FENCA Comments on the European Parliament draft Amendments for 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.

Contact:
Andreas Aumüller, President, andreas.aumueller@fenca.eu
Dr. Andreas Bücker, Senior Advisor European Affairs, andreas.buecker@fenca.eu

Federation of European National Collection Associations FENCA
Friedrichstr. 50–55 / 10117 Berlin / Germany
T: +49 30 206 07 36 30
F: +49 30 206 07 36 33
www.fenca.org
office@fenca.eu
twitter: @FederationFENCA

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

Amendments made by the EU Parliament to the Commission's draft proposal are highlighted in Green.

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

Article 5 (b)

Article 5 (b) reads as follows:

> 'Personal data **shall** be:
> (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes **(purpose limitation)**;'

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 fulfil 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.

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 (purpose limitation);**

2. Chapter II – Article 6 – Lawfulness of processing

Article 6 (1) (f) (Legitimate interest)

> '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 the 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. This shall not apply to processing carried out by public authorities in the performance of their tasks.'

The European Parliament's addition to the Commission draft Regulation which includes legitimate interests pursued by third parties is welcomed by FENCA and seen as absolutely essential for the debt collection and credit management industry in Europe to be able to continue their business activities. At the same time, however, it must be ensured that no legal uncertainty – introduced by the open term 'reasonable expectations' – exists in this respect, and that no exceptions are possible. To avoid such legal uncertainty and exceptions, we suggest the following amendment:

> **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 the 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. This shall not apply to processing carried out by public authorities in the performance of their tasks.**

Recital 39a NEW (Legitimate Interest) *(accompanying recital to Article 6 (1) (f))*

(39a) Provided that the interests or the fundamental rights and freedoms of the data subject are not overriding, the prevention or limitation of damages on the side of the data controller should be presumed as carried out for the legitimate interest of the data controller or, in case of disclosure, of the third party to whom the data is disclosed, and as meeting the reasonable expectations of the data subject based on his or her relationship with the controller. The same principle also applies to the enforcement of legal claims against a data subject, such as debt collection or civil damages and remedies.

The fact that debt collection is defined as a legitimate interest in this newly created recital is highly welcomed by FENCA and its members and is absolutely essential as a basis for the legitimate pursuit of the business activities of the debt collection and credit management sector.

Reinstating Article 6 (4) (Further processing of data/change of purpose)

Article 6 (4) (Further processing of data/change of purpose) has been deleted in the European Parliament's amendments. FENCA would suggest to reinstate Article 6 (4) in the following amended version:

> **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)~~ (f) 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

Article 7 (4)

'4. 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).'**

In FENCA's opinion purpose-limited consent is problematic. In cases where data processing serves to prosecute a legal claim, it must be possible for the data to be passed on by a creditor to a debt collection agency despite a change of purpose that may possibly take place. Probably no debtor would give their consent allowing creditors to pass on the debtor's invoice, payment and other necessary details to a debt collection company.

We therefore suggest that the following amendment to Article 7(4) should be added, so that data processing for the purpose of enforcing existing legal claims is possible also in the case of purpose-limited consent:

> **4. 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 or the enforcement of existing legal claims 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).**

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

Article 14 (4) (ba)

> '4. The controller shall provide the information referred to in paragraphs 1, 2 and 3:
> **(ba) only on request where the data are processed by a small or micro enterprise which processes personal data only as an ancillary activity.'**

The duties to inform the data subject still remain in effect to a considerable extent in the Parliament's position. For small companies in particular, this involves a huge burden of additional administrative work at an additional cost, which may prove difficult for SMEs to bear and, in some cases, may even endanger their continued existence.

In their initial covering letter, debt collection agencies already inform the debtors of their client (i.e. of the creditor who has a claim), the original content of their claim and the basis of their claim.

It is remains uncertain whether data processing at debt collection agencies also falls under the heading of 'ancillary activity', and thus how many companies would be free from this obligation.

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**, 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:
(a) the data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;'

It is extremely problematic that the data subject retains a right to erasure which will take effect in the event that the purpose of use of the data changes.

A claim to erasure in relation to debt collection agencies may possibly be derived on the basis that the data is no longer required for the purpose for which it was originally collected by the creditor or the debt collection agency's client.

Depending upon when the existence of a change of purpose would have to be assumed, the enforcement of legitimate contractual claims could generally be torpedoed as a result thereof.

If the amendment proposed by FENCA in Section 17 (1) were added, the right to erasure would not take effect in the case of data required for the enforcement of existing legal 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) and (2) in connection with Recital 56

'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.

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 *in general or for any particular purpose* to the processing of their personal data.

Recital (56) In cases where personal data might lawfully be processed to protect the vital interests of the data subject, or on grounds of public interest, official authority or the legitimate interests of a controller, any data subject should nevertheless be entitled to object

to the processing of any data relating to them, **free of charge and in a manner that can be easily and effectively invoked.** The burden of proof should be on the controller to demonstrate that their legitimate interests may override the interests or the fundamental rights and freedoms of the data subject.'

It is highly problematic that Article 19 does not contain an exception to the right to object in cases of legitimate third-party interests as defined in Article 6 (1) (f), but instead explicitly excludes these as an accepted exception in Article 19 (2).

Likewise the associated Recital 56 does not allow a legitimate interest to override the data subject's right to object.

Therefore, FENCA suggests the following amendments, so that the right to object does not prevent legitimate cases of pursuing legal claims, such as the collection of outstanding debt through a debt collection company instructed by a creditor.

Article 19

(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 in general or for any particular purpose to the processing of their personal data. This does not apply to data processed as part of legal prosecution or for the purpose of processing data needed for creditworthiness checks.

Recital 56

(56) In cases where personal data might lawfully be processed to protect the vital interests of the data subject, or on grounds of public interest, official authority or the legitimate interests of a controller, any data subject should nevertheless be entitled to object to the processing of any data relating to them, free of charge and in a manner that can be easily and effectively invoked. This does not apply to data processed as part of legal prosecution or for the purpose of processing data needed for creditworthiness checks. The burden of proof should be on the controller to demonstrate that their legitimate interests may override the interests or the fundamental rights and freedoms of the data subject.'