Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Inhalt

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Art. 6 - Lawfulness of Processing 1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies: (…) (f) processing is necessary 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. (…)	**Art. 6 - Lawfulness of Processing** 1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies: (…) (f) processing is necessary for the purposes of the legitimate interests pursued by the controller *or*, ***in case of disclosure, by the third party to whom the data is disclosed, and which meet the reasonable expectations of the data subject based on his or her relationship with the 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.*** (…)	**Art. 6 - Lawfulness of Processing** 1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies: (…) (f) processing is necessary for the purposes of the legitimate interests pursued by ***the*** controller ***or by a third party***, 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. (…)	**Support Council Position**

Justification:

The European Parliament compromise amendment reduces legal certainty around 6(1)(f) defining legitimate interests. The reasonable expectations of the user is not a viable legal benchmark. This legal test will introduce enormous subjectivity into an assessment of legitimate interests above the existing balancing test between the right of the controller and the right of the data subject.

Therefore we support the Council Position as its wording is more consistent.

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Art. 6 - Lawfulness of Processing 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(…)	**Art. 6 - Lawfulness of Processing** deleted	**Art. 6 - Lawfulness of Processing** 4. Where the purpose of further processing is incompatible with the one for which the personal data have been collected ***by the same controller***, the further processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. ***(…)*** ***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 .***	**Art. 6 - Lawfulness of Processing** **Support *modified* Council Position** ***(…)*** ***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 .*** **Alternatively: Amendment (Recital 40):** *Further processing by legitimate business models such as debt collection or credit information services is ascertained to be compatible.* *or* *The provision is not intended to hinder legitimate business models such as direct marketing, debt collection or credit information services.* **Alternatively: Amendment (Recital 38 (Council))** The legitimate interests of a controller including of a controller to which the data may be disclosed or of a third party ***(as in case of credit information or debt collection services f. e.)*** may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding.

Justification:

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.

There are a number of cases where **further processing is absolutely necessary in business. However, the grounds for further processing allowed** in the **Commission's proposal ((a) to (e) of Art. 6 (1))** are **not realistic; f.e.:** a company transfers personal data to a debt collecting agency because of payment default; the debt collecting agency passes on the data to a credit reference agency (CRA) which is processing them responding to the legitimate interests of possible lenders who need to obtain accurate data in order to make a responsible lending decision.

In this context it is very unlike that the data subject would give his or her consent to for further processing. Therefore a legal basis is needed which takes into account legitimate interest. The **Council's Position** allows this further processing on the basis of **overriding legitimate interests** but misses the fact that debt collecting agencies or CRAs are not "**the same controller**". Therefore, the words "by the same controller" should be deleted.

Alternatively, **purposes of further processing** which are **strongly linked to the original purpose** could be defined to **be compatible** in Recital 40.

If Art. 6 (4) was deleted it should be stated in **Recital 38** (Art. 6 (1) (f)) that legitimate interests of third parties provide a legal basis for processing by business models such as credit information or debt collection services which were legitimate under the Data Protection Directive.

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Art. 7(4) - Conditions for consent Consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller.	**Art. 7(4) - Conditions for consent** Consent shall be purpose-limited and shall lose its validity when the purpose ceases to exist or as soon as the processing of personal data is no longer necessary for carrying out the purpose for which they were originally collected. The execution of a contract or the provision of a service shall not be made conditional on the consent to the processing of data that is not necessary for the execution of the contract or the provision of the service pursuant to Article 6(1), point (b).	**Art. 7(4) - Conditions for consent** Deleted	**Support Council Position**

Justification:

The wording "**significant imbalance**" of the **Commission's proposal** is too broad and leaves too much room for interpretation. Especially in cases of credit granting it could be assumed that there is a significant imbalance between the bank and the data subject and as a consequence consent could be no legal basis for processing during the credit granting process any more.

The position of **the European Parliament** would constitute a "**sunset clause**" for data, which would lead to considerable legal uncertainty for both, processor and subject. We believe that this regulation is unnecessary because the data subject has the right to withdraw consent.

Furthermore, the **second sentence of paragraph 4** is likely to have unintended consequences for the credit granting process, as it might be assumed that it is applicable to consent which applies to the transfer of data to credit bureaus, as granted by consumers in a credit application form. To avoid legal uncertainty this sentence should be deleted.

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Art. 9(1) - Processing of special categories of personal data The processing of personal data, revealing race or ethnic origin, political opinions, religion or beliefs, trade-union membership, and the processing of genetic data or data concerning health or sex life or criminal convictions or related security measures shall be prohibited.	**Art. 9(1) - Special categories of data** 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***, or administrative sanctions, judgments,*** criminal ***or suspected offences,*** convictions, or related security measures shall be prohibited.	**Art. 9(1) - Processing of special categories of personal data** 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.	**Support Council Position**

Justification:

The European Parliament introduces additional terms ('administrative sanctions', 'judgments' and 'gender identity') as special categories of data. As a consequence the use of information about court judgments and insolvency information (data which are often specifically and deliberately public) for credit referencing purposes would be prohibited, thus allowing individuals to conceal evidence of financial difficulty and access credit which they are unable to afford or maintain.

We also have concerns that a literal meaning could be taken of 'gender identity' data. This definition could be interpreted too broadly (for example, capturing data like Mr/Mrs). The "gender information" is a very important information when it comes to evaluate the creditworthiness of a data subject and it is often essential to match information collected in the credit reporting and ensuring data quality.

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission/EP/Council	DW
Art. 14 - Information to the data subject	**1. Where personal data relating to a data subject are collected, the controller shall provide the data subject at least the following information:** ***(a) the identity of the controller and of his representative, if any;*** ***(b) the purposes of the processing for which the data are intended;*** ***(c) any further information such as*** ***- the recipients or categories of recipients of the data,*** ***- whether replies to the questions are obligatory or voluntary, as well as the possible consequences of failure to reply,*** ***- the existence of the right of access to and the right to rectify the data concerning him.*** ***New Paragraph X/Recitals:*** ***Paragraphs 1-x only apply to data which are collected after the General Data Protection Regulation entered into force.***

Justification:

Paragraph (1):

The information which has to be supplied pursuant Art. 14 cause an information overload, which does not help the data subject at all. It would be much more helpful for the data subject to get information about the most important aspects, as defined in Art. 10 and 11 of the Data Protection Directive (see our DW-position). If the data subject is interested in more details he can get access pursuant Art. 15.

New Paragraph X:

Credit reference agencies store information about several million people (SCHUFA f.e. - as the biggest German CRA– of 66 million people). These data subjects have already been informed about the data which have been collected in the past, pursuant to Art. 10, 11 of the Data Protection Directive/national law. It is not clear as to whether or not these data subjects would have to be informed pursuant the new Art. 14 again, once the GDPR is entered into force. This cannot be the legislator's intention. It would cause immense costs (SCHUFA at least (!) around 30 million € (turnover 132 million) to send letters to all data subjects to supply them with the new information stated in Art. 14). Therefore it is necessary to clarify (either in Art. 14 or in the recitals) that Art.14 is only applicable to data which have been collected after the GDPR entered into force.

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Article 15 - Right of access for the data subject 1. The data subject shall have the right to obtain from the controller at any time, on request, confirmation as to whether or not personal data relating to the data subject are being processed. Where such personal data are being processed, the controller shall provide the following information: (…) 2. The data subject shall have the right to obtain from the controller communication of the personal data undergoing processing. 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.	**Art. 15 - Right to access and to obtain data for the data subject** 1. ***Subject to Article 12(4), the*** data subject shall have the right to obtain from the controller at any time, on request, confirmation as to whether or not personal data relating to the data subject are being processed ***and in clear and plain language,*** the following information: (…) 2. The data subject shall have the right to obtain from the controller communication of the personal data undergoing processing. Where the data subject makes the request in electronic form, the information shall be provided in an electronic ***and structured format*** , unless otherwise requested by the data subject. ***Without prejudice to Article 10, the controller shall take all reasonable steps to verify that the person requesting access to the data is the data subject.***	**Article 15 - Right of access for the data subject** 1. The data subject shall have the right to obtain from the controller ***at reasonable intervals and free of charge*** (…) confirmation as to whether or not personal data concerning him or her are being processed and where such personal data are being processed ***access to the data and the following information:*** 1b. ***On request and without an excessive charge, the controller shall provide a copy of the personal data undergoing processing to the data subject.***	**Support *modified* Council Position** The data subject shall have the right to obtain from the controller ***at (…) intervals of one year (…) free of charge, about that, without excessive expense,*** (…) confirmation as to whether or not personal data concerning him or her are being processed and where such personal data are being processed ~~***access to the data***~~ ***and the following information***: (…) **Support Council Position** ***On request and without an excessive charge, the controller shall provide communication ~~a copy~~ of the personal data undergoing processing to the data subject.*** **Alternatively: modified EP Position** Where the data subject makes the request in electronic form, the information shall be provided in an electronic ***and structured format , if possible ~~unless otherwise requested by the data subject.~~***
Justification: **Paragraph (1):**			

Unlike Directive 95/46/EC which states that the Member States should grant the data subjects a right of access “at reasonable intervals” and “without excessive delay and expense” all proposals tabled for the GDPR grant an access free of charge; only the amendment of the Council takes into consideration the question of frequency which is welcomed by our association because access rights always cause processing costs, which should be fairly compensated.
Taking this into account, we suggest a well-balanced approach to **grant access at intervals of one year free of charge**. For **further enquiries** of the data subject, only **non-excessive expenses** are allowed.
The information given in paragraph (1) of the Council proposal should be the same as in paragraph (1) of the other two proposals (as to whether or not data are processed and the information enumerated in the first parapraph. The access to the data themselves is regulated in paragraphs (2) and (1b). Otherwise there would be no difference between paragraph (1) and (1b) of the Council proposal.
Paragraph (2)/(1b):
We support the amendments made by the Council (1b).
Credit reference agencies – unlike social networks - do not receive data from the data subjects themselves by means of online authentification. Personal data are rather supplied by their contractual partners, like banks. Therefore CRAs have to make sure that sensible information is not disclosed to subjects who are not entitled to it. This is why it is common practice to send these data to a proven postal address. This is still allowed and possible with the proposal of the Council. At the same time it is not possible to send a “copy” of these data. This is why we prefer the term “communication” of the EP and the COM.

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Art. 19 (1) – Right to object 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.	**Art. 19 (2) – Right to object** 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.	**Art. 19 (1) – Right to object** 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 which is based on points (d), (e) and (f) of Article 6(1) (…). ***The controller shall no longer process*** the personal data (…) unless the controller demonstrates **compelling** legitimate grounds for the processing which override the interests, (…) of the data subject (…).	**Support *modified* Council Position** The data subject shall have the right to object, on ***justified*** grounds relating to his or her particular situation, at any time to the processing of personal data which is based on points (d), (e) and (f) of Article 6(1) (…) ***The controller shall no longer process*** the personal data (…) unless the controller demonstrates ~~**compelling**~~ legitimate grounds for the processing which override the interests, (…) of the data subject (…).

Justification:

As far as social media are concerned it is plausible to give data subjects the ability to object to the processing of their data without any justification and without any consideration of legitimate grounds, as the **EP amendment** does.

However, when it comes to the CRA-sector, this provision would cause damage by opening way to potential **frauds** as data subjects might object to the processing of information about payment defaults. 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 encourage the trilogue participants to revert to the original 1995 Directive wording which states a "justified" objection to be necessary. This would much better protect consumers and the lending market. **Without** a **reasoning** it is **impossible** to evaluate whether the legitimate **grounds o**f the processor are **overriding the interests of the data subject.**

It is not very convincing, why the Commission and the Council demand "compelling" grounds. It should rather be used the same legal test as in Art. 6 (1) (f).

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Art. 20 – Measures based on Profiling	**Art. 20 –Profiling**	**Art. 20 – Automated individual decision making**	
2. Subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:	2. Subject to the other provisions of this Regulation, a person may be subjected to ***profiling which leads to(…)*** only if the processing:	***1a. Paragraph 1 shall not apply if the decision: (...)***	
(a) is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention; or	*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	(a) is ***necessary for*** the entering into, or performance of, a contract between the data subject and a data controller (…); or	**Support *modified* Council Position** (a) ***is ~~necessary for~~ carried out in the course of intending to enter or*** entering into, or performance ***and settlement*** of, a contract between the data subject and a data controller (…); **Alternatively: *modified* EP Position:** *a)* ***is carried out in the course of intending to enter or*** entering into, or performance ***and settlement*** 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 (…); or

Justification:
The provisions in paragraph 2(a) (COM/EP) and 1a(a) (Council) are too narrow for the purposes of the credit industry, as the customers of credit reference agencies perform credit scoring also outside of existing or intended contractual relations. The scope of point (a) should be extended so that the function of the credit reporting agencies remains possible to the past extent.
It is also important to stick to the wording of the Commission “carried out in the course of”, which is taken from Art. 15 of the Data Protection Directive, as the term “necessary” causes ambiguity in this context: It is well accepted that creditworthiness assessment of a possible borrower is a legitimate interest of a creditor. But is a creditworthiness assessment done by a CRA “necessary” in the meaning of a compelling necessity?

Die Wirtschaftsauskunfteien e.V.

Synopse zur EU-Datenschutz-Grundverordnung

Commission	European Parliament	Council	DW
Art. 20 – Measures based on Profiling	**Art. 20 –Profiling**	**Art. 20 – Automated individual decision making**	**<u>Support Commission/Council Position</u>**
--	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.(…)***	--	

Justification:

This provision should be deleted. Mandatory human assessment as suggested with this provision is not in line with the interest of consumers.

Year after year credit reference agencies **provide information** between **250.000.000 – 300.000.000 times on the basis of automated processing alone in Germany**. In most cases the credit, such as purchasing a mobile phone on credit at the point-of-sale within seconds, is granted. With mandatory human assessment this will not be possible any longer. Where scoring is part of a decision to <u>grant</u> credit, why would a consumer want manual intervention to be a requirement? **Human intervention** like contesting the decision is necessary in the **aftermath of a decision**, and only needed, if the decision does not satisfy the request of the data subject, as **provided for in <u>all</u> tabled proposals** ((2) a) COM / (1b) of the Council / (2) (a), (5) sentence 2 of the EP).