

THE LEGAL STANDING OF CONSUMER CREDIT REPORTING IN THE EC.

Federico Ferretti*

Introduction

In virtually all the EC Member States, consumer credit reporting has become the most extensively used instrument used by lenders to underwrite decisions on borrowings or the supply of goods and/or services to customers. Lenders, in fact, access credit reference databases managed by third party providers (the so-called 'Credit Reference Agencies') in order to evaluate a consumer's credit application and his or her creditworthiness.

Credit Reference Agencies (CRAs) are profit-seeking private companies that are deemed to represent an institutional response at the service of the credit industry to the problem of asymmetric information in financial markets. They maintain a full data sharing mechanism based on the collection of data from the various lenders of information about their customers and, at the same time, provide those same lenders with consumer credit reports along with other information services and decision making tools, making consumers' personal data and reputations accessible to other (potential) creditors.¹

Another reason for the credit industry's interest in CRAs is that through an extensive detailed collection and sharing of personal data they are considered to provide useful services in the fight against the growth of over-indebtedness of a borrowing individual.

In policy terms, this would confer to the credit industry the tools for a responsible lending, protecting individuals from running up significant borrowings beyond their means.

¹* Avvocato (Italy). School of Law, University of Leeds (UK).

CRAs usually integrate their databases with data from other public sources, such as, for example, electoral rolls, Court judgements, bankruptcies and voluntary arrangements, and other private information provided by other organisations which compile additional information referring to an individual thus forming a single file. Such files are then made available in the form of a Credit Report which is provided to the (potential) lenders for a fee paid to the one or more CRAs which they have decided to interrogate each time someone applies for credit or hire purchase.

Of utmost importance, consultation by lenders of CRAs databases is not mandatory by law prior to the underwriting of credit and relies on a voluntary basis.

As participation by lenders in a privately owned consumer credit information system is not compulsory, the rules relating to the functioning of the system itself are not imposed by law or regulation but are contracted in a typical supplier-client relationship.

Against this background, the creation of an efficient EC single market in consumer credit in an environment in which consumers receive adequate protection is a present concern on top of the agenda for the completion of the Internal Market. To reach this goal, so far the existing Consumer Credit Directive 87/102/EEC has proved to be ineffective.² Thus, the European Commission and the European Parliament have recently presented new proposals for a directive on the harmonisation of the laws, regulations and administrative provisions concerning credit for consumers.³ However, despite all the efforts, so far the Member States have shown little signs of agreement, and discussions and counterproposals have been lasting for years.

Thus, the aim of this work is to investigate the existing legal framework and standing of consumer credit reporting in the EC, attempting to identify the laws that have an impact on and regulate the functioning of consumer information sharing arrangements. Not only such examination carries an interest of its own, but it also appears useful to determine its suitability for a common market in consumer credit. How closely does it reflect or parallel the future legislative developments at EC level (if any) of a retail credit sector in which consumers receive adequate protection?

To reach its goals, this articles attempts to locate the positive law across Europe without entering into the details of single national provisions of law. This, in fact, would require an in-depth analysis of its own that is worth of attention elsewhere. Likewise, it is not the purpose of this study to make an analysis of the compliance of the industry with the legal framework so identified.

² Directive 87/102/EC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit, OJ L 042, 12/02/1987 p. 0048-0053.

³ Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM (2002) 443 final 2002/0222 (COD); Modified proposal for a directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC, COM(2005) 483 final 2002/0222(COD).

Nevertheless, for the criticality of the difficult questions that consumer credit reporting raises, it ultimately suggests that further research by lawyers and scholars in the field, as well as open debates by policy makers, should precede any search for an appropriate regulatory model for the EC.

The legal framework

As it happens in every business sector, there are various regulatory scenarios within which the consumer information industry may operate. These are: general provisions of a comprehensive law, industry-specific (or sectoral) laws, industry codes of self-discipline (or, else, codes of conduct or practice), absence of any form of regulation.

Normally, industry-specific laws have the advantage to represent a derogation to general laws that may interfere with a business, in so far as the latter successively do not abrogate them. They are specifically tailored for the issues that distinctively affect a particular industry and involve detailed provisions covering a vast array of situations that typically (may) occur.

This may particularly be the case for consumer credit reporting in those circumstances where it is not mandated by law and there is no legal obligation for consumers to provide information nor for lenders to obtain a credit report before granting credit.

For example, in the U.S., the country where credit reporting first originated long before its transplantation in Europe, the passage of the Fair Credit Reporting Act (FCRA) was one of the events that left an indelible mark on the industry.⁴

First passed by Congress in 1970, the FCRA took effect in 1971 and for the following years regulated specifically credit reporting, with only minor amendments until the substantive changes adopted in 1996 and 2003 to further protect consumers. From its enactment, it applied only to individuals (not legal persons) and only to consumer credit (not the business or commercial one)

⁴ Furletti M., *An Overview and History of Credit Reporting*, Discussion Paper, Payment Cards Center, Federal Reserve Bank of Philadelphia, (Philadelphia,2002), 16.

setting forth the rules that govern the reporting activities of CRAs in the U.S. and regulating the way they must interact with creditors and consumers.

Ultimately, the law permitted CRAs to collect consumer credit data and assemble credit reports freely. At the same time, the three broad themes that dominated the legislative debate and intervention were highlighted in the preamble of the FCRA: "to ensure that consumer reporting agencies exercise their grave responsibilities with fairness, accuracy, and a respect for the consumer's privacy".⁵

In this regard, it is important to note that the FCRA has not been the only piece of legislation that has legitimised credit reporting in the U.S.

In 1974, in fact, the enactment of the Equal Credit Opportunity Act (ECOA) ensured the complete acceptance of credit reporting outlawing discrimination in that all consumers were given an equal chance to obtain credit. What is relevant about the ECOA for the purpose of this discussion is that among the factors that contribute to the final decision to extend credit there is the explicit recognition of credit histories (together with amount of income, expenses, and debts).⁶

In the end, therefore, in the U.S. industry-specific laws such as the ECOA and the FCRA contributed decisively in the legitimisation by law of the use of credit reports for credit granting purposes to consumers.

To date, however, this approach is alien to the EC where there is no industry-specific law at Community level. Similarly, at national level the Member States do not have laws equivalent to the FCRA and/or the ECOA.

Of course, this does not mean that the market remains unregulated, but rather that general provisions of comprehensive law apply. Exceptionally, though, some Member States provide domestically for few dispositions concerning consumers' data within the context of other regulations.⁷

⁵ Fair Credit Reporting Act of 1970, Pub. L. No. 91-508, 84 Stat 1114, codified at 15 U.S.C. § 1681(a).

⁶ Equal Credit Opportunity Act of 1975, 15 U.S.C. § 1691 et seq.

⁷ As it will be seen below, for example, this occurs within a banking act or, more commonly, data protection legislation.

The following sections attempt to identify those comprehensive laws that may affect the mechanisms at study in the EC.

Bank Secrecy

As seen, banks and other financial institutions (non-banks) share their customers' information via third-party CRAs.

At a first glance, this practice collides with that banks' customers expectation of confidentiality for financial and commercial transactions, whose history can be traced back thousands of years, mention of it being reported already at the time of the Roman empire.⁸

In many cases, in fact, bank secrecy laws are cited as a primary reason for influencing (in some cases obstructing) the development of credit reporting in a country, pulling in opposite directions and sometimes serving as a barrier.⁹

Among the several objectives of bank secrecy laws, the most evident one is to protect customers from the unwanted distribution of information about their financial matters. Certainly, it cannot be denied that in some occasions there may be objectionable reasons for the customers' interest in bank secrecy, including illegal activities such as for example money laundering, tax evasion and various forms of illicit use of the financial system. At the same time, however, there are a number of legitimate interests for customers to maintain the confidentiality of their financial data, last but not least general privacy considerations. Actually, this assertion is easily tested in today's international recognition and acceptance of the confidential nature of bank transactions when criminal offences are not involved.

The duty of confidence by banks raises difficult questions and complex legal issues which are beyond the scope of this work in so far as they do not collide with the subject matter at study.¹⁰

⁸ Bonini R., *Corso di Diritto Romano*, (Maggioli, 1984); Talamanca M., *Lineamenti di Storia del Diritto Romano*, (Giuffrè, 1989).

⁹ Del Villar R., Diaz de León A., and Hubert J.G., "Regulation of Personal Data Protection and of Credit Reporting Firms: A Comparison of Selected Countries of Latin America, the United States, and the European Union", in Miller M.J. (Ed.), *Reporting Systems and the International Economy*, (MIT Press: Cambridge, 2003), pp. 397-431.

¹⁰ For a thorough analysis of international banking secrecy laws, see Campbell D. (1992), *International Bank Secrecy*, (Sweet & Maxwell: London, 1992).

Moreover, the legal protection for confidentiality at the disposal of customers, however, may present appreciable differences from jurisdiction to jurisdiction. Nevertheless, for the purposes of this examination, and bearing in mind that each country has its own peculiarities, a general distinction could be drawn between civil and common law countries, pointing out eventual common characteristics.

In common law countries the duty of confidentiality is an implied term in the contractual relationship between a bank and its customer. This obligation, therefore, does not arise from statute or legislation but from precedents that form a body of case law decided by competent Courts in common law jurisdictions.

To summarise, the historic leading case is *Tournier v. National Provincial and Union Bank of England*, in which it was established that the bank owed its customer a legal, and not merely a moral, duty of confidentiality and could not lawfully disclose to third parties information concerning the customer's affairs¹¹.

This duty is not absolute but it is qualified by four exceptions, namely:

- (i) where disclosure is under compulsion by law;
- (ii) where there is a duty to the public to disclose;
- (iii) where the interests of the bank require disclosure;
- (iv) where disclosure is made by the express or implied consent of the customer.

Exceptions (i) and (ii) mean that the release of a customer's confidential information may be mandated by law in cases where the public interest prevails as the latter will suffer if disclosure does not occur. This, for example, happens in cases of criminal offences and tax evasion, or for the purposes of banking supervision (intended as the reporting of financial data by banks to monitor the soundness of the financial system). Significantly, in most cases – and certainly in the case of

¹¹ [1924] 1 K.B. 461.

banking supervision - the data of customers do not become publicly available but rather their dissemination is limited to the relevant authorities (such as, for example, a bank supervisor) that in turn are required to maintain a certain degree of confidentiality.

As far as consumer credit reporting is concerned, this is radically different from banking supervision. In fact, while the former represent a tool at the service of lenders (banks and non-banks) for their profitability, the latter is a public function carried by central banks or other public regulatory bodies that serve a public interest in the general stability of the banking and payment system.¹²

Also, this work has already stressed that the use of CRAs by lenders is not mandated by law, occurring on a voluntary basis.

Thus, legal scholars mainly assume that banks have been relying on either exception (iii) the interest of the bank; or exception (iv) consent of the customer; but it is arguable that banks have no entitlement to divulge customers' credit information under the common law and that the safest and proper course of action would be to ensure that they have the consent of the customer, either express or implied.¹³

In civil law countries such as European continental jurisdictions, by contrast, bank secrecy is not limited to a contractual obligation of the bank to its customers, but the obligation may also arise from statute or legislation, generally in the banking law or civil code, or from tradition. This, however, does not mean to say that it cannot be overridden by other legislation making exception to the rule. In some cases, besides, a breach of bank secrecy may constitute a criminal offence, unlike in common law jurisdiction where it gives rise to a civil claim for damages and/or a right to an injunction to prevent further disclosure.

Obviously, the exact content of the law varies from jurisdiction to jurisdiction, an example of which is provided in Table 1 below.

¹² Jappelli T. and Pagano M., *Information Sharing in Credit Markets: The European Experience*, CSEF Working Paper No. 35, University of Salerno, (Salerno, 2005).

¹³ Wadsley J. and Penn G. A., *The Law Relating to Domestic Banking*, 2nd ed., (Sweet & Maxwell: London, 2000), pp. 137-199; Campbell A., "Bank Confidentiality and the Consumer in the United Kingdom", in Cartwright P. (Ed.), *Consumer Protection in Financial Services*, (Kluwer Law International: London, 1999) pp. 93 et seq.

Table 1

Source: Research Group – Centre for Economic Studies, IFO Institute for Economic Research, Munich Society for the Promotion of Economic Research.¹⁴

Country	Sources	Secrecy Laws	Punishment of banks officials for violation of bank secrecy
Austria	1,2	Sections 23, 23a, 34, 35a of the Credit System Act (KWG). Relatively new amendments, they indicate a moderate-strong level of secrecy and are solidified through Austrian court decisions.	There are criminal sanctions, the prosecution is at the request of the injured party.
Belgium	1	Secrecy is not written out, rather is observed out of tradition. However, society places little value in banking secrecy, and consequently secrecy is rather weak.	No criminal offence, but any loss from wrongdoing must be reimbursed.
Denmark	1,2	Banking code explicitly states that secrecy must be maintained, leading to a “more trusting relationship than what is usual in business”.	Moderate prison terms and fines.
Finland	1,2	Generic secrecy law exists, although not particularly strong.	There are criminal sanctions, as well as compensation and/or fines.
France	1,2	Formerly the topic of discussion, Article 57(1) of the Banking Law passed in 1984 clearly indicates bank secrecy in France.	Criminal sanctions and fines.
Germany	1	Not explicitly written out anywhere, Germany refers to Art. 2(1) of the Basic Law which grants every individual the right to develop his own personality; this law is viewed as including bank secrecy.	Reparations for lost money, and the right for the customer to seek a court injunction against a bank.
Greece	1	Generally held that bank secrecy has become a law through time-customs, the Law Decree of 1971 recognised this and placed bankers under almost absolute secrecy.	Criminal sanctions
Ireland	1	Secrecy is not clearly written out, yet enforced through court decisions.	n.a.
Italy	1	Unwritten, yet traditionally observed (thus legally binding) provision restrict bankers from releasing information to third parties.	Failure to comply with court orders are punishable with criminal sanctions.
Luxembourg	1	Article 458 of the Penal Code states that “... professionals (i.e. bankers, etc.) who come into contact with secrets entrusted to them must respect those secrets”.	A fine is imposed for divulgence of confidential information.
Netherlands	1	No written law, the country relies on the principles gleaned from the intent of the law to define bank secrecy.	Moderate fines/sentences
Portugal	1	Decree Law 2/78 was passed stating that the utmost concern must be shown for the safeguarding of bank secrecy.	n.a.
Spain	1	No express provision establishing secrecy, yet a secrecy clause exists in the bylaws of the Bank of Spain.	Moderate fines and criminal sanctions.
Sweden	1	General provision states that the relations of individuals to a bank may not be disclosed without legal causes.	Fines/reimbursement
United Kingdom	1	No written law, <i>Tournier v. National Provincial and Union Bank of England</i> (1924) created a clear definition of bank secrecy, although recent court	Civil sanctions

¹⁴ CESifo Dice, available at <http://www.cesifo-group.de/pls/diceguest/download/F4547/LAWS/PDF>.

1 Campbell D. (1992), *International Bank Secrecy*, Sweet & Maxwell, London.

2 The Center for the Study of Central Banks, New York University, <http://www.law.nyu.edu/centralbankscenter/>

An interesting model is represented by some other countries that explicitly mention directly in the banking law what activity is permitted, thus avoiding any conflict with bank secrecy.

This is the example offered by credit reporting in the Czech Republic, that managed to implement data sharing arrangements through the provision of an exception in the banking law that was introduced only very recently expressly to grant banks the authority to share information.¹⁵

As mentioned, the major erosion of the concept of bank confidentiality has occurred through the introduction in both common law and civil law jurisdiction of legislation to fight criminal activities, tax evasion, and abuses of the financial system.

For the purposes of this work, in many cases the sharing (i.e. disclosure to third parties) of financial data is allowed through the individual authorisation of customers (i.e. individual consent) required by banks. However, whether such authorisation is the free choice of the individual or rather is enforced by financial institutions is all another (crucial) matter.

In the end, therefore, it may well be that nowadays a banker's duty of confidentiality, whether in common law or civil law, have very similar rules as to when information may be disclosed, either pursuant to overriding statutory obligation or by way of consent.

Thus, individual authorisation by consent seems the element that consumer credit reporting has to rely on to avoid breaches of bank secrecy, at least until the day it will be required and/or regulated

¹⁵ The Banks Act No. 21/1992. Article 38° states that “(1) Banks and foreign bank branches may provide each other with bank account details, identification data on account holders and information on matters attesting to the financial soundness and trustworthiness of their clients, including via legal entities which are not banks. Holdings in such legal entities may only be held by banks, which shall see to it that such legal entities keep the information secret and protect it against misuse. (...). (2) The Czech National Bank shall create a database from the information within the scope referred to in paragraph 1 obtained from banks, foreign bank branches, and other persons where a special legislative act so provides. (...) The transfer of information into this database shall not be deemed a breach of banking secrecy. However, banks and foreign bank branches shall treat information on the clients of another bank or foreign bank branch acquired from the database as if it were information on their own clients. (3) (*omissis*)”.

by law (if ever), except in those countries where the exception is purposely in the banking law itself.¹⁶

Data Protection

As it emerged already very clearly from the study conducted so far, an impressive number and type of personal data are involved, constituting the basis, or ‘raw material’, of consumer credit information systems.

To begin with, therefore, in the EC the activities of CRAs necessarily fall within the scope of privacy legislation, more specifically data protection.

While bank secrecy obligations are part of a long-standing legal tradition, though eroded in recent years, data protection laws are a relatively new phenomenon.¹⁷

From the aftermath of the atrocities of World War II, when the Nazis regime used various data collection and mining techniques available at the time to identify and persecute Jews all over the countries of their dominion, there is general consensus in Europe that information can become a tool of oppression and personal privacy must be protected.¹⁸

Such consciousness was reflected very soon in many European countries, which recognised at domestic level the importance of privacy as a fundamental freedom of the individual and considered its protection as a constitutional principle.¹⁹

¹⁶ See above the example of the Czech Republic.

¹⁷ It is useful to remind that data protection is one of several concepts (or aspects) of privacy, thus the two are not coincidental. See *Privacy and Human Rights – An International Survey of Privacy Laws and Developments*, Electronic Privacy Information Centre (Washington D.C., 2002) and Privacy International (London, 2002). According to the Report, “the recognition of privacy is deeply rooted in history. There is recognition of privacy in the Qur'an [*an-Noor 24:27-28 (Yusufali); al-Hujraat 49:11-12 (Yusufali)*] and in the sayings of Mohammed [*Volume 1, Book 10, Number 509 (Sahih Bukhari); Book 020, Number 4727 (Sahih Muslim); Book 31, Number 4003 (Sunan Abu Dawud)*]. The Bible has numerous references to privacy [*Richard Hixson, Privacy in a Public Society: Human Rights in Conflict 3 (1987). See also, Barrington Moore, Privacy: Studies in Social and Cultural History (1984)*]. Jewish law has long recognized the concept of being free from being watched [*See Jeffrey Rosen, The Unwanted Gaze (Random House 2000)*]. There were also protections in Classical Greece and ancient China [*Robert Ellis Smith, Ben Franklin's Web Site 6 (Sheridan Books 2000)*].” (Italic added, it transcribes the references indicated in the Report).

¹⁸ Privacy and Human Rights, op. cit *supra* note 17. Kuner C. (2005), “Privacy, Security and Transparency: Challenges for Data Protection Law in a New Europe”, EBLR (2005), 1-8; Samuelson P. (2000), "Privacy as Intellectual Property", 52(5) *Stanford Law Review* (2000), 1125-1174. Singleton S., *Privacy and Human Rights: Comparing the United States to Europe*, White Paper written for the Competitive Enterprise Cato Institute's conference on financial privacy, (The Cato Institute: Washington D.C. 1999).

¹⁹ The genesis of modern legislation in this area at European national level can be traced to the first data protection law in the world enacted in the Land of Hesse in Germany in 1970. This was followed by national laws in Sweden (1973),

As well, at international level the significance of providing an adequate legal protection to the privacy of individuals has been cherished for the first time as early as 1953 in the Council of Europe's Convention on Human Rights and Fundamental Freedoms, which in its Article 8 established for the first time 'the right to privacy', elevating it as an international human right.²⁰

From the 1960s, the fast developments of information and communication technologies gave rise to the need to protect individuals from the massive processing of data regarding individuals and the increasing purposes of their use. Such concerns provoked a shift of regulatory attention from the privacy of individuals to the more specific concept of protection of 'personal data' which culminated in the 1981 Council of Europe's Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (Convention No. 108/1981).²¹

Several member states of the European Community, however, did not sign the Convention.²²

Still, since the year 2000 the fundamental right to privacy recognised by the European Convention of Human Rights has been incorporated also in the Charter of Fundamental Rights of the European Union (Article 8).²³

Importantly, moreover, the Convention represented a major contribution to the current Community's legal framework which culminated in the adoption of the 1995 EC Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Data (Directive 95/46/EC) to respond to the threats posed by sophisticated information

the United States (1974), Germany (1977), and France (1978). See Privacy and Human Rights, op. cit *supra* note 17.

²⁰ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, (ETS No: 005) open for signature November 4, 1950, entry into force September 3, 1950, available at <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>

Article 8 states: (1) Everyone has the right to respect for his private and family life, his home and his correspondence. (2) There shall be no interference by a public authority with the exercise of this right except as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health of morals, or for the protection of the rights and freedoms of others.

²¹ Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data Convention, (ETS No. 108), Strasbourg, 1981, available at <http://www.coe.fr/eng/legaltxt/108e.htm>

²² For example, Italy and Greece.

²³ C 364 (2000), p. 0001-0022.

Article 8 - Protection of personal data – states:

“1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority”.

technologies to personal privacy at the same time fostering the single market in a global information society. Thus, the Directive serves the double purpose of both ensuring the free movement of personal data in the internal market and guaranteeing a high level of protection for data subjects. It establishes a minimum level of harmonisation, setting out a high level of normative protection with the result that the member states cannot go beyond nor fall short of these minimum standards.²⁴

The scope of the Directive, which applies to any operations performed upon personal data (data processing) is to provide for good data management practices on the part of those entities that determine the purposes and means of the processing of personal data (data controllers). It contemplates a sequence of general rules on the lawfulness of the processing of personal data, the principal ones including the following obligations: (i) to process personal data only for specified, explicit and legitimate purposes; (ii) to use personal data that are adequate, relevant and not excessive in relation to the purpose for which they are collected and/or further processed; (iii) to process accurate and up-to-date personal data, taking any reasonable step to ensure the rectification or erasure of inaccurate data; (iv) to keep the personal data in a form that permits identification of data subjects for no longer than necessary; (v) to process personal data only upon obtaining the unambiguous consent of data subjects after having informed him or her of the processing of the data; (vi) to guarantee the security of the data against accidental, unauthorised access, or manipulation; (vii) to provide notification to the national supervisory authority before carrying out all or certain types of data processing operations; (viii) to provide for certain safeguards or special procedures in the case of transfer of data outside the EU to third countries that guarantee an adequate level of protection.²⁵

For the purpose of this discussion, it is worth to emphasise that the Directive applies to all data controllers and/or any other persons processing personal data on their behalf (data processors), meaning that it is a comprehensive law that creates a regime where the same rules and principles apply to everyone across all industries.

²⁴ Directive 95/46/EC, OJ L 281, 23/11/95, p. 0031-0050.

²⁵ *Ibid.*

Consumer credit reporting is no exception. Accordingly, indeed, data protection legislation constitutes its principal legal framework having an enormous impact on how, and even whether, an the industry develops (or, at least, ought to develop).

Notably, however, the Directive provides in its Article 5 that “the member states shall (...) determine more precisely the conditions under which the processing of personal data is lawful” within the limits of the provisions that it establishes.²⁶

This leaves a distinctive margin of manoeuvre to the Member States, causing the well known result of the differing implementation of data protection legislation within their national jurisdiction, as well as diverging concepts in its application, despite the principle that “the level of protection must be equivalent in all member states”.²⁷

As a result of this lack of uniformity in the implementation of the Directive by the Member States, one of the major concerns relates to its legal certainty, as well as a burden for the free movement of data in the EC and the effectiveness of equivalent high standards of protection of the rights and freedoms of individuals alike.²⁸

In this context, some Member States have enacted provisions or guidelines that further specify the domestic regulation of consumer information sharing. As a consequence, this has contributed to the implementation of different national legal requirements for the industry at study that result in the lack of coordination one with the other.

Consumer Credit Laws

²⁶ *Ibid.*, Article 5.

²⁷ *Ibid.*, Recital (8) and Recital (9). According to Recital (9) such margin of manoeuvre in the implementation of the Directive should be in accordance with EU Law. On the differing implementation of the Data Protection Directive (95/46/EC) see Commission of the European Communities, *Report from the Commission – First report on the implementation of the Data Protection Directive (95/46/EC)*, Brussels 15.05.2003, COM(2003) 265 final; Korff D. *Comparative summary of national laws*, EC Study on Implementation of Data Protection Directive (Study Contract ETD/2001/B5 3001/A/49), Human Rights Centre, University of Essex, (Colchester, 2002); European Commission, *Analysis and impact study on the implementation of Directive EC 95/46 in Member States*, available at <http://www.europa.eu.int/comm/privacy>.

²⁸ *Ibid.* See also Sousa de Jesus A., *Data Protection in EU Financial Services*, ECRI Research Report No. 6, (Brussels, 2004), p. 27; The International Chamber of Commerce, *Position Paper to the European Commission on the Consultation process on the data protection directive* available at http://europa.eu.int/comm/justice_home/fsj/privacy/docs/lawreport/paper/uscib_en.pdf.

Although one may be tempted to think that consumer credit laws by their nature should include the regulation of information sharing arrangements, unexpectedly these are normally excluded from their provision.

The United Kingdom provides an example at national level of the most recently enacted and modern consumer credit law vis-à-vis the attitude towards the related issue of consumer credit reporting.

The Consumer Credit Act 2006 reforms the Consumer Credit Act 1974. The aim of the new Act is to protect consumers and create a fairer and more competitive credit market.

There have been some pressure from the industry to use the Consumer Credit Act 2006 as a vehicle for addressing the subject of data sharing. However, such issue has been considered wider than just those covered by the Consumer Credit Act. Data sharing does not, therefore, feature in the Act and the British Government does not propose to make any changes relating to CRAs.²⁹

The example provided by the UK is in some way reflected at European level, where it appears that similar reasoning and choices were made.

Adopted in 1987, the Consumer Credit Directive 87/102/EEC established a legal framework for consumer credit throughout the EU with the aim of promoting a common market for credit and creating an environment in which consumers receive adequate protection.³⁰ Significantly, no provision nor mention of consumer information sharing was made.

Directive 87/102/EEC has been amended twice, in 1990 and in 1998, but again no action in relation to consumers' data was taken on these occasions.

However, the minimal harmonisation approach of Directive 87/102/EEC has resulted in the fragmentation and segmentation of credit markets into separate national ones. As recent research conducted by the Centre for European Policy Studies has stressed, "the introduction of a minimum harmonisation clause in Directive 87/102/EC allowed member states to provide a higher level of

²⁹ Department of Trade and Industry, *Consumer Credit Bill, Full Regulatory Impact Assessment*, available at www.dti.gov.uk/ccp/creditbill/pdfs/creditbillria2.pdf; See also Experian, *Official Website*, <http://www.experian.co.uk/corporate/compliance/consumercredit/consumercredit.html>.

³⁰ Directive 87/102/EC for the approximation of the laws, regulations and administrative provisions of the member states concerning consumer credit, OJ L 042, 12/02/1987 p. 0048-0053.

consumer protection in the field of consumer credit than that established in the Directive. In many cases, national legislators have used this opportunity and consumer credit legislation has largely been re-nationalised. This move has resulted in a complex fragmentation of consumer credit regulations throughout the EU. (...) Consequently, with Directive 87/102/EC, the legislation on consumer credit under the minimum harmonisation clause has limited the development of the EU internal market and reduced the possibilities of expanding the consumer credit business across member state frontiers".³¹

As a reaction, the European Commission presented on 11/09/2002 a proposal for a Directive on the harmonisation of the laws, regulations and administrative provisions concerning credit for consumers (hereinafter the 'Proposal').³²

The Proposal aimed "to pave the way for a more transparent market, a more effective market and to offer such a degree of protection for consumers that the free movement of offers of credit can occur under the best possible conditions both for those who offer credit and those who require it".³³

The text spelled out a comprehensive set of provisions that would have impacted the way the consumer credit industry and market function, including consumer credit reporting.

In particular, in Chapter III of the Proposal titling 'Protection of Privacy', Article 7 (Collection and Processing of Data) stated:

"Personal data obtained from consumers, guarantors or any other person in connection with the conclusion and management of agreements covered by this directive, and in particular by Article 6 (1), may be processed only for the purpose of assessing the financial situation of those persons and their ability to repay".³⁴

³¹ Lanoo K. and de la Mata Muñoz, *Integration of the EU Consumer Credit Market – Proposal for a More Efficient Regulatory Model*, CEPS Working Document No. 213, (Brussels, Nov. 2004), pp.5-6.

³² Proposal for a Directive of the European Parliament and of the Council on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers, COM (2002) 443 final 2002/0222 (COD).

³³ *Ibid*, Explanatory Memorandum, p. 4.

³⁴ *Ibid*. In turn, Article 6(1) – Exchange of Information in Advance and duty to provide advice - of the Proposal provided: "Without prejudice to the application of Directive 95/46/EC, and in particular Article 6 thereof, the creditor and, where applicable, the credit intermediary may request of a consumer seeking a credit agreement, and any guarantor, only such information as is adequate, relevant and not excessive, with a view to assessing their financial situation and their ability to repay.

The following Article 8 (Central Database), innovatively bringing into play either CRAs or PCBs depending to the various institutional arrangements of each Member State, specified:

“1. Without prejudice to the application of Directive 95/46/EC, Member States shall ensure the operation on their territory of a central database for the purpose of registration of consumers and guarantors who have defaulted. This database may take the form of a network of databases.

Creditors must consult the database prior to any commitment on the part of the consumer or guarantor, subject to the restrictions referred to in Article 9. The consumer and, where appropriate, the guarantor shall, if they so request, be informed of the result of any consultation immediately and without charge.

2. Access to the central database in another Member State shall be ensured under the same conditions as for firms and individuals in that Member State, either directly or via the central database of the home Member State.

3. Personal data received under paragraph 1 may be processed only for the purpose of assessing the financial situation of the consumer and guarantor and their ability to repay. The data shall be destroyed immediately after the conclusion of the credit or surety agreement or the refusal by the creditor of the application for credit or the proposed surety.

4. The central database referred to in paragraph 1 may include the registration of credit agreements and surety agreements.”³⁵

The Proposal, finally, introduced in Article 9 the principle of responsible lending, based on the requirement that a lender has “previously assessed, by any means at his disposal, whether the consumer and, where appropriate, the guarantor can reasonably be expected to discharge their obligations under the agreement”.³⁶

The consumer and guarantor shall reply accurately and in full to any such request for Information”.

³⁵ *Ibid.*

³⁶ *Ibid.*

In practice, the introduction of the rather difficult – and controversial - concept of ‘responsible lending’ would have represented an obligation for the ‘good lender’ to consult centralised credit databases and to examine the responses provided by the consumer and eventually the guarantor.

The above three provisions of the Proposal would have been an interesting ground for discussion and detailed analysis for this work and its subject matter, if it wasn’t that they have been suppressed in the modified version presented after rejection of the Proposal on 11/09/2003 by the Legal Affairs Committee of the European Parliament and its consequent withdrawal by the Commission.³⁷

On 10/10/2005, in fact, the Commission presented pursuant to Article 250(2) of the EC Treaty a modified proposal for a Directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC (hereinafter the ‘Amended Proposal’).³⁸

As a whole, the Amended Proposal has revolutionised the original Proposal. As far as consumer information sharing is concerned, the former Article 7 has been completely erased and the former Article 6 has been incorporated with substantial modifications in the new Article 5(1):

“The creditor and, where applicable, the credit intermediary shall adhere to the principle of responsible lending. Therefore, the creditor and, where applicable, the credit intermediary, shall comply with their obligations concerning the provision of pre-contractual information and the requirement for the creditor to assess the consumer’s creditworthiness on the basis of accurate information provided by the latter, *and, where appropriate, on the basis of a consultation of the relevant database.* (emphasis added)

Where the credit agreement allows the creditor to change the total amount of credit after the date of conclusion of the credit agreement, the creditor shall update the financial

³⁷ Committee on Legal Affairs and the Internal Market, P5_TA-PROV(2004)0297, (A5-0224/2004 - Rapporteur: Joachim Wuermeling) PE 338.483, “European Parliament legislative resolution on the proposal for a European Parliament and Council directive on the harmonisation of the laws, regulations and administrative provisions of the Member States concerning credit for consumers (COM(2002) 0443 – C5-0420/2002 – 2002/0222(COD)).

³⁸ Modified proposal for a directive of the European Parliament and of the Council on credit agreements for consumers amending Council Directive 93/13/EC, COM(2005) 483 final 2002/0222(COD)

information at his disposal concerning the consumer and shall assess the consumer's creditworthiness before any significant increase in the total amount of credit".³⁹

As made clear in the Explanatory Memorandum of the Amended Proposal, the obligation to set up national credit reference databases has been deleted, "since this would go beyond the purpose of this Directive. Issues relating to data protection are already dealt with in the Data Protection Directive 95/46/EC. Therefore, the Commission proposes to guarantee only a mutual access to existing private and public databases on a non-discriminatory basis".⁴⁰

In the intention of the legislator, this simply means that the Amended Proposal requires all existing databases on consumer credit to be opened up to EU credit providers on a non-discriminatory basis, instead of requiring the setting up of new consumer credit databases at national level.⁴¹

Finally, as regards the controversial concept of 'responsible lending', the Amended Proposal has modified the initial formulation requiring lenders to give standardised information about important elements such as annual percentage interest rate, fees and monthly repayments when advertising consumer credit products. It also obliges lenders to give consumers comprehensive information about a credit agreement in good time before they sign the contract, to document the agreement properly and keep the consumers properly informed about their respective rights and obligations under the agreement throughout their credit relationship. These information requirements, coupled with the right to cancel a credit agreement within fourteen days of signing it, is intended to help consumers to avoid taking on more debt than they can afford. In addition to this core requirements, the revised law demands lenders to check a consumer's creditworthiness before concluding a credit agreement with him or her, without imposing any specific means among the many that could be used (CRAs, indeed, are just one possibility).⁴²

³⁹ *Ibid.*, Article 5(1).

⁴⁰ *Ibid.*, Explanatory Memorandum, p. 6; See also *Ibid.*, Article 8(1) Database Access.

⁴¹ European Commission MEMO/05/361 Date 10/10/2005 available at <http://europa.eu.int/rapid/pressReleasesAction.do?reference=MEMO/05/361&format=HTML&aged=0&language=EN&guiLanguage=fr>

⁴² *Ibid.*

In the end, therefore, the position of the relevant European institutions after consultation with the industry seems to voluntarily neglect the regulation of consumer credit reporting within the context of a consumer credit law, with the result that it will substantially leave the *status quo* in the sector.

It should not be forgotten, in any event, that this is still a proposal and so far the member states have shown little signs of agreement in the area of harmonisation of national laws in consumer credit.

From past experience, therefore, it is not excluded that further processes and amendments will happen on top of the time necessary for the implementation of a directive whose discussions have been lasting for years. Its enactment, therefore, seems ways too far from being at sight.

Concluding Remarks

This work has examined the legal standing of consumer credit reporting in the EC.

Within the various existing legal scenarios, industry-specific laws are alien to the data sharing arrangements in place, thus at Community level there is no uniform or harmonised legislation similar to that that has shaped the industry in the U.S. where they first developed.

What emerges from a survey of the legislative framework in the EC is that omni-comprehensive data protection is and will remain the crucial law that to date regulates the sector.

At the same time, the new proposals for a consumer credit directive seem to leave the state of affairs unchanged, as the issues relating to consumers' data have been considered wider than those that they intend to cover, referring their regulation back to the data protection directive.

This means, in the end, that it is the data protection legislation as implemented in each national Member State that applies.

Certainly, additional intriguing scenarios of other less obvious applicable laws may be identified, such as provisions concerning gender recognition (when existing in some Member States) or issues of social discrimination and access/exclusion to credit. As well, the mechanisms of information sharing in today's sensitive context of data protection intended as a human right may give rise to new possibilities of other applicable laws, such as those relating to unfair contract terms. All these,

however, would be the result of legal interpretations that should be tested and discussed in detail separately elsewhere.

What strikes someone attention from the fragmented application of national data protection laws is that the lack of uniform application of the rules is likely to contribute to leave the sector as a domestic business far from the principles of the Community's Internal Market. However, the free movement of people and an effective mobility of Europeans from a Member State to another, coupled with issues of non-discrimination based on nationality, will require harmonisation in the sector. How is a lender from one Member State supposed to behave when faced by the credit application of an EC foreign national who has changed residency to that Member State and whose information are stored in his or her previous country? What rules should it apply? Will the EC foreign national be discriminated in his or her credit application?

Most importantly, on top of that, policy makers should debate openly whether the sophisticated mechanisms of credit reporting comply with the positive law and whether the latter is adequate to cover the many issues and concerns that may rise. The sector, in fact, is surrounded by many difficult questions and complex legal issues such as, for example, concerns over the privacy and right to non-discrimination of individuals, the real connection between credit reporting and the predictability of human behaviour, the meaning of over-indebtedness and the sources of debts, the powerful and arbitrary positioning of privately owned companies such as CRAs in the modern society, institutional arrangements, a system of governance for the cross-border exchange of information within the EC, competition in the consumer information distribution market, etc. Provided, of course, that consumer credit information is really the answer to responsible lending practices in an efficient and thriving consumer credit market, a circumstance that should be still demonstrated - either by way of conclusive evidence of a relation of cause and effect or, at least, empirically.

As debates of the like are numerous and critical, it would be advisable as a matter of policy to carefully analyse and question publicly the many implications of the system of credit reporting

itself, beginning from its worthiness vis-à-vis the many concerns for civil liberties and discrimination that intuitively it is likely to carry with it.

If the smooth operation and further development of an efficient financial market is important for the economy, at the same time there is a duty to protect consumers adequately, for instance by preserving the right of individuals to the privacy of their transactions as well as a fair and legitimate use of their personal data.

Looking ahead, therefore, legal research on the topic seems particularly important as the EC single market and the political desire for further harmonisation and integration within the Community are likely to have a dramatic impact on the financial service industry, in particular consumer lending.