amendment (Adopted in Plenary)	Council Amendments	Amendment
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ANALYSIS

We believe that making human assessment mandatory within the decision-making procedures across all automated processing, not only will – in many instances – be of no use to the consumer (stretching waiting times for consumers or prohibiting consumer lending directly at the point-of-sale), but it will also increase risk, introducing an element of possible bias into the decision making process.

Although we agree that the consumer should have the possibility to have any decision reviewed upon request, we think that the mandatory inclusion of human assessment will place disproportionate burdens on the industry without clear benefits to data subjects, and may even result in a consequential harm.

Ultimately, we fear that the proposed provisions on automated processing/profiling could prohibit or restrict risk assessment as part of lending practices. Too restrictive rules on automated processing/profiling would be to the detriment for both consumers and businesses alike.

We welcome that the Council does not endorse these provision. We propose that decision-makers evaluate where automated processing is in the best interest of the consumer and reject the requirement for manual intervention as a mandatory requirement. We would support data subjects having the ability to invoke human assessment, including the ability to request an explanation of the decision reached, after such an assessment.

ACCIS supports the Council's position, as long as creditworthiness assessment (including automated processing/profiling) performed by CRAs and credit institutions, is considered as a “necessary” step in view of entering into a contract between a lender and a borrower. This necessity has been already acknowledged by the EU Regulation on prudential requirements for credit institutions and investment firms and by the Third Basel Accord, which require financial entities to perform some credit profiling to reduce and prevent lending risk. It is worth to underline that Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property allows for an automated processing of data in the course of creditworthiness assessment requiring only that the consumer is informed about such processing (Art. 19(5)(c)).