FENCA Comments on the European Commission draft Regulation on Data Protection COM(2012) 11 final

Since 1993 the Federation of European National Collection Agencies (FENCA) has represented the interest of the European credit management and debt collecting sector and has coordinated the exchange with the institutions of the European Union and the European public. FENCA's 21 members represent 75% of all debt collection agencies in Europe and hold 80% of the market share in the EU, with well over 75,000 staff providing services for more than five million businesses. The European credit management and debt collecting sector re-injects between 45 and 55 billion Euros of valid claims into the economy each year, thereby securing above all the liquidity of micro, small and medium enterprises within the EU.
Through its cooperation with the US partner ACA International FENCA provides its members with a worldwide network of several thousand credit management and debt collection companies.

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General Observations

FENCA welcomes the objective of the European Commission to harmonize the data protection rules in Europe. We support the objective to facilitate cross-border transactions and to create standards which have an impact on worldwide data transfer activities as these have not been restricted to state borders for a long time.

Nevertheless, it has been noticed that the draft regulation presented by the Commission aims primarily at protecting natural persons and consumers from risks arising from using social networks such as Facebook or Google. The key problem in this regard, however, is the fact that the traditional data processing industry, including credit management and debt collecting companies, are meant to be bound to the same rules as the 'digital world' of Facebook and Google.

Debt collection companies process data exclusively in the interest of the creditors whom they represent as legal service providers. At the same time they act in the interest of the entire private sector which is dependent on the compensation of receivables and the maintenance of sufficient liquidity. Debt collection companies inform about loss of account receivables and – in cooperation with credit reporting agencies – contribute to the prevention of negative effects when lending credit.

The proposed EU data protection regulation in its current version leads to serious legal uncertainties, and is disproportionate in as much as it constitutes a serious threat to business models which so far have been fully legitimate.

In contrast to often expressed concerns that existing high data protection standards in some EU 28 states are undermined, we see the danger of entire industries in Europe being confronted with excessive requirements including an unnecessary bureaucratic burden.

Specific Observations

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

Article 5 (b)

Article 5 (b) reads as follows:

> 'Personal data must be:
> (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.'

The principle of strict limitation to a specific purpose proves to be ill-suited to daily use. Particularly in cases where a collection agency receives personal data of a debtor from a client (who has become a creditor), since – strictly speaking – this data was originally not collected by the client to also fulfill the purpose of being passed on to a legal services provider (such as a collection agency) for pursuing the legitimate legal claim to retrieve the debt from a debtor (who originally was the client's customer, and thus a consumer.

Therefore, and in order to prevent misunderstandings, Article 5 (b) should not include the phrase 'specified' purposes. The additional phrase 'explicit and legitimate purposes' alone is sufficient to indicate that personal data should exclusively be collected and processed in a clearly defined and legal context.

Furthermore, Article 5 (b) and Article 6 (4) are contradictory with regard to further processing for purposes incompatible with the purpose for which the data was collected. To clarify the relation between the two Articles and increase legal certainty, Article 5(b) should be rephrased so as to specify that personal data must not be further processed in a way incompatible with the purposes for which it has been collected, unless specific provisions of the regulation provide otherwise.

Therefore, we propose the following modification to Article 5 (b):

> **Personal data shall be:**
> **(b) collected for ~~specified~~, explicit and legitimate purposes and not further processed in a way incompatible with those purposes unless provisions of this Regulation provide otherwise (purpose limitation);**

Article 5 (d)

Article 5 (d) stipulates:

> 'Personal data must be:
> (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;'

Already today debt collection companies apply a variety of measures in order to keep the respective data of debtors up to date, since these companies are dependent on the accuracy and timeliness of that data. Only when the latest data (i.e., the current address etc.) for a debtor is available, the collection of outstanding debt can be successful.

As a general rule, however, it is not usually in the interest of a debtor (who may also be unwilling to pay) to inform the debt collection company about his or her latest address and other personal, as this would accelerate the debt collection process. For this reason alone it would be difficult to implement the provision proposed in the draft regulation to keep the data accurate and up to date.

The provisions contained in Articles 17 (Right to be forgotten and to erasure) and 19 (Right to object) of the draft regulation would cause additional difficulties on the side of the debt collection company to comply with the requirements specified in Article 5 (d). It may be the case, e.g., that a debt collection company forwards data with the current address of a data subject/debtor to a credit agency. Shortly afterwards the data subject/debtor moves from that address, but this new information is given neither to the debt collection company nor the credit agency.

Thus we propose to delete the following phrase in Article 5(d):

> **Personal data must be:**
> (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;

2. Chapter II – Article 6 – Lawfulness of processing

> **Article 6 (1) (b)**
>
> '1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:
> b) Processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract.'

Under certain circumstances, the use of personal data by debt collection companies for retrieving outstanding claims on behalf of their clients could be legitimate under Article 6 (1) (b), and the data subject would not need to give their consent as provided for in Article 7 (Conditions for consent).

Nevertheless: The requirement to obtain consent as provided for in Article 7 would render the debt collection companies' work nearly impossible. Except in cases where the consent of a customer (and thus a potential debtor) to possibly hire a debt collection company is obtained at the point of signature of the contract, debt collection companies depend – as do all other legal service providers

– on a defined legal basis on how to collect and process debtors' data in order to act in the creditors' interest.

Article 6 (1) (b) could be interpreted as a 'general prosecution clause' for debt collection, according to which the processing of personal data is legal in order to fulfill a contract where the contracting parties are the creditor (i.e. the client of the debt collection company) and the debtor (i.e. the data subject).

Debt collectors become active mostly on the basis of contracts between their clients with their clients' final customers who at some stage do not completely fulfill the contract, i.e. have not paid all outstanding debt. Even if a contract were to be cancelled at some stage after signature it would be necessary that all authorized receivables which have not yet been paid are going to be paid. Legal claims, however, would not be covered (e.g. compensation for damages). Accordingly, these would need to be covered as well.

Therefore, we propose the following addition to Article 6 (1) (b):

> **b) Processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract; <u>or to enforce legal claims</u>.**

> **<u>Article 6 (1) (f) (Legitimate Interest)</u>**
>
> '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 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.'

There is no objective justification for the European Commission's proposal to change the interest balance clause in Article 6 (1) (f) so fundamentally compared to the current legislation. The deletion of 'the legitimate interests of third parties' poses an existential thread to a large number of legitimate business models. Should the debt collection and credit management sector not be able to perform their work alternatively on the basis of Article 6 (1) (b), it would put their existence completely into question. At the same time it remains unclear why the protection of the interests of the data subject requires this particular restriction.

In case the legitimate interests of third parties will not be reintroduced into the balance of interest clause there would be no legal basis left anymore on which credit agencies could perform their services.

Debt collectors work closely with credit agencies, obtain information on creditworthiness from them and report credit losses in order to protect the entire private sector from harm. At the same time debtors are protected from measures creating unnecessary costs.

Viable debt collection would not be possible without the data provided by credit agencies. The negative impact on the entire private sector – on the mail-order business and credit service industry in particular which both depend on sufficiently reliable credit information – would be tremendous.

Thus we propose the following change to Article 6 (1) (f):

> **f) Processing is necessary for the purposes of the legitimate interests pursued by a controller, <u>or to the protection of interests of third parties,</u> 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.**

> **<u>Article 6 (4) (Further processing of data/change of purpose)</u>**
>
> 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 to any change of terms and general conditions of a contract.

The work of debt collecting companies presupposes that data that was originally given to a company/creditor or collected by a company/creditor in order to collect a debt, is not necessarily meant to also be forwarded to credit agencies.

Since Article 6 (4) refers merely to (1) (a-e), the legitimate interest clause, Article 6 (1) (f), is explicitly exempted as a legal legitimation for such a change of purpose.

Otherwise this could lead to cases where data processing with a change in purpose is not authorized even though the change in purpose is legitimate and no overriding interests of the data subjects oppose this. Credit information agencies in particular, however, have to be able to obtain data on the basis of the legitimate interest clause.

Therefore, we propose the following change to Article 6 (4):

> **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)~~ <u>(f)</u> of paragraph 1. This shall in particular apply to any change of terms and general conditions of a contract.**

3. Chapter II – Article 7 – Conditions for consent

> **<u>Article 7</u>**
>
> ‘1. The controller shall bear the burden of proof for the data subject's consent to the processing of their personal data for specified purposes.

2. If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal.

4. 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.'

The rigid unilateral attribution of burden of proof to the data subject is not justified. If there was any real, 'significant imbalance' between the data subject and the controller per se according to the disposition in Paragraph 4, consent could not provide a legal basis for processing. There is no economic or legal justification for such a rule.

The draft Regulation not only requires request of consent in situations where it is not required under the present Directive, but also increases the bureaucratic burden to gain and document such consent. Under these requirements, it becomes very difficult or even impossible for normal businesses to gain valid and reliable consent from most of their customers and contacts.

To withdraw consent 'at any time' can have especially consequences if third party interests are concerned. If those third parties have legitimate interests, then one of the data subjects must prevail in order to withdraw consent. In addition, most of the contracts (e.g.: life insurance) might not be executable if the consent is withdrawn. The inserted wording is necessary for the data subject to be aware of the consequences of their choice.

The wording 'significant imbalance' between the position of the data subject and the controller is too broad and even misleading. For example, it may be assumed that in cases of treatments by a physician or services by a lawyer there is regularly a 'significant imbalance'. In these cases, consent would no longer be a possibility to lay the basis for legal processing of data in credit granting processes. For the sake of legal certainty, paragraph 4 should be deleted.

FENCA therefore suggests the following amendments to Article 7:

1. [delete:]

2. [delete:]

3. The data subject shall have the right to withdraw his or her consent at any time, provided a legitimate interest prevails. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal. If the consent is still necessary for the execution of a contract, its withdrawal implies the willingness to terminate the contract.

4. [delete:]

4. Chapter III – Article 14 – Information to the data subject

Article 14

This provision sets high transparency requirements. Transparency is certainly an essential aspect when it comes to data protection. The fact that nowadays data is processed electronically can be presumed to be common knowledge and should not be a reason to expand the 'initial information' of the data subject unnecessarily.

In their first letters debt collection companies already inform the data subject about the contractor or the owner of the initial claim as well as about the origin of the claim. Should all the information be included in the first letter as laid out in Article 14, there is a concern that debt collecting companies would be over-burdened and data subjects/debtors be overwhelmed by the flood of information.

It goes without saying that, if requested, debt collection companies – sometimes in consultation with the creditor – provide the data subject with additional information. In case the data subject wishes to receive even further information they can refer to Article 15 (Right to access).

A system of gradual information and notifications would fulfill the individual need of information on the side of the data subject on the one hand and at the same time reduce unnecessary burden for businesses on the other hand.

5. Chapter III – Article 17 – Right to be forgotten and to erasure

Article 17 (1) (a)

'1. 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, especially in relation to personal data which are made available by the data subject while he or she was a child, where one of the following grounds applies:
(a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;'

Article 17 (1) (a) allows for the possibility for a debtor to demand from a debt collection company to erase their data, if the data is not needed anymore for the purpose that it was originally obtained for by the creditor.

Depending on the definition of 'change of purpose', even enforcements of justified contractual claims could generally be torpedoed on the basis of Article 17.

The act of debt collection, or of obtaining a default summons, could in fact constitute a change of purpose from the original one between creditor and debtor, which may have been, e.g. the supply of ordered goods.

There is grave concern that on the basis of Article 17 some debtors would exercise their right to erasure in an unjustified manner, even though the creditor has enforceable, possibly even titled claims.

Thus, we propose to amend Article 17 (1) (a) in the following manner:

> **(a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed, unless the data are necessary for the enforcement of existing legal claims.**

6. Chapter III – Article 19 – Right to object

> **Article 19 (1)**
>
> 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.

A debtor could exercise their right to erasure (Article 17 (1) (a)) and their right to object (Article 19 (1)) vis-á-vis a debt collection company at any time and without further justification, unless Article 6 (1) (b) could be affirmed as a legal basis for data processing. In this case debt collection companies could no longer pursue the legitimate claims of a creditor.

There is grave concern that on the basis of Article 19 debtors could exercise the right to object in an unjustified manner, even though the creditor has enforceable, possibly even titled claims.

We suggest the following amendment to Article 19 (1):

> **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 overrides the interests or fundamental rights and freedoms of the data subject, or unless the processing is necessary for the enforcement of existing legal claims.**

7. Chapter III – Article 20 – Measures based on profiling

Article 20 obviously concerns automated processing rather than profiling. The naming of this article should reflect this and therefore the Article should be re-named into 'Measures based on automated processing'.

The regulation does not fit in the legitimate activity of credit information agencies within the range of credit examination. In this area it is usual and indispensable to represent the creditworthiness of a person or a company e.g. in a numerical value in order to give to the information user a first and fast to seize overview of the creditworthiness classification.

To allow this procedure also in future, however, the permission regulation in paragraph 2 a) applying only for the conclusion or the fulfilment of a contract is perceived to be too narrow, because the customers of credit reporting agencies perform credit ratings also outside of existing or intended contractual relations. This wording must be extended so that the function of the credit reporting agencies remains possible to the past extent.