Formal comments of the EDPS on the Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral

1. Introduction

On 14 March 2018, the Commission tabled a proposal for a Directive on credit servicers, credit purchasers and the recovery of collateral (hereinafter "the Proposal")[1].

The Proposal aims to prevent the excessive build-up of non-performing loans (hereinafter "NPLs") on banks' balance sheets by increasing the efficiency of debt recovery procedures through the availability of a common accelerated extrajudicial collateral enforcement procedure (hereinafter "AECE") and by encouraging the development of secondary markets for NPLs.

The Explanatory Memorandum states that the Proposal is essential for the completion of the Banking Union and is equally important for the establishment of the Capital Market Union and the strengthening of Europe's Economic and Monetary Union (EMU). Moreover, it is explained that high stocks of NPLs, i.e. loans that are more than 90 days past due and are consequently assessed as unlikely to be repaid by the borrower, could have a negative impact on bank performance. In particular, it is stressed that such high stocks of NPLs could reduce a bank's profitability and could in severe cases put in question the viability of a bank with potential implications for financial stability. In addition, such high stocks of NPLs could tie up significant amounts of a bank's resources, which reduces a bank's capacity to lend money.

One of the EDPS' tasks is to advise the Commission services in the drafting of new legislative proposals with data protection implications. The EDPS notes that the Commission did not consult him during the inter-service consultation, nor after the adoption of the Proposal. However, the EDPS welcomes that the Commission consulted him on 12 November 2018 and that he had the opportunity to exchange views informally. The EDPS takes positive notice of the approach taken by the Council working group.

The EDPS has limited his comments below to the provisions of the Proposal that are particularly relevant from a data protection perspective.

2. General comments

Preliminary Remarks

The EDPS welcomes that the Proposal stresses in Recital 54 that Regulation (EU) 2016/679 (hereinafter the "GDPR") and Regulation (EC) No 45/2001 (now repealed and replaced by Regulation (EU) 2018/1725) will apply to the processing of personal data in the context of the

[1] COM (2018) 135 final, Proposal for a Directive of the European Parliament and of the Council on credit servicers, credit purchasers and the recovery of collateral, Procedure file 2018/0063 (COD).

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Proposal. He also welcomes that Recital 54 of the Proposal explicitly stresses that the transposing national legal act should specify the precise purpose for the processing of personal data and that the principles of necessity, proportionality, purpose limitation and storage period should be respected.

As the Proposal aims to foster the development of secondary markets for NPLs, in particular by encouraging banks to outsource the servicing of non-performing loans to specialised credit servicers or to sell such credit agreements to credit purchasers, the EDPS is of the opinion that it is most important that borrowers receive all relevant information after their credit agreement was sold. For this reason, the EDPS suggests to introduce in Recital 54 of the Proposal a specific reference to the principle of transparency, thus recalling that data subjects should be informed about the processing of their personal data during all stages.

The EDPS also positively notes that the Proposal contains with Article 36 a specific provision to the applicability of the GDPR and of Regulation (EC) No 45/2001. However, for the sake of clarity, the EDPS suggests to introduce the following, simpler wording: "*The processing of personal data for the purposes of this Directive shall be carried out in accordance with Regulation (EU) 2016/679 and with Regulation (EU) No 2018/1725.*"

Requirements for the authorisation of credit servicers

The EDPS notes that the Proposal requires credit servicers to obtain authorisation by its home Member State before commencing its activities. Among other requirements, Article 5(1)(c) of the Proposal foresees that "*the applicant has appropriate governance arrangements and internal control mechanisms in place which ensure respect for borrower rights and compliance with personal data protection rules in accordance with the laws governing the credit agreement*" (emphasis added).

The EDPS is concerned that the wording of Article 5(1)(c) of the Proposal could be misinterpreted in the sense that personal data protection is subordinated or subject to the "*laws governing the credit agreement*". For this reason, the EDPS recommends the following wording: "*the applicant has appropriate governance arrangements and internal control mechanisms in place which ensure respect for borrower rights and compliance with the laws governing the credit agreement and with Regulation (EU) 2016/679.*"

Contractual relationship between a credit servicer and a creditor

The EDPS observes that pursuant to Article 9(3) of the Proposal credit servicers will be obliged to keep and maintain - among others - all correspondence with the creditor and the borrower and all instructions from the creditor regarding each credit agreement they manage and enforce on behalf of a creditor "*for at least 10 years from the date of the contract*".

The EDPS recalls that in accordance with the 'data minimisation principle' and the 'storage limitation principle' as laid down in Article 5(1)(c) and (e) of the GDPR, personal data should be adequate, relevant and limited to what is necessary and no longer kept than it is necessary for the purposes for which the personal data are processed. Against this background, and also in light of possible different requirements under the applicable national laws in this matter, the EDPS recommends the following wording: "*for a period not longer than is necessary for the purposes of the implementation of this Directive and in accordance with the relevant applicable national laws and in any event no longer than 10 years*".

In this regard, and in line with the wording of Article 10(1)(f) of the Proposal, which refers to "*all relevant information concerning the outsourced services*", the EDPS recommends to add in Article 9(3)a and (b) of the Proposal the word "relevant", i.e. "*all relevant correspondence*" and "*all relevant instructions*".

Transmission of personal data to the competent authorities of the Member States

Article 13(2) of the Proposal provides an obligation for credit institutions or subsidiaries of a credit institution to inform the competent authorities about the transfer of a credit agreement to a credit purchaser. In particular, the competent authorities will have to be informed on the type of asset securing the credit agreement and whether it is a consumer credit agreement (a), the value of the credit agreement (b) and on the identity and address of the borrower and of the credit purchaser or its legal representative (c). Pursuant to Article 13(3) of the Proposal, the competent authority would then have to transfer this information together with any other information that it considers necessary to the competent authorities of the Member State where the credit purchaser or its representative is resident or established and of the Member State where the borrower is established. Similarly, pursuant to Article 18 and 19 of the Proposal, a credit purchaser would be required to inform and transfer all of the aforementioned data to the competent authority where he intends to directly enforce a credit agreement or transfers the credit agreement to another credit purchaser. The competent authority would then have to transfer this information to the competent authorities of the Member State where the borrower or the new credit purchaser or its representative is established.

Taking into account that the total volume of NPLs across the Union is currently at the level of € 950 billion[2] it is obvious that the proposed transmission of personal data would require competent authorities to transmit a high amount of information, including personal data. The EDPS observes that Article 20 and 21 of the Proposal, which define the supervisory role of the competent authorities, provides these authorities with the power to obtain all necessary information to assess the ongoing compliance with the proposed obligations and to conduct on-site and off-site inspections. Taking into account the principle of 'data minimisation', the EDPS is doubtful whether the proposed obligation to transmit all the personal data by default in all cases as laid down in Article 13(2)(c), Article 18(1)(c) and Article 19(1) of the Proposal is indeed necessary for the supervision by the competent authorities. In particular, the sharing of anonymised, pseudonymised data or aggregated information might also be sufficient to achieve effective supervision. For this reason, the EDPS calls upon the legislators to reassess the necessity of and limit the scope of the proposed data sharing obligation.

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[2] SWD(2018) 75 final, Impact Assessment, The development of secondary markets for non-performing loans by removing undue impediments to loan servicing by third parties and the transfer of loans (Part 1/2), p. 5.