

**ACCIS position paper on the EC's proposed data protection Regulation (COM (2012) 11 final) ("the draft Regulation")**

**Amendment 1**

**Principles relating to personal data processing  
Article 5 – paragraph 1 – point c**

*Text proposed by the Commission*

(c) adequate, relevant, and *limited to the minimum necessary* in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data;

*Amendment*

(c) adequate, relevant, and *proportionate limited to the minimum necessary* in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data;

**Amendment 2**

**Principles relating to personal data processing  
Article 5 – paragraph 1 – point d**

*Text proposed by the Commission*

(d) accurate and kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;

*Amendment*

(d) accurate and *where necessary*, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without *undue* delay;

*Justification*

*Credit reference agency services depend on, and are made more effective by, access to large amounts of relevant data, from which the most predictive will be extracted and used according to the profile of the individual or business and the purpose for which a decision is being made. It is necessary for a credit reference agency ("CRA") to hold data for significant periods of time, and in relation to an individual's previous addresses and/or identities.*

*Credit reference agency services are created in line with current data protection requirements, and:*

- *whilst credit reference agencies do hold and/or make available a range of data for modelling purposes that data will be used to determine which provides the most statistically effective contribution to a decision. Thus, data will only ever be used in a scoring model if it is predictive of the outcome being assessed. Different models will*

- use different data depending on the product, market, applicant and outcome being assessed. ; and
- retain data only for so long as necessary. ACCIS works with regulators and in line with existing legislation to ensure there are appropriate limits for the length of time data is retained, and that these limits are transparent to consumers.

The draft Regulation is contrary to other EU legislation. For example, the importance of having access to data above a “minimum necessary” level in the context of credit reference agency services is recognised in the following:

- The Consumer Credit Directive (2008/46/EC) requires creditors to assess a consumer’s creditworthiness on the basis of “sufficient information” before the conclusion of a credit agreement (Article 8 of that Directive);
- The proposed Directive of the European Parliament and the Council on credit agreements relating to residential property (2011/0062 (COD)), which requires creditors to conduct a “thorough” assessment of a consumer’s creditworthiness, using information from “relevant” sources (Article 14 of that draft Directive).

ACCIS believes that personal data should be proportionate to the processing purposes, in order to allow a degree of flexibility for individual industries.

### Amendment 3

#### Lawfulness of processing

##### Article 6 – paragraph 1 – point f

###### *Text proposed by the Commission*

(f) processing is necessary for the purposes of the legitimate interests pursued by *a* controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.

###### *Amendment*

(f) processing is necessary for the purposes of the legitimate interests pursued by *the a* controller *or by the third party or third parties to whom the data are disclosed*, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.

### Amendment 4

#### Lawfulness of processing

##### Article 6 – paragraph 4

###### *Text proposed by the Commission*

4. Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in *points (a) to (e) of* paragraph 1. This shall in particular apply

###### *Amendment*

4. Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in ~~points (a) to (e)~~ of paragraph 1. This shall in particular

to any change of terms and general conditions of a contract.

apply to any change of terms and general conditions of a contract.

### *Justification*

*The legitimate interests condition is of fundamental significance to CRA's across the EU. Much of the processing carried out by CRAs is undertaken for the legitimate interests of their clients. Similarly, lenders (in the widest definition being any organisation providing goods or services ahead of payment) who contribute data to the shared databases operated by CRAs will often rely on the legitimate interests of the CRAs. The long-established network of data sharing which underpins many credit reference agency services is therefore heavily dependent on the words proposed above being included in the draft Regulation (as they are currently included in Directive 95/46/EC).*

*By not repeating the provisions of the current legislation, there is a material risk that credit reference agencies' ability to effectively serve their clients and help them assess customers' ability to meet their financial obligations will be adversely affected. ACCIS believes that the removal of these words may not have been intentional, as the wording "a controller" is ambiguous in this respect. As a consequence, a definition of "third party" should be given in Article 4 of the draft Regulation (see Article 2 f) of the Directive 95/46/EC).*

*Furthermore, CRAs rely on a constant flow of data. In cases of a change of purpose during the data processing, this should be also possible under the conditions of Article 6 paragraph 1 f), which is not included in the reference of Article 6 paragraph 4 (only "(a) to (e)", not "(a) to (f)"). Otherwise, the processing of relevant and predictive data would not be possible any longer.*

## **Amendment 5**

### **Procedures and mechanisms for exercising the rights of the data subject**

#### **Article 12 – paragraph 2**

##### *Text proposed by the Commission*

2. The controller shall inform the data subject without delay and, at the latest within one month of receipt of the request, whether or not any action has been taken pursuant to Article 13 and Articles 15 to 19 and shall provide the requested information. This period may be prolonged for a further month, if several data subjects exercise their rights and their cooperation is necessary to a reasonable extent to prevent an unnecessary and disproportionate effort on the part of the controller. The information shall be given in writing. Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject.

##### *Amendment*

2. The controller shall inform the data subject without delay and, at the latest within one month of receipt of the request, whether or not any action has been taken pursuant to Article 13 and Articles 15 to 19 and shall provide the requested information. This period may be prolonged for a further month, if several data subjects exercise their rights and their cooperation is necessary to a reasonable extent to prevent an unnecessary and disproportionate effort on the part of the controller. The information shall be given in writing. Where the data subject makes the request in electronic form, the information shall be provided in electronic form, unless otherwise requested by the data subject ***or unless the controller has reason to believe that providing the information in electronic form***

*would create a significant risk of fraud.*

#### Justification

*Releasing certain data in electronic form such as credit files could result in modification or identity theft when provided to consumers. Release of data from credit reference agencies should be dependent upon authentication checks which satisfy criteria set out by the agency holding the data to prevent interception, misuse, fraudulent use or modification.*

#### Amendment 6

##### Procedures and mechanisms for exercising the rights of the data subject Article 12 – paragraph 4

*Text proposed by the Commission*

*4. The information and the actions taken on requests referred to in paragraph 1 shall be free of charge. Where requests are manifestly excessive, in particular because of their repetitive character, the controller may charge a fee for providing the information or taking the action requested, or the controller may not take the action requested. In that case, the controller shall bear the burden of proving the manifestly excessive character of the request.*

*Amendment*

*4. The charges for taking action or providing information upon the request of data subject referred to in paragraph 1 shall not exceed actual costs of handling the requests born by the controller.*

#### Justification

*Existing legal requirements determine the manner in many EU Member States concerning access to credit files by consumers. The ability for credit reference agencies to charge a nominal fee allows for coverage of costs incurred in relation to follow up enquiries, and is commonly used mechanism to confirm the identity of the applicant and so prevent fraud.*

#### Amendment 7

##### Right to be forgotten and to erasure Article 17 – paragraph 1 – point c

*Text proposed by the Commission*

*(c) the data subject objects to the processing of personal data pursuant to Article 19;*

*Amendment*

*(c) the data subject objects to the processing of personal data pursuant to Article 19, and the objection is upheld;*

*Justification*

*This amendment is designed to ensure that a data subject cannot simply make an objection under Article 19, therefore triggering the principle of the Right to be Forgotten, where the objection would be without merit.*

**Amendment 8**

**Right to be forgotten and to erasure**  
**Article 17 – paragraph 3 – point f (new)**

*Text proposed by the Commission**Amendment*

*(f) for prevention or detection of fraud, confirming identity, and/or determining creditworthiness, or ability to pay.*

*Justification*

*It would not be appropriate for individuals to be able to delete data about themselves which is held for legitimate reasons in line with existing legislation.*

**Amendment 9**

**Right to object**  
**Article 19 – paragraph 1**

*Text proposed by the Commission**Amendment*

1. The data subject shall have the right to object, on grounds relating to their particular situation, at any time to the processing of personal data which is based on points (d), (e) and (f) 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.

1. The data subject shall have the right to object, on grounds relating to their particular situation, at any time to the processing of personal data which is based on points (d), (e) and (f) of Article 6(1), unless the controller demonstrates legitimate grounds for the processing which override the interests or fundamental rights and freedoms of the data subject.

*Justification*

*This amendment is designed to demonstrate that legitimate grounds should be sufficient grounds for processing, as per Article 6.*

## Amendment 10

### Measures based on profiling

#### Article 20 – paragraph 1

*Text proposed by the Commission*

1. Every natural person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.

*Amendment*

1. Every natural person shall have the right **to request** not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.

## Amendment 11

### Measures based on profiling

#### Article 20 – paragraph 2 – point c

*Text proposed by the Commission*

(c) is *based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards.*

*Amendment*

(c) is **consistent with the requirements of Article 6 and of this Article 20** ~~based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards.~~

## Amendment 12

### Measures based on profiling

#### Article 20 – paragraph 2 – point d (new)

*Text proposed by the Commission*

*Amendment*

**(d) Data controllers should notify the data subject where such processing takes place and give the individual the right to have any such decision reviewed.**

### *Justification*

*The scope of Article 20(1) is potentially very wide and could be regarded as covering scoring models. Scoring models are used extensively across the EU by businesses:*

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- to help determine credit-worthiness, and to identify fraud and money-laundering;
- to provide reassurance with regard to an individual's ability to afford repayments; and
- to manage credit accounts and collections.

*Credit and other scoring systems are widely recognised to be highly effective, transparent, consistent, and non-discriminatory ways of assimilating and balancing fairly large amounts of (often conflicting) data in order to make decisions.*

*Profiling for the purposes of credit scoring can be clearly distinguished from profiling for social media purposes, not least in that this profiling is clearly notified to the individual in advance. Credit scoring has public interest benefits in supporting economic growth, and it has personal benefits for data subjects. It allows consumers the benefit of transparent, quick and objective decision-making in connection with credit applications, and protects them against the very serious consequences of taking on credit they cannot afford to repay.*

*The wording of Article 20 threatens the continued use of these models. At a time when the issue of indebtedness is high on the European agenda, ACCIS would suggest that data subject rights are better protected by rights individuals can use in connection with this processing (such as ensuring that the data used in automated profiling is accurate, and that decisions can be reviewed), rather than a broad restriction on specific types of processing. With these protections in place, automated profiling should be permitted if it is otherwise in compliance with the provisions of the draft Regulation.*

## APPENDIX 1

**The Nature and Importance of Credit Reference Agency Services****1. The Nature of Credit Reference Agency Services**

1.1. The services of a credit reference agency ("CRA") can differ between Member States, dependent on the nature and ownership of the credit bureau (for example, whether it is publically or privately operated). Main activities that these services can include are briefly as follows:

- When an individual makes an application for credit such as a mortgage or a loan, or for other services that involve credit such as a mobile telephone agreement, the services of a CRA can be used to verify and/or authenticate the individual, and to indicate whether the application may be fraudulent;
- Credit reference and related data can be used to help determine whether an individual should be accepted (according to criteria set by the lender), and if so the terms on which credit will be granted;
- Credit reference and related data (often in combination with other data obtained by the decision-making organisation) may be used manually for underwriting in its "raw" form, or managed in a more automated manner through decision-making systems which may also incorporate credit scoring techniques;
- Similar services can be used to monitor and manage accounts once they have been set up;
- If accounts go into arrears or default, and if the account holder absconds without leaving a forwarding address, the services of a CRA can assist with tracing and contacting an individual, and determining the strategies which should be applied to collecting any overdue amounts.

1.2. ACCIS members, and other CRA's across the EU, provide a complex range of services in these areas. Many of these depend on advanced data-sharing arrangements, and are designed to achieve the following:

- Tools to combat fraud and identity theft;
- Provision of technologies to allow for quick and efficient decision-making. (Credit reference agency services facilitate access by individuals and businesses (including SME's) to credit and other services in a way which is consistent with their expectations in a technological world. This particularly requires rapid (sometimes instantaneous) and effective decision-making, delivered in convenient ways, often in situations where there is no face-to-face contact between lender and borrower, and where the use of paper and the burden on the individual to provide supporting evidence are both kept to a minimum);
- Responsible lending, so that individuals and businesses do not become over-exposed to levels of debt which they cannot support;
- The efficient management of accounts and the minimisation of bad debt (the occurrence of which inevitably increases the cost of credit for responsible borrowers);
- The fair and lawful treatment of individuals and businesses.



- 1.3. Services such as these are widely used in a number of situations in which mainstream goods and services which are the subject of credit are offered in the EU. The assessment of credit applications using automated decision-making processes is almost inextricably embedded in many sectors, which can include finance, banking, retail, utilities and telecommunications.

## 2. The Importance of Credit Reference Agency Services

- 2.1. Credit reference agency services are widely recognised as being essential to the effective operation of credit in a modern economy. The free flow of responsibly managed credit to consumers and businesses is widely recognised as being essential to economic growth:

*“Well functioning financial markets contribute to sustainable growth and economic development...Credit reporting is a vital part of a country’s financial infrastructure and is an activity of public interest.”*

(The World Bank: “General Principles for Credit Reporting.” Consultative Report, March 2011).

*“Small firms benefit from credit bureaus.”*

(International Finance Corporation presentation entitled “Global Credit Bureau Program” September 2010)

*“...empirical evidence has provided plenty of evidence supporting the claim that credit sharing institutions have a positive effect on lending to the private sector. For instance, Jappelli and Pagano (2002) show that strong credit-sharing institutions are positively related to the size of the credit market. Other empirical studies, including Jappelli and Pagano (1993), Love and Mylenko (2003), Galindo and Miller (2001) and Powell, et al. (2004) have shown that credit is more abundant when borrowers and lenders benefit from credit-sharing institution.”*

(OECD Discussion Paper on Credit Information Sharing)

*“Data protection and the right to privacy are fundamental to the establishment of a private credit bureau. Governments should ensure that a legal framework is in place that protects privacy but does not stifle the creation of private credit bureaus.”*

(OECD Discussion Paper on Credit Information Sharing)

- 2.2. As well as performing this vital role, credit reference agency services are widely recognised as being the best way of producing fair and effective decisions in relation to credit in a modern economy.

*“Historically, credit would be granted on the basis of a credit officer’s personal knowledge of the debtor. Robust credit reporting systems capture most of this information and sometimes even facts that might not be disclosed to credit officers. Moreover, creditors are generally able to access credit reporting information at a fraction of the cost and time of traditional lending mechanisms. At the same time, credit reporting systems support unbiased decision-making as such decisions are based on objective and correct data. This last feature favours segments of the population that may have been denied credit in the past due to some form of prejudice (e.g. assuming that a low-income individual is always a bad debtor.”*

(The World Bank: “General Principles for Credit Reporting.” Consultative Report, March 2011).

- 2.3. By ensuring that individuals do not take on credit obligations which they are unable to manage, credit reference agency services help to ensure that individuals are less likely to be exposed to the potentially very serious personal consequences which can result from over-indebtedness.
- 2.4. ACCIS would contend that credit reference agency services are essential to the successful operation of the EU economy, and that any material restriction placed on existing, legitimate activities in these areas would have implications far beyond the effect on the revenues of CRAs. As well as detrimental impact on the economy and society at large, any such restriction would have particular adverse consequences for individuals and small businesses.