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COVER NOTE

From:	Mr Wojciech Rafal WIEWIOROWSKI, European Data Protection Supervisor
date of receipt:	26 August 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
Subject:	Formal comments of the European Data Protection Supervisor on the Proposal for a Regulation on general product safety, amending Regulation (EU) No 1025/2012 of the EP and of the Council, and repealing Council Directive 87/357/EEC and Directive 2001/95/EC of the EP and of the Council.

Delegations will find attached the above document.

Encl.: Opinion 11/21 on the Proposal for a Directive on consumer credits



EUROPEAN DATA PROTECTION SUPERVISOR

The EU's independent data protection authority

26 August 2021

Opinion 11/2021

on the Proposal for a Directive on consumer credits

edps.europa.eu

The European Data Protection Supervisor (EDPS) is an independent EU authority, responsible under under Article 52(2) of Regulation (EU) No 2018/1725 '[w]ith respect to the processing of personal data... for ensuring that the fundamental rights and freedoms of natural persons, and in particular their right to data protection, are respected by Union institutions and bodies', and under Article 52(3) thereof '...for advising Union institutions and bodies and data subjects on all matters concerning the processing of personal data'. Under Article 58(3)(c) of Regulation 2018/1725, the EDPS shall have the power 'to issue on his or her own initiative or on request, opinions to Union institutions and bodies and to the public on any issue related to the protection of personal data'.

Wojciech Wiewiorówski was appointed as Supervisor on 5 December 2019 for a term of five years.

*Under **Article 42(1)** of Regulation (EU) No 2018/1725, the Commission shall 'following the adoption of proposals for a legislative act, of recommendations or of proposals to the Council pursuant to Article 218 TFEU or when preparing delegated acts or implementing acts, consult the EDPS where there is an impact on the protection of individuals' rights and freedoms with regard to the processing of personal data' and under Article 57(1)(g), the EDPS shall 'advise on his or her own initiative or on request, all Union institutions and bodies on legislative and administrative measures relating to the protection of natural persons' rights and freedoms with regard to the processing of personal data'.*

This Opinion relates to the EDPS' mission to advise the EU institutions on coherently and consistently applying the EU data protection principles. This Opinion does not preclude any future additional comments or recommendations by the EDPS, in particular if further issues are identified or new information becomes available. Furthermore, this Opinion is without prejudice to any future action that may be taken by the EDPS in the exercise of his powers pursuant to Article 58 of Regulation (EU) 2018/1725.

Executive Summary

The European Commission adopted on 30 June 2021 a Proposal for a Directive on consumer credits. The Proposal aims to replace Directive 2008/48/EC on credit agreements for consumers and to adapt the current rules **to the ongoing digitalisation of the market and other trends** (new operators, such as peer-to-peer lending platforms and new forms of consumer credit, such as short-term high-cost loans).

The EDPS welcomes the aim of strengthening consumer protection and recalls the relationship of **complementarity between consumer and data protection**. The Proposal has a clear impact on the protection of individuals' rights and freedoms with regard to the processing of personal data, in particular in light of the provisions concerning **creditworthiness assessment, personalised offers on the basis of automated processing** and the use of personal data in the context of **advisory and other activities**.

To promote fair access to credit and data protection, the EDPS recommends clearly delineating the **categories and sources of personal data** that may be used for the purpose of creditworthiness assessment. In particular, the EDPS invites the legislator to strive for increased consumer protection and harmonisation by clearly specifying the categories of data that should and should not be processed. The EDPS also recommends **explicitly prohibiting the use of any special categories of personal data** under Article 9 of the GDPR.

Taking into account the possible adverse consequences for the persons concerned, the EDPS considers that the **requirements, role and responsibilities of credit databases or third parties providing 'credit scores'** should be addressed. Further clarifications should also be provided regarding the situations where consultation of external sources is necessary and proportionate.

Consumers should always receive **meaningful prior information** whenever their creditworthiness assessment is based on automated processing. Where the creditworthiness assessment involves the use of profiling or other automated processing of personal data, consumers should be able to request and obtain a **human assessment**.

As regards **personalised offers** on the basis of automated processing, the EDPS recommends introducing the obligation for the creditor to **provide clear, meaningful and uniform information about the parameters used to determine the price**. Moreover, the EDPS encourages the legislator to clearly **delineate the categories of personal data** that may be used as parameters to draw up a personalised offer.

The EDPS recommends **explicitly confirming the full applicability of Regulation 2016/679** ('GDPR') to any processing of personal data falling within the scope of the Proposal. Having regard to the **Proposal for an Artificial Intelligence Act**, the EDPS recommends ensuring that the relevant consumer credit and data protection rules are integrated as part of the (third-party) conformity assessment process prior to CE marking.

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THE EUROPEAN DATA PROTECTION SUPERVISOR,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 16 thereof,

Having regard to the Charter of Fundamental Rights of the European Union, and in particular Articles 7 and 8 thereof,

Having regard to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (the General Data Protection Regulation)[1],

Having regard to Regulation (EU) No 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data[2], and in particular Article 42(1) thereof,

HAS ADOPTED THE FOLLOWING OPINION:

1 Background

1. The European Commission adopted on 30 June 2021 a Proposal for a Directive on consumer credits (the "Proposal")[3]. The Proposal aims to modernise consumer credit rules in order to address changes brought about by digitalisation[4] and to repeal Directive 2008/48/EC on credit agreements for consumers[5].

2. The Proposal follows a REFIT evaluation, which found that the objectives of Directive 2008/48/EC, namely ensuring high standards of consumer protection and fostering the development of an internal market for credit, are still relevant. At the same time, it found that the regulatory landscape remains significantly fragmented across the EU and that the imprecise wording of some provisions of the Directive leads to legal uncertainty, which both hamper the smooth functioning of the internal market for consumer credit and does not guarantee a consistently high level of consumer protection[6].

3. Against this background, the Proposal aims to strengthen consumer protection by addressing shortcomings regarding the scope of application of Directive 2008/48/EC, enhancing and harmonising the obligation to provide adequate information and explanations to consumers, establishing safeguards related, among others, to interest rates and the cost of the credit, and promoting financial education.

4. The EDPS remarks that the Proposal will have a clear impact on data protection, in particular in light of its provisions concerning: advertising and marketing of credit agreements (Article 7); personalised offers on the basis of automated processing (Article 13); the obligation to assess the creditworthiness of the consumer (Article 18), which may require the consultation of the relevant databases (Article 18(9)), also hosted in a Member State other than the one of the creditor in case of cross-border credit services (Article 19); advisory services (Article 16); activities listed under letters from (a) to (e) of Article 32(1).

5. On 1 July 2021, the European Commission requested the EDPS to issue an opinion on the Proposal, in accordance with Article 42(1) of Regulation (EU) 2018/1725. These comments are limited to the provisions of the Proposal that are relevant from a data protection perspective.

2 General comments

6. The EDPS welcomes the objective of the Proposal, which aims to **strengthen consumer protection,** taking into account the increased **digitalisation** in the consumer credit sector. The Impact Assessment accompanying the Proposal identifies a number of important developments which entail the need for additional protection, including:

   - the emergence of new actors such as **peer-to-peer lending platforms**;
   - the increased use of **online sales** channels;
   - the placing on the market of new products such as **short-term high-cost loans**, that can lead to significant costs for the borrower;
   - the increased use of **automated decision-making for credit scoring** and the use of personal data not directly provided by consumers for assessing their **creditworthiness**;
   - the **increased financial vulnerability** of many households in the European Union due to the COVID-19 crisis.

   These trends, as noted in the Impact Assessment, "*raise questions in terms of consumer and data protection and potential discrimination from decisions based on opaque algorithms*"[7].

7. An additional serious concern, not sufficiently addressed in the current Proposal, exists in relation to what **types and sources of data** are used by lenders to assess consumers' creditworthiness and how artificial intelligence algorithms and interpret those data. Some lenders and lending platforms have started using consumer data from external, non-traditional sources to build credit scores (e.g. social media data or consumer browsing history)[8]. Leaving it up to lenders to define which types of data are relevant for creditworthiness assessment might not only be contrary to the principle of data minimisation, but also leads to unfair commercial practices. The absence of clear and specific rules, as to the amount and type of personal data that creditors may process in the context of creditworthiness assessments, entails significant **risks of excessive and unfair data processing**. These risks are further increased in light of automation bias[9] in case of algorithmic decision-making.

8. Against this background, the EDPS recalls the relationship of **complementarity between consumer and data protection**[10]. In the context of consumer credit, the use of personal data has a determinative impact on the on the ability of individuals to obtain **fair access to credit**. While objectively assessing the creditworthiness of consumers is clearly necessary, both in the interest of creditors and consumers, appropriate safeguards must be in place to ensure that individual consumers are sufficiently protected as regards the processing of their personal data. In this sense, data protection also means consumer (financial) protection.

9. The EDPS notes and welcomes the measures contained in the Proposal that seek to address these issues, notably those specifying the **type of information** that should be used during a **creditworthiness assessment**, as well as **consumers' rights** and procedures to be implemented in case of automated decision-making to conduct the creditworthiness assessment. At the same time, the EDPS formulates a number of recommendations to **further strengthen the protection of personal data**, and ultimately consumers' protection.

10. The **overall aim** of these recommendations is, consistently with the EDPS Strategy 2020-2024[11], to ensure a digital economy that provides adequate protection to individuals, especially

the most vulnerable ones. This means in practice addressing the **information and power asymmetries in the digital economy** (in this case, between lenders and borrowers, in consumer credit markets) by ensuring clear **obligations for providers of financial services to provide meaningful information and ensure transparency** (on the databases consulted, on profiling and automated decision-making, on price personalisation and the logic involved). It also means **limiting *ex ante* the types of personal data** that can be used for creditworthiness assessment, and consumer lending more broadly, to what is necessary and proportionate (for instance, by excluding for instance social media activity or online search queries, online browsing data, health data such as cancer data, as well as any special category of personal data under Article 9 of the GDPR). Ensuring compliance with the principle of proportionality in the processing of personal data would also help **protect consumers from being targeted at moments of vulnerability with unfair credit offers** (for instance, high-cost payday loans).

3 Specific comments

3.1 Information and sources of information for the assessment of creditworthiness

11. Article 18(2) of the Proposal specifies that the assessment of creditworthiness shall be carried out on the basis of "***relevant and accurate information*** *on the consumer's income and expenses and other financial and economic circumstances which is* ***necessary and proportionate***" (emphasis added). Examples provided include evidence of income or other sources of repayment, information on financial assets and liabilities, or information on other financial commitments.

12. In terms of **sources of information**, the Proposal specifies that the information shall be obtained from relevant internal or external sources, including the consumer and, where necessary, on the basis of a consultation of a database referred to in Article 19. The information obtained in accordance with this paragraph shall be appropriately verified, where necessary through reference to independently verifiable documentation.

13. Recital 47 of the Proposal provides further indications on the types of information that **should** be used to assess creditworthiness, referring to information on the financial and economic situation, including income and expenses of the consumer. Reference is also made to the European Banking Authority's Guidelines on loan origination and monitoring (EBA/GL/2020/06), which contain guidelines on what categories of data may be used for the processing of personal data for creditworthiness purposes. Those Guidelines refer a.o. to evidence of income or other sources of repayment, information on financial assets and liabilities, or information on other financial commitments[12].

14. Recital 47 of the Proposal also offers indications on the types of information which **should not** be used to assess creditworthiness. It states in particular that "*[p]ersonal data, such as personal data found* ***on social media platforms*** *or* ***health data, including cancer data, should not be used when conducting a creditworthiness assessment.***" (emphasis added)

15. The EDPS considers the aforesaid clarifications important and directly related to the principle of **data minimisation** established under Article 5(1)(c) of the GDPR, according to which personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed. This means in practice that data for the creditworthiness assessment should have a **clear relationship** with the borrower's ability to repay the loan and **not have a disproportionate or unexpected impact** on the fundamental rights to privacy and to the protection of personal data of the person concerned.[13]

16. As indicated above, digitalisation has increased the number and categories of data about consumers generated online, also impacting creditworthiness assessment practices by financial companies relying, among other sources, upon the use of social media data[14]. However, as noted in the Commission Staff Working Document, Evaluation of Directive 2008/48/EC on credit agreement for consumers, *"[s]uch novel techniques are presented by the industry as a way to help consumers with a thin credit profile to obtain a loan which they would, under more traditional CWA [creditworthiness assessment] practices, not be able to receive. However, they raise questions in terms of their actual added value compared to more traditional techniques. These practices, which **are often directed at vulnerable consumers**, can indeed circumvent the need for a solid credit history and sound financial situation, but it is unclear their **accuracy and robustness** on the assessment of the ability of the consumers to reimburse the credit. They also raise questions in terms of **respect of data protection legislation**, in particular the **principles of transparency, fairness, data minimisation and purpose limitation**."* [15]

17. The EDPS therefore welcomes the specification under recital 47 that personal data found on social media platforms or health data, including cancer data, should not be used when conducting a creditworthiness assessment. However, the EDPS recommends explicitly **extending the prohibition to all special categories of data under Article 9 of Regulation 2016/679, and not just health data.** Along the same lines, the EDPS considers that inferring consumers' credit risk from data such as **search query data or online browsing activities** cannot be reconciled with the principles of purpose limitation, fairness and transparency, as well as relevance, adequacy or proportionality of data processing. Therefore, the **EDPS recommends explicitly extending the prohibition to search query data or online browsing activities.**

18. To ensure harmonisation[16], as well as promote fair access to credit and a higher level of data protection, **the EDPS recommends further specifying the categories of data to be processed for creditworthiness assessment in the operative part of the Proposal.** The Proposal itself should include a clear overview of the categories of personal data that can be processed (e.g., information concerning financial assets and liabilities, evidence of income etc.), rather than referring to guidance alone.[17] Specifying the categories of data which can be used for creditworthiness assessment by financial actors would improve legal certainty and should be developed in a manner that promotes compliance with the principles of data minimisation, proportionality and fairness.

19. In addition, the EDPS considers that the Proposal should provide a clear and comprehensive indication of **which external sources should be deemed as "relevant"** in the context of creditworthiness assessment. In particular, taking into account the possible adverse consequences to the persons concerned, **the requirements, role and responsibilities** of credit databases or third parties providing 'credit scores' **should also be explicitly regulated** by the Proposal. The EDPS also recommends providing further clarifications regarding the **situations where consultation of such external sources is necessary and proportionate**, recalling that the aforementioned prohibitions regarding certain categories of data should in any event remain applicable.

20. To enhance transparency regarding the processing of personal data by 'third parties' (that is, other than the creditor and the borrower), the EDPS recommends specifying in the Proposal that Member States shall require the creditor to **provide information** in advance to the loan applicant about the external sources that will be consulted and about his or her data subjects rights having regard to these sources.

3.2 Procedures for creditworthiness assessment

21. Article 18(3) of the Proposal states that Member States shall require that the creditor or, where applicable, the provider of crowdfunding credit services, establishes **procedures** for the creditworthiness assessment and that the creditor or the provider of crowdfunding credit services **documents and maintains such procedures**. Member States shall also require that the creditor or the provider of crowdfunding credit services documents and maintains the information referred to in Article 18(2) of the Proposal.

22. The EDPS notes that the financial decision triggered by creditworthiness assessment might have **significant impact on the persons affected**. It is therefore essential that the creditors have **data quality control mechanisms** in place providing the highest possible level of accuracy of the information processed for the purpose of creditworthiness assessment.

23. Hence, the EDPS recommends adding to Article 18(3) that the procedures for creditworthiness assessment shall include **data quality control mechanism** (in particular, periodic reviews of data to ensure that data are accurate and updated) ensuring the highest possible data quality, in compliance with the principle of **accuracy** under Article 5(1)(d) of the GDPR. The documentation of such procedures, to be integrated with the data quality aspect, shall allow the controller (the creditor, in this case) to demonstrate data protection compliance according to the **accountability** principle (Article 5(2) of the GDPR).

24. The EDPS also notes that Article 18(3) of the Proposal does not provide any indication as to how long the data may or should be retained. It also does not differentiate between the situation where the request for credit has been granted or rejected. In accordance with the principle of **storage limitation**, personal data shall be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed (Article 5(1)(e) of the GDPR). To increase legal certainty and promote harmonisation, the EDPS recommends **specifying the maximum period for which the data may be retained by the creditor or provider**, taking into account whether the request for credit has been granted or rejected. In case of rejection, data about the loan applicant should in principle be retained for less time than in case the loan is granted, according to a maximum retention period starting from the rejection of the application to the loan (taking into account also the right of the applicant to contest the decision).

3.3 Consumer rights regarding creditworthiness assessment

25. Article 18(6) states that where the creditworthiness assessment involves the use of **profiling or other automated processing of personal data**, Member States shall ensure that the consumer has the right to:

    (a) request and obtain **human intervention** on the part of the creditor or the provider of crowdfunding credit services to review the decision;

    (b) request and obtain from the creditor or the provider of crowdfunding credit services **a clear explanation** of the assessment of creditworthiness, **including on the logic and risks** involved in the automated processing of personal data as well as **its significance and effects** on the decision;

    (c) **express his or her point of view and contest** the assessment of the creditworthiness and the decision.

26. Recital 48 of the Proposal recalls that the Proposal for Regulation laying down harmonized rules on artificial intelligence (Artificial Intelligence Act)[18], specifies that AI systems used to

evaluate the **credit score or creditworthiness** of natural persons should be classified as **high-risk** AI systems, since they determine those persons' access to financial resources or essential services such as housing, electricity, and telecommunication services. Recital 48 further states that "[*i*]*n view of those high stakes,* ***whenever the creditworthiness assessment involves automated processing****, the consumer should have a* ***right to obtain human intervention*** *on the part of the creditor or providers of crowdfunding credit services. The consumer should also have the right to obtain a meaningful explanation of the assessment made and of the functioning of the automated processing used,* ***including among others the main variables, the logic and risks involved****, as well as a right to express his or her point of view and to contest the assessment of the creditworthiness and the decision.*"

27. The EDPS welcomes the inclusion of these rights, which are similar in substance to those provided by Article 22 of the GDPR in cases involving automated decision-making. Indeed, this specification **enhances legal certainty, harmonisation (a 'level playing field' for creditors) and ultimately consumer protection** in case of consumer credit assessment involving automated processing, including, but without being limited to, cases involving profiling and/or automated decision-making within the meaning of Article 22 GDPR.

28. However, the EDPS recommends **replacing the term 'intervention' with 'assessment'** under Article 18(6) and recital 48. Indeed, given the high risk for consumers, as well as the increased automation bias, the EDPS considers that the term "assessment", implying a thorough human review at the point the automated decision is delivered (accompanied by timescale and named contact point for queries by consumers)[19], is better suited to address or mitigate the risk of financial exclusion triggered by the decision on the applicant's eligibility to the loan.

29. The EDPS also recalls the EDPB-EDPS Joint Opinion on the Artificial Intelligence Act, stating that **the classification of an AI system as high-risk triggers a presumption of high-risk under the GDPR** to the extent that personal data is processed[20]. The user of the AI system should therefore carry out a **data protection impact assessment** under Article 35 of the GDPR before the system is used[21].

30. The EDPS also notes that Article 18(7) provides that "*Member States shall ensure that where the credit application is* ***rejected*** *the creditor or the provider of crowdfunding credit services is required to inform the consumer without delay of the rejection and, where applicable,* ***of the fact that the assessment of creditworthiness is based on automated processing of data****.*" (emphasis added)

31. In this regard, the EDPS recalls that the data subject (in this case, the consumer/borrower) shall be informed about profiling and automated decision-making concerning him or her and be provided with meaningful information about the logic involved, the significance and the consequences of the processing, pursuant to Articles 13 and 14 of the GDPR, in all cases of decisions significantly affecting the data subject (that is, **not only in case of rejection** of the credit application, since a credit may still be granted to the borrower, but - as indicated at Section 3.5 of this Opinion - at an excessive or 'unfair' price[22]).

32. In the interest of clarity and legal certainty, the EDPS recommends amending Article 18(7) of the Proposal to clarify that the **information shall be provided regardless of whether the application is rejected or granted**. To enhance consumer protection, the EDPS also recommends specifying that individuals should be **explicitly informed of their rights under Article 18(6)** of the Proposal at the moment where the application is rejected or granted.

33. Finally, the EDPS recalls the **risk of bias inherent to algorithmic decision-making**. In order to avoid discrimination based on bias, the creditor should, also on the basis of a data protection impact assessment, take adequate organisational and technical measures to address this risk.

3.4 Consultation of relevant databases in the context of the creditworthiness assessment

34. Article 18(9) of the Proposal states that "*[m]ember States whose legislation requires creditors or providers of crowdfunding credit services to assess the creditworthiness of consumers on the basis of a* ***consultation of the relevant database*** *may retain this requirement.*" Moreover, Article 19 specifies the possibility of cross-border access to databases in case of cross-border credit services[23]. The provisions under Articles 18(9) and 19 are further specified under recitals 49 and 50 of the Proposal[24].

35. Article 10(3), letter (r) and Article 11(2), letter (l) of the Proposal provide that the pre-contractual information must specify "*the consumer's right to be informed immediately and free of charge, pursuant to Article 19(2), of* ***the result of a database consultation*** *carried out for the purposes of assessing his or her creditworthiness.*"

36. In this regard, the EDPS recommends adding to the information to be provided to consumers pursuant to Articles 10 and 11 of the Proposal "***the indication of the relevant databases that may be consulted*** *by the creditor or provider of crowdfunding service, of her or his data subject rights in relation to such sources and of a named contact point for the exercise of those rights*". The EDPS stresses that this information should be provided **before** the consultation of the database takes place, together with a reference to data subjects' rights and to a named contact point for the exercise of those rights.

37. Providing ***ex ante*** **information to consumers about the databases that may be consulted** and of her or his data subject rights in relation to such sources would provide the data subject (consumers applying for the loan) the possibility to effectively and usefully exercise his or her data subject's rights (for instance, the right to rectification under Article 16 of the GDPR), thus enhancing data quality[25].

38. The EDPS also recommends **harmonising the categories of information that can be contained in the databases for creditworthiness assessment**. Such harmonisation would in fact be **beneficial in particular to cross-border database consultation**, leading to more accurate creditworthiness assessments[26]. Furthermore, **the EDPS recommends including in the Proposal clear indicators to specify when the relevant databases might be consulted by creditors, specifying the term '*where necessary*'** in Article 18(2). In particular, the Proposal should specify the criteria on the basis of which creditors can have access to the database and, in particular, clarify whether only creditors who are requested by the consumer to take steps to conclude a contractual relationship with him or her can have access to his or her data.

3.5 Consumer rights having regard to the personalised offer (loan pricing)

39. Article 13 provides that Member States shall require that creditors, credit intermediaries and providers of crowdfunding credit services **inform consumers when they are presented with a personalised offer that is based on profiling or other types of automated processing of personal data**. Recital 40 further states that creditors, credit intermediaries and providers of crowdfunding credit services should be allowed to **personalise the price** of their offers for specific consumers or specific categories of consumer based on **automated decision-making and profiling** of consumer behaviour allowing them to assess the consumer's purchasing

power. Consumers should therefore be clearly informed when the price presented to them is personalised on the basis of automated processing, so that they can take into account the potential risks in their purchasing decision. Article 10(3), letter (t) and Article 11(2), letter (m) also refer to the obligation of the creditor to provide the consumer "*where applicable, an indication that the price was personalised on the basis of automated processing, including profiling*". Finally, Article 12 lays down the obligation for creditors to provide "adequate explanations", including the elements of letters (a)-(d) of paragraph 1[27].

40. In this regard, the EDPS notes that **Article 13 contains a transparency obligation, but it does not provide as such a lawful legal basis for the processing of personal data within the meaning of the GDPR.** As result, any personalised pricing of consumer credit still requires a valid legal basis under Article 6 of the GDPR, as well as compliance with other data protection principles, including the principles of fairness and purpose limitation.

41. While the Proposal's aim to increase transparency is welcome, **the EDPS is concerned that Article 13 might be seen as implicitly legitimating personalised processing in ways that exacerbate existing information and power asymmetries between consumers and providers.** For this reason, the EDPS recommends to revise recital 40, further regulating the use of personalised offers in consumer credit arrangements and **clearly delineating the categories of personal data that may be used as parameters** to draw up a personalised offer. In addition, the EDPS recommends expanding the information obligation contained in **Article 13** of the Proposal, which should require the provision by the creditor of **clear, meaningful and uniform information about the logic and the parameters used to determine the price**[28].

3.6 Advertising and marketing of credit agreements; advisory and other services

42. The EDPS recalls the need to ensure full respect of the principles of **data minimisation** and **purpose limitation**, also having regard in particular to the following activities: advertising and marketing of credit agreements pursuant to Article 7; advisory services pursuant to Article 16 and the activities listed under Article 32(1) of the Proposal.

43. Having regard to advertising and marketing of credit agreements pursuant to Article 7, the EDPS recommends specifying in the Proposal that **the use of data collected and processed in the context of creditworthiness assessment for advertising or marketing purposes should not be allowed.**

44. Having regard to the advisory services referred to under Article 16, the EDPS recommends further delineating in the Proposal which information regarding the consumer's financial situation, preferences and objectives related to the credit agreement or crowdfunding services may be considered as "strictly necessary" for the purpose of providing advisory services and the activities listed under Article 32(1) of the Proposal.

3.7 Relationship to existing Union legislation on personal data protection

45. The EDPS observes that recital 25 of the Proposal[29] refers to respect *for "the rights to the protection of personal data, to property, to non-discrimination, to protection of family and professional life, and to consumer protection".* Recital 49 also refers to compliance with the GDPR when referring to cross-border access to private or public databases.

46. The EDPS notes that entities covered by the Proposal will deploy a wide range of activities involving the processing of personal data. This means that the requirements of the GDPR will

need to be taken into account, in particular the requirements concerning purpose limitation, storage limitation, data protection by design and by default, data minimisation, as well as the obligations related to security of personal data and data protection impact assessment[30] and prior consultation.

47. The EDPS considers that it should be made evident in the Proposal that all entities covered by the Proposal should act in compliance with existing Union legislation on personal data protection when carrying out *any* of the activities covered by the Proposal which involve the processing of personal data. The EDPS therefore recommends explicitly clarifying in the operative part of the Proposal that the Union's legislation for the protection of personal data, in particular the GDPR, shall apply to any processing of personal data falling within the scope of the Proposal.

48. A corresponding recital should equally clarify that the Proposal does not seek to affect the application of existing EU laws governing the processing of personal data, including the tasks and powers of the independent supervisory authorities competent to monitor compliance with those instruments.

3.8 Interaction with the proposed Artificial Intelligence Act

49. The EDPS notes that the Proposal includes several references to the Proposal for a Regulation laying down harmonised rules on artificial intelligence (Artificial Intelligence Act)[31]. In particular, recital 40 refers to price personalisation as outcome of automated decision-making and profiling and to the potential risks stemming from such personalisation. In addition, recital 48 recalls that AI systems intended to be used to evaluate the creditworthiness of natural persons or establish their credit score (determining access to financial resources or essential services such as housing, electricity, and telecommunication services) are considered "high-risk" AI systems under the Artificial Intelligence Act[32].

50. In this regard, the EDPS considers that the requirements laid down in the Proposal concerning creditworthiness assessments and price personalisation **should be integrated** into the requirements under Chapter 2 of Title III of the Artificial Intelligence Act. Chapter 2 of Title III determines the requirements on the basis of which the provider of the AI system shall draw up an EU declaration of conformity and affix the CE marking pursuant to Article 19 of the Artificial Intelligence Act.

51. Absent the aforesaid integration (which could be achieved for instance introducing a cross-reference to the Proposal in aforesaid Chapter 2 of Title III), the assessment of conformity of AI systems assessing creditworthiness would not take into account the rules established by the Proposal to enhance consumer and data protection (e.g., restrictions regarding the use of data from social media or health data)[33].

52. In light of the above, the EDPS recalls the recommendations made in the Joint EDPB-EDPS Opinion[34] to **include** data protection requirements, as well requirements **stemming from sectoral legislation, in this case consumer credit, applicable Union legislation under the requirements for declaration of conformity of the AI system**[35]. In the absence of this inclusion, the loan applicant's consumer and data protection rights might in practice be jeopardised by the (high-risk) creditworthiness AI system.

53. The EDPS also recalls that the Joint EDPB-EDPS Opinion recommended that the Artificial Intelligence Act prohibits *any* type of social scoring. Such a 'horizontal' **prohibition of social scoring in the Artificial Intelligence Act** would be beneficial not only having regard for

instance to decisions on eligibility to mortgages or insurance products (possibly relying on such "social scoring"), but also having regard to the assessment of creditworthiness. The EDPS recommends including in the Proposal a cross-reference to the proposed Artificial Intelligence Act in respect of the prohibition of social scoring, in accordance with the recommendations provided in the Joint EDPB-EDPS Opinion.

54. The EDPS also recommends providing for *ex ante* verification of the creditworthiness AI system, including verification of compliance with the Proposal's requirements, with the involvement of the competent authority having specific expertise on consumer loans established pursuant to Article 41 of the Proposal[36].

55. Finally, the EDPS recalls the need for integration of the requirements under data protection law (for instance, data minimisation, privacy by design and by default)[37] in the requirements under the Artificial Intelligence Act, in particular in the context of the certification of the AI creditworthiness system[38]. The integration of this requirement would be crucially beneficial to individuals' rights, both as data subject and consumer.

4 Conclusions

In light of the above, the EDPS:

- welcomes the aim pursued by the Proposal of **strengthening consumer protection** to address the risks posed by digitalisation of consumer credit;
- recalls the relationship of **complementarity between consumer and data protection**, and the important role that can be played by the latter also in terms of consumer empowerment;
- recommends further delineating **the categories of data** that may or may not be used for the purpose of creditworthiness assessment and to **explicitly prohibit the use of any special categories of personal data under Article 9 of the GDPR** in the operative part of the Proposal;
- recommends providing a clearer indication of **which external sources may be deemed as "relevant"** in the context of creditworthiness assessment;
- recommends addressing the requirements, role and responsibilities of **credit databases or third parties providing 'credit scores'**, together with further clarifications regarding the situations where consultation of such external sources is necessary and proportionate;
- recommends adding under Article 18(3) of the Proposal that the procedures for creditworthiness assessment shall include **data quality control procedure**;
- recommends **replacing the term [human] "intervention" with "assessment" in** Article 18(6) and recital 48 of the Proposal. Moreover, the EDPS recommends ensuring the consumer is informed where the creditworthiness assessment is based on automated processing **in all cases** (that is, not only in case of rejection of the application for the loan);
- welcomes the obligation to inform consumers that they are presented with a **personalised offer**. However, the EDPS recommends adding an obligation to provide clear, meaningful and uniform information about the parameters used to determine the price and to clearly delineate the categories of personal data that may be used as parameters to draw up a personalised offer;

- welcomes the consumer's **right to be informed of the result of a database consultation** carried out for the purpose of assessing his or her creditworthiness. However, the EDPS recommends providing for the obligation to **inform the applicant in advance** of such consultation. The EDPS also recommends harmonising the categories of information which can be contained in the databases for creditworthiness assessment;

- recommends specifying in the Proposal that the use of data collected and processed in the context of creditworthiness assessment for **advertising and marketing** purposes should not be allowed;

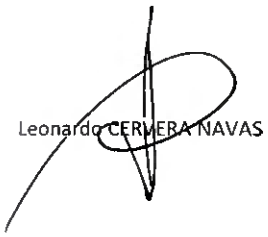
- recommends further delineating in the Proposal which information regarding the consumer's financial situation, preferences and objectives related to the credit agreement or crowdfunding services may be considered as "strictly necessary" for the purpose of providing **advisory services and the activities listed under Article 32(1) of the Proposal;**

- recommends **including a provision and a corresponding recital on the applicability of the GDPR** in the context of the Proposal, and notably to the processing of personal data by creditors and providers of crowdfunding services;

- recalls the need for integrating the requirements under data protection law and consumer credit legislation into the requirements under the **proposed Artificial Intelligence Act**, in particular in the context the certification of AI systems used for creditworthiness assessment, notably as part of the (third-party) conformity assessment process prior to CE marking.

Brussels, 26 August 2021

p.o. Leonardo CERVERA NAVAS - Director



Wojciech Rafał WIEWIÓROWSKI

[e-signed]

Notes

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), L119, 4.5.2016.
[2] Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC, L 295, 21.11.2018
[3] Proposal for a Directive of the European Parliament and of the Council on consumer credits, 30.6.2021, 2021/0171 (COD).
[4] See at page 3 of the Explanatory Memorandum.
[5] Directive 2008/48 of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC, L133, 22.5.2008.
[6] See at page 1 of the Explanatory Memorandum.
[7] Impact Assessment report accompanying the Proposal, SWD(2021) 170 final, at page 3.
[8] BEUC, Review of the Consumer Credit Directive - BEUC Position, April 2019, p. 15, available at: https://www.beuc.eu/publications/beuc-x-2019-019_review_of_the_consumer_credit_directive.pdf.
[9] Automation bias is the propensity for humans to favor suggestions from automated decision-making systems and to ignore contradictory information made without automation. See among others Cummings, Mary (2004). "Automation Bias in Intelligent Time Critical Decision Support Systems": *"Automation bias occurs in decision-making because humans have a tendency to disregard or not search for contradictory information in light of a computer-generated solution that is accepted as correct and can be exacerbated in time critical domains."*
[10] See EDPS "Preliminary Opinion of the European Data Protection Supervisor Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy", March 2014, available at:
https://edps.europa.eu/sites/edp/files/publication/14-03-26_competitition_law_big_data_en.pdf;
Opinion 7/2015, "Meeting the challenges of big data. A call for transparency, user control, data protection by design and accountability", available at:
https://edps.europa.eu/sites/edp/files/publication/15-11-19_big_data_en.pdf;
and Opinion 8/2016, "Opinion on coherent enforcement of fundamental rights in the age of big data", available at:
https://edps.europa.eu/sites/edp/files/publication/16-09-23_bigdata_opinion_en.pdf.
[11] The EDPS Strategy 2020-2024, Shaping a Safer Digital Future: a New Strategy for a New Decade, available at: https://edps.europa.eu/press-publications/publications/strategy/shaping-safer-digital-future_en
[12] European Banking Authority Guidelines on loan origination and monitoring EBA/GL/2020/06, 29 May 2020, at page 71, Annex 2, available at:
https://www.eba.europa.eu/regulation-and-policy/credit-risk/guidelines-on-loan-origination-and-monitoring.
[13] For an example of personal data deemed inappropriate to describe solvency, see for example the decision of the Finnish Office of the Data Protection Ombudsman summarised at:
https://edpb.europa.eu/news/national-news/2019/data-protection-ombudsman-ordered-svea-ekonomi-correct-its-practices_en.
[14] See also the EBA report on big data and advanced analytics, January 2020, automated credit scoring, at page 20, "*The most common ML methods used to assess credit applications are regression, decision trees and statistical analysis to generate a credit score using limited amounts of structured data. However, due to the increased availability of data, institutions are increasingly turning to additional data sources, unstructured and semi-structured, including on social media activity, mobile phone use and text message activity, to capture a more accurate view of creditworthiness.*"
The report is available at:
https://www.eba.europa.eu/sites/default/documents/files/document_library/Final%20Report%20on%20Big%20Data%20and%20Advanced%20Analytics.pdf
[15] Commission Staff Working Document, Evaluation of Directive 2008/48/EC on credit agreement for consumers, SWD(2020) 254 final, at page 37. See also at pages 62-63: *"The European Consumer Organisation BEUC and the Financial Services User Group (FSUG), for instance, have expressed concerns about the new types of personal data (e.g. digital footprints or social network data) collected online (notably by new types of providers such as certain fintech providing online credit or crowdfunding platforms) for verifying the creditworthiness of consumers and the impact this could have on vulnerable consumers in particular and their access to credit."*
See also Nikita Aggarwal, 'The norms of algorithmic credit scoring', (2021) 80(1) Cambridge Law Journal 42-73 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3569083), calling for substantive restrictions on the processing of personal data by credit providers, and supporting the prohibition of the collection and processing of certain types of personal data, such as health related and social media data, that are intrinsic to the person's identity

and autonomy. At page 13, the author notes that *"Algorithmic credit scoring, and the wider ecosystem of data-driven, algorithmic decision-making in which it is situated, present a growing threat to consumer privacy and therefore consumer autonomy. First, due to the increased scope for 'objective' harm — for example, where consumers' data are hacked and used to coerce them, inter alia through identity theft [..]. Second, due to the increased scope for 'subjective' harm caused by the chilling effects of constant surveillance and behavioural profiling, and consumers' reduced ability to understand and control how data relating to them are used to shape their (financial) identities."*

[16] Commission Staff Working Document, Evaluation of Directive 2008/48/EC on credit agreement for consumers, SWD(2020) 254 final, at page 36: "*The obligations to ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness on the basis of "sufficient information" has been implemented differently across the EU. Although Article 8 has been fully transposed, its practical implementation varies significantly between Member States, leading to a diverse regulatory landscape, as shown by a mapping of national approaches in relation to creditworthiness assessment (CWA) carried out by the Commission. The majority of Member States defined more detailed information to be taken into account in the CWA. In a number of them the consultation of databases is compulsory for creditors. This implies, that, depending on the Member States, the amount and categories of data collected by creditors, as well as the techniques to do so, differ greatly.*"

[17] In this regard, see also Case 9/56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1958:7, ruling on the possible extent of delegation of powers.

[18] Proposal for Regulation of the European Parliament and of the Council laying down harmonized rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, COM(2021) 206 final.

[19] See EDPB, Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 specify, at page 27, stating that *"Human intervention is a key element. Any review must be carried out by someone who has the appropriate authority and capability to change the decision. The reviewer should undertake a thorough assessment of all relevant data, including any additional information provided by the data subject." See also at page 32, referring, as good practice recommendation, to "agreed timescales for the review".*

[20] See paragraph 21, at page 9 of the EDPB-EDPS Joint Opinion on the Artificial Intelligence Act.

[21] See paragraph 21, at page of the EDPB-EDPS Joint Opinion on the Artificial Intelligence Act, adding that "*[e]ven if the initial risk assessment by the provider does not indicate that the AI system is "high-risk"" under the Proposal, this should not exclude a subsequent (more granular) assessment (data protection impact assessment ('DPIA') under Article 35 of the GDPR, Article 39 of EUDPR or under Article 27 of the LED) that should be made by the user of the system, considering the context of use and the specific use cases".*

[22] The EDPB Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679 specify at page 22 that *"Automated decision-making that results in **differential pricing** based on personal data or personal characteristics could also have a significant effect if, for example, prohibitively high prices effectively bar someone from certain goods or services." Another example of decisions having a significant effect concerns "decisions that affect someone's financial circumstances, such as their **eligibility** to credit".*

[23] Article 19 of the Proposal: "*1. Each Member State shall in the case of **cross-border credit** ensure access for creditors and providers of crowdfunding credit services from other Member States to databases used in that Member State for assessing the creditworthiness of consumers. The conditions for access to such databases shall be non-discriminatory.*
2. Paragraph 1 shall apply both to public and private databases.
3. The databases referred to in paragraph 1 shall hold at least information on consumers' arrears in payment.
4. Where the credit application is rejected on the basis of a consultation of a database referred to in paragraph 1, Member States shall require that the creditor or the provider of crowdfunding credit services informs the consumer immediately and free of charge of the result of such consultation and of the details of the database consulted."

[24] *"(49) To assess the credit status of a consumer, the creditor or the provider of crowdfunding credit services should also **consult credit databases**. The legal and actual circumstances may require that such consultations vary in scope. To prevent any distortion of competition among creditors or providers of crowdfunding credit services, they should have access to private or public credit databases concerning consumers in a Member State where they are not established under non-discriminatory conditions compared with creditors or providers of crowdfunding credit services established in that Member State. Member States should facilitate the **cross-border access to private or public databases**, in compliance with the Regulation (EU) 2016/679 of the European Parliament and of the Council. To enhance reciprocity, credit databases should as a minimum hold information on consumers' arrears in payment, in accordance with Union and national law.*
(50) Where a decision to reject an application for credit is based on the consultation of a credit database, the creditor or the provider of crowdfunding credit services should inform the consumer of this fact and of the information about him or her hold in the database consulted."

[25] In the same sense, see EDPS Opinion on credit agreements relating to residential property, 25 July 2011, at paragraph 14: *(emphasis added): "The EDPS therefore suggests some modifications to the text of the Directive with the purpose of addressing the shortcomings identified above. Any access to the database should be subject to the following conditions, which should be introduced in the text of Article 16: (i) definition of the criteria on the basis of which creditors or credit intermediaries can have access to the database and, in particular, clarification of whether only creditors or credit intermediaries who concluded a contract with a consumer or are required by the consumer to take steps to conclude a contractual relationship with him can have access to his or her data; (ii) obligation to **communicate in advance to the consumer that a certain creditor or credit intermediary has the intention to access his or her personal data***

***in the database**; (iii) obligation to contemporaneously communicate to the consumer of his or her rights to access, rectify, block or erase the data contained in the database pursuant to the principles of Directive 95/46/EC."*
The Opinion is available at: https://edps.europa.eu/sites/default/files/publication/11-07-25_credit_agreements_en.pdf
The Mortgage Directive (Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010, OJ L 60, 28.2.2014, p. 34–85, under Article 18(5)(b), lays down: *"[Member States shall ensure that:] (b) in accordance with Article 10 of Directive 95/46/EC, the creditor **informs the consumer in advance that a database is to be consulted**".*

[26] See Commission Staff Working Document, Evaluation of Directive 2008/48/EC on credit agreement for consumers, SWD(2020) 254 final, at pages 39 and 40 in particular: *"Although only a few Member States reported different requirements for foreign providers, industry representatives specifically referenced the **different requirements to access credit databases** in other Member States or the **differences in the content of such databases** as one of the main obstacles to accessing the information needed to conduct creditworthiness assessments for foreign consumers.*
Since the Directive did not establish the nature, coverage, type and breadth of the data contained in the databases, these differ extensively between Member States, obstructing the effective exchange of data across Member States. This lack of uniformity in the data can also give an incomplete picture of the consumer that can prevent credit providers from carrying out a sound creditworthiness assessment.
Indeed these databases can include only negative data (such as in France, where the public register only includes data about arrears on repayment or application to the over-indebtedness commissions) or, most frequently, both negative and positive (such as ongoing financial commitments) data.
There is also a growing push from certain credit providers and credit registers to include "non-traditional data" (such as data from GPS, social media, web-browsing) in these database. However the added value of such data, its proportionality and compliance with data protection rules is challenged, for instance by consumer organisations (see EQ4)."

[27] Article 12 of the Proposal: "*Member States shall ensure that creditors and, where applicable, credit intermediaries and providers of crowdfunding credit services are required to provide adequate explanations to the consumer on the proposed credit agreements or crowdfunding credit services and any ancillary services that make it possible for the consumer to assess whether the proposed credit agreements or crowdfunding credit services and ancillary services are adapted to his or her needs and financial situation. The explanations shall include the following elements:*
(a) the information referred to in Article 10, 11 and 38;
(b) the essential characteristics of the credit agreement, crowdfunding credit services or ancillary services proposed;
(c) the specific effects that the credit agreement, crowdfunding credit services or ancillary services proposed may have on the consumer, including the consequences of payment default or late payment by the consumer;
(d) where ancillary services are bundled with a credit agreement or crowdfunding credit services, whether each component of the bundle can be terminated separately and the implications for the consumer of such termination.
2. Member States may adapt the requirement referred to in paragraph 1 with regard to the manner in which the explanations shall be given and the extent to which they shall be given to the following:
(a) the circumstances of the situation in which the credit is offered;
(b) the person to whom the credit is offered;
(c) the nature of the credit offered."

[28] See the WP29 (endorsed by EDPB) Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679, at page 25, on the obligation for the controller (in this case, the creditor) to provide **meaningful information about the logic involved** (in the processing of personal data): *"The growth and complexity of machine-learning can make it challenging to understand how an automated decision-making process or profiling works. The controller should find simple ways to tell the data subject about the rationale behind, or the criteria relied on in reaching the decision. The GDPR requires the controller to provide **meaningful information about the logic involved, not necessarily a complex explanation of the algorithms used or disclosure of the full algorithm**. The information provided should, however, be sufficiently comprehensive for the data subject to understand the reasons for the decision. Example: A controller uses credit scoring to assess and reject an individual's loan application. The score may have been provided by a credit reference agency, or calculated directly based on information held by the controller. Regardless of the source (and information on the source must be provided to the data subject under Article 14 (2)(f) where the personal data have not been obtained from the data subject), if the controller is reliant upon this score it must be able to explain it and the rationale, to the data subject. The controller explains that this process helps them make fair and responsible lending decisions. It provides details of **the main characteristics considered in reaching the decision**, the source of this information and the relevance. This may include, for example: the information provided by the data subject on the application form; information about previous account conduct, including any payment arrears; and official public records information such as fraud record information and insolvency records. The controller also includes information to advise the data subject that the credit scoring methods used are regularly tested to ensure they remain fair, effective and unbiased. The controller provides contact details for the data subject to request that any declined decision is reconsidered, in line with the provisions of Article 22(3)." (emphasis added)*
It is worth also recalling that the EDPB **Guidelines on automated individual decision-making and profiling** further highlight the importance of **transparency (intertwined with the fairness principle)** towards the data subject referring among others to **payday (short term high cost) loans**: *"Processing also has to be **fair, as well as***

***transparent**. Profiling may be unfair and create discrimination, for example by denying people access to employment opportunities, credit or insurance, or targeting them with excessively risky or costly financial products. The following example, which would not meet the requirements of Article 5(1)(a), illustrates how unfair profiling can lead to some consumers being offered **less attractive deals** than others. Example: A data broker sells consumer profiles to financial companies without consumer permission or knowledge of the underlying data. The profiles define consumers into categories (carrying titles such as "Rural and Barely Making It," "Ethnic Second-City Strugglers," "Tough Start: Young Single Parents,") or "score" them, focusing on consumers' financial vulnerability. The financial companies offer these consumers payday loans and other "non-traditional" financial services (high-cost loans and other financially risky products)."*
On automated decision-making in the context of Artificial Intelligence Systems and transparency, see, among others: Ostmann, F., and Dorobantu C., (2021), "*AI in financial services. The Alan Turing Institute*", available at: https://doi.org/10.5281/zenodo.4916041

[29] Recital (25): *"This Directive respects fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union ('the Charter'). In particular, this Directive fully respects the rights to the protection of personal data, to property, to non-discrimination, to protection of family and professional life, and to consumer protection pursuant to the Charter."*

[30] See WP29 (endorsed by EDPB) Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679, WP 248 rev.01, referring at page 9 to "evaluation or scoring" as one of the nine criteria for determining the qualification as "likely to result in a high risk" processing operations and providing in this regard the following example: "a financial institution that screens its customers against a credit reference database".

[31] Proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts, 2021/0106 (COD).

[32] See Annex III, 5.(b) of the Artificial Intelligence Act.

[33] The clarification of the relationship between the Proposal and the Artificial Intelligence Act is also necessary due to the broad definition of 'Artificial Intelligence System' under Article 3, letter (a) of the Artificial Intelligence Act: "'*artificial intelligence system' (AI system) means software that is developed with one or more of the techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.*" Such broad definition would in fact apply to most cases of 'algorithmic scoring', including creditworthiness assessments.

[34] EDPB-EDPS Joint Opinion 5/2021 on the proposal for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act), 18 June 2021, available at: https://edpb.europa.eu/system/files/2021-06/edpb-edps_joint_opinion_ai_regulation_en.pdf

[35] See at paragraph 23 of the EDPB-EDPS Joint Opinion 5/2021: *"[..] the compliance with legal obligations arising from Union legislation (including on the personal data protection) should be precondition to being allowed to enter the European market as CE marked product. To this end, the EDPB and the EDPS recommend including in Chapter 2 of Title III of the Proposal the requirement to ensure compliance with the GDPR and the EUDPR. These requirements shall be audited (by third party audit) before the CE marking in line with the accountability principle."*

[36] See also paragraphs 36-37 of the EDPB-EDPS Joint Opinion 5/2021.

[37] See at paragraphs 36-37 of the EDPB-EDPS Joint Opinion 5/2021.

[38] See at paragraph 76 of the EDPB-EDPS Joint Opinion 5/2021: "*The Proposal is missing a clear relation to the data protection law as well as other EU and Member States law applicable to each 'area' of high-risk AI system listed in Annex III. In particular, the proposal should include the principles of data minimization and data protection by design as one of the aspects to take into consideration before obtaining the CE marking, given the possible high level of interference of the high-risk AI systems with the fundamental rights to privacy and to the protection of personal data, and the need to ensure a high level of trust in the AI system.*
Therefore, the EDPB and the EDPS recommend amending the Proposal so as to clarify the relationship between certificates issued under the said Regulation and data protection certifications, seals and marks. Lastly, the data protection authorities should be involved in the preparation and establishment of harmonized standards and common specifications."
See also the Executive Summary, at page 3: "*The certification system outlined in the Proposal is missing a clear relation to the EU data protection law as well as to other EU and Member States' law applicable to each 'area' of high-risk AI system and is not taking into account the principles of data minimization and data protection by design as one of the aspects to take into consideration before obtaining the CE marking. Therefore, the EDPB and the EDPS recommend amending the Proposal as to clarify the relationship between certificates issued under the said Regulation and data protection certifications, seals and marks. Lastly, the DPAs should be involved in the preparation and establishment of harmonized standards and common specifications.*"