28 February 2023

ACCIS STATEMENT

CJEU TO SHAPE REGULATORY FRAMEWORK FOR CREDIT DATABASES

The CJEU currently considers four cases on the application of the General Data Protection Regulation (GDPR) to credit databases processed by credit information agencies. The judgements of the CJEU may impact the way credit information agencies can work in each Member State of the European Union. On 26 January 2023, the oral hearings in three out of the four cases took place in Luxembourg. Surprisingly, one important consideration was almost absent: How can these cases shape a harmonised framework for credit databases in the European Union? The following statement explains the issues and the consequences for the present cases in front of the CJEU.

Two joint cases deal with the question if and for how long credit databases are allowed to store data collected from a publicly available insolvency register (*SCHUFA Holding and Others (Libération de reliquat de dette)*, C-26/22 and C-64/22) and the other two separate cases consider the requirements for credit scoring by credit information agencies (*SCHUFA Holding and Others (Scoring)*, C-634/21; *Dun & Bradstreet Austria*, C-203/22). Another case also involves a credit information agency (*Österreichische Datenschutzbehörde and CRIF*, C-487/21), but the subject of the case is not specific to credit databases. It deals more generally with the obligation to provide data subjects with a copy of their data.

European Union law leaves no doubt as to the importance of credit databases (such as in the Consumer Credit Directive (CCD I), the Capital Requirements Regulation (CRR) and the Mortgage Credit Directive (MCD)) and the CJEU has confirmed the importance of the verification of creditworthiness several times (*ASNEF-EQUIFAX*, C-238/05; *LCL Le Crédit Lyonnais*, C-565/12; *CA Consumer Finance*, C-449/13; *OPR-Finance*, C-679/18). Given the importance of credit databases under European Union law, the outcome of the present cases in front of the CJEU should not fundamentally impact the important function credit information agencies fulfil for the benefit of creditors and the consumers receiving credit.

Cross-border credit activity and the movement of workers underline the need to make credit databases better accessible between countries. The role of credit databases for the internal credit market of the European Union has been recognised by the CCD I and further magnified in the proposal of a new Consumer Credit Directive (CCD II). Representatives of the European Parliament and the Council reached a provisional political agreement on the new

rules on 2 December 2022. Some issues remained open and a final political agreement as well as the conclusion of the formal legislative process are expected before the end of 2023. One of the key demands of the CCD II is better cross-border access to public or private credit databases in order to prevent distortion of competition among creditors.

To achieve this goal of the CCD II, credit information agencies will need to provide meaningful cross-border reports and credit scores to allow creditors to evaluate the creditworthiness of consumers. This requires a legal framework which allows credit databases to provide comparable content throughout the European Union. Such a framework exists because credit information agencies have to comply with the GDPR. Data protection authorities across the European Union have interpreted the application of the GDPR to credit databases. Some, such as Estonia, have developed detailed guidance. Others, such as Germany or Italy, have approved codes of conduct implementing the requirements of the GDPR for credit databases.

Over time, a consistent interpretation of the GDPR to the processing of credit databases and the use of credit scoring will be capable of ensuring that cross-border access to comparable information allows effective evaluation of creditworthiness throughout the internal market as envisaged by the CCD II. To the extent national laws specifically govern the activities of credit information agencies, it is up to the national legislator to keep them in line with the principles of the GDPR.

However, whether the GDPR will be able to ensure a harmonised framework for credit databases within the European Union will depend to some extent on the outcome of the present cases in front of the CJEU. In the first two cases, one question is whether the publication period of information regarding insolvencies in a publicly available register should determine the term for which credit information agencies can store such information. Given that within the European Union, Germany has the shortest publication period (six months) and most of the other Member States publish similar information for three to ten years, the definition of the storage period in credit databases based on the publication period would lead to a fragmented approach. In order to reach harmonisation, the storage term for information about a concluded insolvency case should be based mainly on the necessity of the information for the evaluation of creditworthiness and not on the term of the publication of the information.

The first two cases also seek clarification as to the legal impact of approved national codes of conduct under Article 40 GDPR. If national codes of conduct would substitute the GDPR, they would pose a risk for harmonisation. However, this is not the role of codes of conduct. They can be used to legally formalise the analysis of the necessity. A code of conduct interprets the GDPR and provides courts with a valid indication for the necessity test. Therefore, if codes of conduct are applied as evidence for the interpretation rather than as derogations from the GDPR, they should not lead to diverging requirements in different Member States.

In the third case, the regional administrative court in Germany asked the CJEU about the application of the prohibition of automated decisions in Article 22 GDPR to the calculation of credit scores provided by credit information agencies. The answer to the question could impact harmonisation within the European Union as well because, if the prohibition was applied to credit information agencies, then national legislators would be encouraged to provide national derogations for the prohibition. Such national derogations would most likely cause further fragmentation within the European Union because each Member State is likely

to take a different approach to how scoring by credit information agencies should be safeguarded.

Such a negative impact on harmonisation could be avoided because consumers are fully protected even if Article 22 GDPR is not applied to credit information agencies. For example, a bank would usually evaluate creditworthiness based on information provided by a credit information agency and own information collected from the potential borrower. The bank decides on this basis whether to grant a loan and has to comply with the Article 22 GDPR obligations if the decision is made automatically. The provision is not designed to apply to credit information agencies, because they do not provide loans and do not decide whether they should be provided.

Cross-border access to credit databases will only be meaningful if the rules applied to credit information agencies are applied reasonably consistently throughout the European Union. The GDPR provides for the opportunity to further develop a harmonised framework through interpretation. Codes of conducts in line with the GDPR can shape harmonisation effectively. The upcoming decisions of the CJEU will impact the degree of harmonisation of the regulatory framework for credit databases within the European Union.

. /.

ABOUT ACCIS

ACCIS is the voice of organisations responsibly managing data to assess the financial credibility of consumers and businesses. Established as an association in 1990, ACCIS brings together more than 40 members from countries all over Europe as well as associates and affiliates across the globe.