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**TOPIC: Automated Decision-Making in Consumer Credit: Legal Obligations of Credit Providers and Credit Scoring Institutions**

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**Automated Decision-Making in Consumer Credit: Legal Obligations of Credit Providers and Credit Scoring Institutions**

The use of new technologies, in particular of Artificial Intelligence (AI), in the financial sector results in the automation of many processes, including (a) the assessment of consumers' creditworthiness through automated processing of their financial data and (b) the decision-making as to the granting or denial of credit by credit institutions through an automated assessment of the customers' positive or negative rating, in combination with other data.

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Credit scoring is usually carried out by the credit institutions themselves or by third party credit risk or scoring institutions (*such as Tiresias in Greece*) that have access to consumer financial databases, including their income, expenses, as well as their financial obligations. The outcome of this scoring often plays a decisive role in the decision to grant credit.

These processes are crucial for consumers' access to finance and other essential services. Therefore, when such processes are carried out automatically and without human intervention, Credit Providers and Credit Scoring Institutions must comply with a set of legal obligations stemming from, among others, the GDPR, Directive 2023/2225 on credit agreements for consumers, the AI ACT and the DORA Act.

***The concept of automated decision-making: Is the automated assessment of a consumer's creditworthiness considered "automated decision-making producing legal or similarly significant effects" under article 22 of the GDPR?***

For the implementation of article 22 of the GDPR establishing the data subject's right not to be subject to a decision based solely on automated processing, three conditions must be cumulatively met: a) the existence of a decision, b) such decision's footing solely on automated processing and c) the production of legal or similarly significant effects by this decision.

According to Recital 71 of the GDPR, it is evident that the decision to grant or refuse credit to a consumer by automated means constitutes "*automated decision-making producing legal or similarly significant effects*", resulting in additional statutory obligations for credit institutions, as will be discussed below. However, this is not the case with the process of assessing the consumer's creditworthiness. It is partially argued that the creditworthiness' assessment is not a stand-alone "*decision*" but is essentially a pre-stage of such decision and in any case it doesn't produce 'legal or similarly significant' effects.

The Guidelines on Article 29 Data Protection Working Party on Automated Individual Decision-Making and Profiling for the purposes of Regulation 2016/679 provide a detailed interpretation of the concept of "*automated decision-making producing legal or similarly significant effects*." According to these guidelines, a "*decision producing legal effects*" is one that affects an individual's legal rights, legal status, or contractual rights. The automated assessment of a consumer's creditworthiness does not fall into this category, as the assessment is carried out before the conclusion of a contract.

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However, automated decision-making can produce similarly significant effects when the decision has the potential to significantly affect the circumstances, behavior, or choices of the individuals concerned. For example, decisions that impact an individual's financial circumstances, such as their eligibility for credit, can have significant effects. A negative assessment can substantially deprive the data subject of the opportunity to obtain credit.

This issue was definitively addressed by the Court of Justice of the European Union (CJEU) in Case C-634/21, "*Schufa*". The Court, in an obiter dictum, stated that the aim of the obligations inserted by article 22 of the GDPR is the protection of data subjects from imperilment of their rights, such as discrimination, and the assurance that automated data processing is carried out transparently and with appropriate safeguards. If the credit assessment were not considered automated decision-making under article 22 but a preparatory act (*restrictive interpretation*), the data subject would be deprived of the rights provided in that article, such as the right to human intervention and explanation of the decision.

In conclusion, the Court held that "*Article 22(1) of Regulation (EU) 2016/679 ... must be interpreted as meaning that the automated establishment, by a credit information agency, of a probability value based on personal data relating to a person and concerning his or her ability to meet payment commitments in the future constitutes 'automated individual decision-making' within the meaning of that provision, where a third party, to which that probability value is transmitted, draws strongly on that probability value to establish, implement or terminate a contractual relationship with that person*".

## ***Obligations for Credit Providers and Credit Scoring Institutions as data controllers under Article 22 of the GDPR***

As a consequence, the assessment of consumers' creditworthiness through automated processing of their financial data, and the decision-making on the granting or denial of credit (*as a decision based solely on automated processing which produces legal effects concerning the individual or similarly significantly affects them*), must be based on one of the following legal bases: a) the necessity for the performance of a contract, b) authorization granted by the European Union or Member State law, or c) the data subject's explicit consent. Furthermore, in cases where the legal basis is a) or c), the relevant institutions must adopt suitable measures to safeguard the data subject's rights. These measures include the right to human intervention, the right to contest the decision, and the data subjects' right to express their point of view.

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Additionally, when personal data is not provided directly by the data subject, the institutions must inform them about the existence of automated decision-making, including the logic involved, the significance, and the envisaged consequences of processing of their financial data. In this sense, the Credit institutions shall also carry out a “data protection impact assessment” of the aforementioned automated processing of their clients’ financial data, according to article 35 para 3 (a) of the GDPR.

## ***Further legal obligations for credit providers and credit scoring institutions in automated decision-making under GRPR, Directive 2023/2225 on credit agreements for consumers, the AI ACT and the DORA***

Among other obligations provided in the GDPR, according to general principles on personal data processing outlined in article 5 thereof, the Institutions must use only the necessary financial data for defined purposes, such as the credit-scoring assessment and ensure that the financial data are accurate and up-to-date.

Furthermore, the obligations stemming from Directive (EU) 2023/2225 on credit agreements for consumers, which aims to promote responsible practices in credit relationships and the enhance the information and education provided to consumers, are noteworthy. According to Recital 53 of the Directive, responsible credit practices include the prior assessment of creditworthiness, often via automated systems (AI), based on financial databases. This does not imply that a positive assessment should prejudice the creditor’s freedom of contract.

When automated processing of consumers’ personal data is used to assess their creditworthiness, article 18 para 8 of the Directive requires that Member States shall ensure that consumers are informed thereof and are, thus, enabled to exercise their right to human intervention. Consumers shall be afforded with the rights: a) to request a clear and comprehensible explanation of the creditworthiness assessment, including the logic, risks, significance, and effects of the automated processing of personal data; b) to express their own point of view to the creditor; and c) to request review of the creditworthiness assessment and the credit decision by the creditor. This provision complements article 22 of the GDPR, reinforcing consumers’ right to human intervention and transparency in credit-related automated decision-making.

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In addition, the use of AI-based automated systems for credit scoring triggers the application of the AI ACT (*Regulation EU 2024/1689 laying down harmonised rules on artificial intelligence*). Specifically, article 6 para 2 in conjunction with Annex III para 5(b) of the AI Act classifies “AI systems intended to evaluate the creditworthiness of natural persons or establish their credit score, except for AI systems used to detect financial fraud,” as high-risk AI systems, imposing additional obligations on providers and deployers of these systems.

Providers of high-risk AI credit scoring systems must ensure compliance with the requirements set out in Sections 2 and 3 of the AI Act, including the establishment of a risk management system, technical documentation of the AI system before market placement, automatic recording of events (logs) throughout the system's lifetime, transparent operation, provision of instructions and information to deployers, human oversight during use, assurance of the system's accuracy and cybersecurity, and the establishment of a quality management system.

Deployers of such systems, i.e., credit scoring institutions, must ensure human oversight by competent and well-trained individuals, implement appropriate technical and organizational measures to ensure the system operates according to the provider's instructions, maintain automatic records of events produced by the AI system, and inform individuals that they are subject to or interacting with an AI system.

Finally, the DORA Act (Regulation (EU) 2022/2554 on digital operational resilience for the financial sector) is noteworthy, as it applies to credit institutions and credit rating agencies. It addresses the management of digital risks by these institutions and will be effective from 17 January 2025. The Act sets requirements for the security and continuity of automated systems supporting business processes, such as credit ranking and decision-making on granting or denying credit. Key requirements include the establishment of a risk management framework, mechanisms to detect and respond to unusual activities, backup and restoration policies, and an incident management process, all aimed at ensuring financial stability and consumer protection.

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