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**Positive Credit Reporting
System**

Possibility Under Estonian Legislation

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Table of Contents

Introduction.....	3
1. Credit Reporting.....	4
1.1. Public Credit Register.....	6
1.2. Private Credit Bureau.....	7
1.3. Information in Credit Reporting.....	8
2. Idea of Positive Credit Reporting in Estonia.....	12
2.1. “No!” by Estonian Data Protection Inspectorate.....	14
3. Responsible lending principle.....	21
3.1. Art 7 in DPD.....	24
3.2. Legitimate Interest According to Article 29 Working Party.....	26
3.3. Balancing Test.....	28
3.4. Positive credit reporting and balancing test.....	30
4. Personal Data.....	34
5. Pros and cons for credit reporting.....	39
Conclusion.....	45
References.....	47

Introduction

There have been discussions in Estonia on the topic of whether Estonia should have a positive credit reporting system. This has raised several questions, but mainly on the data protection field. What data should be processed? Would this data that would be shown in the registry impinge data subjects, ultimately consumers, right to have privacy? What is considered as personal data? Is this kind of data considered as information that should not be shown under circumstances where one party has may be a legitimate interests?

Yes, the positive credit reporting registry and the idea of creating one raises a lot of questions. It is understandable why as all people are at the end of the day consumers, and just normal people, who want to feel safe and protected from people with cruel intentions. Can it be said that a creditor has bad intentions when it wants to see information on a debtor who is applying for a credit? Should it not be considered OK that a creditor wishes to evaluate the creditworthiness of the debtor?

The hypothesis of this thesis that positive credit reporting system is justified and it should have a green light in Estonia for making one. The thesis will analyse first credit reporting and the possible ways of running one. Next it will analyse the idea in Estonia to create it and what are the notes that should be taken into account when there should be a green light for creating one. Should the responsible lending already state yes, or is there more, such as balancing test. Last section of the thesis will be personal data and the “Yes” and “NO” on positive credit reporting system.

1. Credit Reporting

After the worldwide financial crisis¹ that took place not so long time ago, some Estonia's credit institutions have expressed their thoughts on to make a valid and well-working positive credit reporting system.² Credit reporting means the use of information about persons', mainly natural person's, financial obligations.³ It is fairly sensitive information, considering that a creditor has access to see what kind of financial obligation or in a financial situation a person is. Thoughts on creating a positive credit reporting system raises question whether such kind is necessary?⁴ So far Estonia has a private credit bureau which is known as Krediidiinfo AS (Credit Info Ltd).⁵

Now when a lender has to make the decision whether to grant the credit or not, a full picture of a client's financial position and outstanding debt obligation is needed. To estimate a person's creditworthiness in a useful way is to prevent irrelevant lending and borrowing. So the information accessed for it has to reflect the indebtedness of the client and the likelihood, that if the borrower will grant a loan to the client, it will be a very good chance that it will be paid back. This means that credit reporting has to contain and reflect accurate data about the borrower.⁶

Credit reporting is simply said a system for collecting, sharing and using appropriate data for the purposes of making decisions related to credit contracts and / or managing credit agreements.⁷ This system contains data that is related to individuals as 1) the data subjects; 2) creditors as the data providers and as users for the system; & 3) credit register operators

¹ Krediidipank "Ülemaailmne finants- ja majanduskriis (alates 2008)", see here: <http://www.krediidipank.ee/bank/history/2008-2009.html> (last accessed 03.11.2014)

² Kaido Saar "Andmebaas teeb laenud odavamaks", Äripäev 2013, see here:

<http://www.aripaev.ee/apps/pbcs.dll/article?>

[avis=EA&date=20131015&category=OPINION&lopeNo=310159957&Ref=AR&template=printart](http://www.aripaev.ee/apps/pbcs.dll/article?avis=EA&date=20131015&category=OPINION&lopeNo=310159957&Ref=AR&template=printart) (last accessed 03.11.2014)

³ Dieter Steinbauer & Elina Pyykkö "Towards Better Use of Credit Reporting in Europe", CEPS-ECRI Task Force Report, September 2013, p i

⁴ *Ibid*

⁵ Krediidiinfo AS home page: http://www.krediidiinfo.ee/index.php?ss_max=10&ss=&m=&otsi=1&lang=I (last accessed: 04.11.2014)

⁶ ACCIS Association of Consumer Credit Information Suppliers "ACCIS Response to Financial Services User Group (FSUG) Position Paper on the London Economics Study on Means to Protect Consumers in Financial Difficulty", p 2

⁷ *Ibid*, p 1

as credit system data collectors, processors and suppliers of the data.⁸ Data providers can be 1) the creditors themselves, 2) private credit reference agencies, public credit registers, public authorities, or 3) some other official licensed data controller in a sole or joint capacity.⁹ The scope for using credit reporting, meaning after the creditor has assessed the creditworthiness of the client, and also its functioning depends largely on the legislative framework of the country where the credit reporting institute is.¹⁰

When talking about credit reporting it always raises the question why is it needed? Simply said, information sharing improves creditors' knowledge of their clients, also potential ones characteristics, which allows creditors to make more accurate decisions and monitor clients' loan performance more effectively.¹¹

The advantages of information sharing by creating a credit registry is: 1) it improves a bank's knowledge about the clients' characteristics and in turn scales down adverse selection and facilitates more precise credit pricing; 2) it scales down bank's informational rents¹², which for example is a possibility of realizing extra profits on the exclusively available information, which can be seen as the possibility to increase the competition in banking market); 3) due to the registry, the clients of the creditors are more disciplined (in order not to get bad reputation) & 4) reduces the incentives to over-borrow with the multiple lenders.¹³

Credit reporting has a significant role in minimising risks to over-borrowing with the multiple lenders as creditors have an access to check from a reliable source the current information about the client and thereby helping to provide consumers with responsible and sustainable access to credit.¹⁴ Responsible lending will be discussed further in the thesis. As credit reporting is a good way to grant credit in a responsible way and to ensure

⁸ *Ibid*

⁹ *Ibid*

¹⁰ *Ibid*, p 11

¹¹ *Ibid*, p 15-16

¹² Informational rent is when a bank acquires proprietary firm-specific information that is unavailable to other banks. See C. Schenone "Lending Relationships and Information Rents: Do Banks Exploit Their Information Advantages?", University of Virginia, 2007, p 2

¹³ Julia Kiraly & Katalin Merö „The Missing Credit Information System in Hungary“, Journal of Internet Banking and Commerce, April 2011, vol. 16, no. 1, p 8

¹⁴ See fn 3, p 10

that the client himself is included in the process,¹⁵ Estonian credit market should create a functioning accurate system.

There are three possibilities to create a data reporting registry: 1) exchange among public registers; 2) exchange among commercial reporting agencies & 3) exchange among consumer reporting agencies.¹⁶ Of course with data collection for credit reporting come risks as well. For example transmission of delicate information among unauthorised third parties, possibly even for identity theft.¹⁷ Even though there are benefits from an accurate credit reporting system, some stakeholders have expressed their concern about data sharing among the banking industry. It is worrying that it may cause the exclusion from some services. The usability of the data collected and processed in the system is an issue that requires control on multiple levels.¹⁸

As mentioned above, there are few possibilities of credit reporting systems – public credit registers (PCR) and private credit bureaus (CB). These organisations collect credit data on natural persons and legal entities. Both of them reduce exogenous information asymmetries, increase clients' discipline and make credit rationing better.¹⁹ Comprehensive credit reporting is based on the collection of data from a large variety of sources and sectors, which may include retail, telecoms, energy, water, insurance etc.²⁰ In most of the EU's Member States are credit reporting systems.²¹ Complete credit registers are in Austria, Belgium, UK, Netherlands, Ireland, Italy and Sweden. From the non-EU countries systems are in the US and Norway.²²

Further below it will be discussed more about PCRs and Cbs.

¹⁵ See fn 3, p 3

¹⁶ N. Jentzsch "Do We Need a European Directive for Credit Reporting", CESifo DICE Report 2/2007, p 2

¹⁷ See fn 3, p 29

¹⁸ *Ibid*

¹⁹ Article 29 Data Protection Working Party "Opinion 03/2014 on Personal Data Breach Notification. Adopted on 25 March 2014", p 27

²⁰ See fn 3, p 27

²¹ *Ibid*, p 29

²² See fn 13, p 5

1.1. Public Credit Register

Public Credit Register (PCR) institutions are typically in Europe, where they first originated and evolved with the purpose of providing an information system for supervisors to analyse bank portfolios and to look after the health and soundness of the overall financial system of a country, which also included the level of the borrower indebtedness.²³ In the PCR systems there is also a two-way flow of clients' credit data between the creditors and the centralised database. The first flow is from the participating institutions to the public credit registry. PCRs have complete coverage of the financial institutions of a country.²⁴ Under this kind of system, no bank lender is left out as may happen for example when parties are free to comply with the system. PCRs also avoid the risk that even if there are credit reporting institutions, then the creditors will not choose to which to report to get data.²⁵ Creditors, where there is a fully working public-credit reporting system would have to collaborate with PCRs as there would not be boundaries for accessing information.²⁶

Belgium is one of the few countries where the exchange of credit information in the country is being managed by the National Bank of Belgium, who operates its Central Individual Credit Register. But the Belgian credit bureau thus distinguishes itself from the other ACCIS (Association of Consumer Credit Information Suppliers) members by being the only partially state-owned entity.²⁷

PCR normally will not pose any risk of being strategically misused to distort competition.²⁸ These kind of registries report the coverage of individuals and companies by a public credit registry with information on their repayment history, unpaid debts, or credit outstanding from the past 5 years. This is also expressed as a % of the adult population. PCRs are known as registries that are managed by the public sector, in most cases by the central bank or the superintendent banks. They collect data on the creditworthiness of borrowers (both

²³ F. Ferretti "The Legal Framework of Consumer Credit Bureaus and Credit Scoring in the European Union: Pitfalls and Challenges – Overindebtedness, Responsible Lending, Market Integration, and Fundamental Rights", p 6

²⁴ *Ibid*

²⁵ *Ibid*

²⁶ *Ibid*

²⁷ M. Rothmund & M. Gerhardt "The European Credit Information Landscape. An analysis of a survey of credit bureaus in Europe", p 3

²⁸ See fn 19, p 27

as natural person and legal entity) in the financial system and make the collected data available to financial institutions.²⁹

1.2. Private Credit Bureau

A private credit bureau (CB) is defined as a private firm or non-profit organisation that maintains a database on the creditworthiness of borrowers (both natural persons and legal entities) in the financial system and facilitates the exchange of credit information among banks and financial institutions.³⁰ With only very few exceptions, the collection and redistribution of credit information in Europe is a for-profit business. Non-profit basis is only in Belgium, Italy, the Netherlands, Serbia and Slovenia. The % of the profit action is 83% and for non-profit 17%.³¹

CB's main feature is that they are profit seeking companies, which are subject to the same rules and regulations as every incorporated company doing business in the marketplace. In most cases they have a broad range of client members, from banks to non-bank creditors and include a wide range of businesses and agencies. Usually country's legislation does not require creditors to consult their CBs databases prior to the underwriting of a credit.³² Creditors check CB's databases only when they feel the need to do so.³³

CBs do not necessarily collect information on the same populations across countries. According to some surveys the coverage figures per country is that CBs register data for different products³⁴, such as consumer credit, mortgage loans etc. CBs generally store information on non-national borrowers. Some CBs do not check the records on the existing entries of deceased persons or citizens with new ID numbers and the non deletion of their old entries.³⁵

CBs provide their clients, creditors, with additional related services, in particular statistical

²⁹ See fn 3, p 24

³⁰ See fn 23, p 24

³¹ See fn 27, p 3

³² See fn 23, p 5

³³ *Ibid*

³⁴ See fn 27, p 2

³⁵ *Ibid*

models that produce and sell credit-scoring services by rating clients according to their credit history and profile, which are derived from processing data, which is gathered from different sources.³⁶ The reports cover information from the past 5 years – expressed as a % of the adult population.³⁷

1.3. Information in Credit Reporting

There are reasons why private and public credit reporting institutions may be complements to each other. For example, CBs may provide a greater degree of detail than PCRs, may merge other types of information with banking record or may provide credit-scoring services to lenders. Therefore, a debtor may obtain a clearer assessment of a credit applicant's solvency by accessing both the relevant PCR and a CB than by confining himself to only one of these two sources of information.³⁸

So what information is meant when talking about the collection of data for credit reporting? According to some surveys the CBs store negative data on individuals and three quarters of them also positive data. The stored data contains information on consumer, credit application, legal information or loan data. Consumer data is name and address; date of birth, gender and identification number or tax number. Only few CBs register personal information on income, family groups and assets.³⁹ Credit application data is enquiries from lenders and other requests, rejected cheque list and other data such as stoppage, enquiries by customers for own credit reports, but also other bureaus' negative data and business phone filer for identification checks. Legal information is about bankruptcy and court judgements. Loan data is information about taken loans, home purchases and / or mortgages and credit ad store cards, but also on overdrafts and retail credit.⁴⁰ Much less keep tracks of telecoms, mail orders and utilities. The last but not least information that is in most cases collected in credit reporting is information about payment.⁴¹ The data source can either be the client (one who buys the credit reporting service) himself, a public

³⁶ *Ibid*

³⁷ See fn 3, p 24

³⁸ T. Jappelli & M. Pagano „Role and Effects of Credit Information Sharing“, Centre for Studies in Economics and Finance. Working Paper No. 136, p 17

³⁹ See fn 27, p 11-12

⁴⁰ *Ibid*

⁴¹ *Ibid*, p 12-13.

register or the consumer. Usually it is the client or a public as the source of data. Rarely comes the financial / credit information from consumers themselves, although they are sometimes drawn on as an additional source identification data, for example name, address, gender, date of birth and / or ID.⁴²

Who buys the information service? On the client side there are approximately fourteen groups, who are: banks, leasing companies, credit card suppliers, mortgage providers, retail credit suppliers, insurance companies, debt collectors, enforcement divisions (courts, tax authorities and the police), government departments, telecommunication companies, internet providers, television suppliers, utilities and brokers.⁴³ Main information sources for the credit reporting are banks and leasing companies.⁴⁴ It is understandable why these two are the main sources, because banks and leasing companies take the most likely risk when handing out the loan to the their customer.

Both PCRs and CBs are institutions which collect credit data on natural and / or legal persons. They reduce exogenous information asymmetries, increase borrower discipline and improve credit rationing.⁴⁵ Negative information is data about defaults on payments, delays, delinquencies, and bankruptcies. Positive information refers to data on the borrowers credit commitments, payments and other details which do not constitute a default or late payment. Either way both, positive and negative information assists creditors in assessing the creditworthiness of the borrower. The type of information available through the credit reporting system may affect the intensity of competition between creditors.⁴⁶

1.4. Obstacles in Credit Reporting

Cross-border credit reporting is quite a lot in its infancy, even though ACCIS is active in encouraging of reciprocal exchange within the boundaries of the respective national regulatory frameworks.⁴⁷ May be most importantly, credit reporting allows borrowers to

⁴² *Ibid*, p 14

⁴³ *Ibid*, p 15

⁴⁴ *Ibid*

⁴⁵ See fn 19, p 27

⁴⁶ *Ibid*, p 28

⁴⁷ See fn 27, p 5

build a credit history and to use a documented track record of responsible borrowing and repayment as a “reputation collateral” to access credit outside established lending relationships.⁴⁸ The use of credit reporting systems is: a) all credit providers should be able to access a sufficient range of financial data on their existing or proposed customers to assist them in making a credit-granting decisions; b) the credit data that the creditor deems sufficient for an individual credit decision can be retrieved from different sources within the whole ecosystem of credit reporting; c) the decision as to what information should be used for the credit decision should be left to the creditor; & d) the standards for reporting and gathering data should be aligned at a national level to achieve comparability.⁴⁹

The type and extent of data the creditor requests from the credit data register depend on how much information the creditor already has about the customer. Also, the necessary information sufficient for a credit decision may depend on the type of product offered to the customer. Of course, as each person is a consumer, everybody wants a convenient and affordable access to credit.⁵⁰ The main differences among EU Member States in terms of credit reporting systems is the extent from differences in legislative frameworks. In some Member States, data sharing is required by law, but in others, data sharing is voluntary and usually based on reciprocity. Reciprocity is a rule that ensures only those organisations that share data may receive it. Data protection rules are directly applicable to processing credit data.⁵¹ While data protection legislation provides the legal framework for credit reporting, the reporting and use of credit data is conducted under the framework of consumer credit legislation, which can sometimes result in conflicts. For example, in some countries, creditors are obliged by law to provide PCRs with information about the customers, while in the case of Cbs, data provision is generally agreed voluntarily and based on contractual obligations.⁵² The capital requirements directive for credit institutions and investment firms establishes the period of data retention for credit data that has to be used in credit risk models^{53, 54}.

⁴⁸ M. Bruhm, S. Farazi & M. Kanz “Bank Competition, Concentration, and Credit Reporting” Policy Research Working Paper 6442, May 2013, p 2

⁴⁹ See fn 3, p 10

⁵⁰ *Ibid*, p 12

⁵¹ *Ibid*, p 29

⁵² *Ibid*, p 31

⁵³ See Directives 2006/48/EC and 2006/49/EC

⁵⁴ See fn 3, p 31

The diversity of credit reporting systems throughout the world and the absence of an internationally agreed framework for credit reporting policy targeted the World Bank to develop a set of General Principles for Credit Reporting⁵⁵. The World Bank states in its principles that data elements to be collected should include at least identification on the credit including amount, data of origination, maturity, outstanding amount, type of loan, default information, arrears data and transfer of the credit when applicable.⁵⁶ With the aim of contributing to financial stability and economic growth, the access to finance and responsible lending, these principles suggest the characteristics that should be satisfied by different systems and the infrastructure needed to support these systems.⁵⁷ For required standards in credit reporting, the legislative framework has a significant role in protecting the privacy of individuals, but also in ensuring that the required data can be accessed by authorised actors to provide the services that generate economic growth. Here come in the policy-makers, how must be placed responsibilities and liabilities on the parties on which they must be reasonably placed, as they are all network participants. These network participants are: the consumer, the creditor and the credit register.⁵⁸ If Estonia will make a decision on creating a positive credit reporting system, this should be taken into account.

But what should it be asked when creating a legislative framework? The question is – under which circumstances should public policy create a credit reporting system, by mandating banks, to disclose their private information? If the circumstances has been cleared out, then which information should be pooled and which should be kept confidential? And not the least for how long should information remain available in credit reporting system? These questions are only some of the many policy issues that arise in the making, designing and regulating of information exchange in credit markets.⁵⁹

As it is known, there are three types of credit reporting systems: a) black list – the most inexpensive one, which contains only information on defaulters; b) intermediate systems – include reporting of loan amounts, so that creditors may form a more precise estimate of the total indebtedness of borrowers; & 3) the most sophisticated systems, which includes

⁵⁵ See “General Principles for Credit Reporting” September 2011 by Financial Infrastructure Series. Credit Reporting Policy and Research.

⁵⁶ See fn 3, p 38

⁵⁷ See fn 3, p 35

⁵⁸ *Ibid*, p 47

⁵⁹ See fn 38, p 16

other forms of positive information about debtors' characteristics, for example demographic information for household and accounting information for firms.⁶⁰ Estonia, who has expressed its thoughts to create an intermediate system, which is a positive credit reporting⁶¹, but it would contain information about the debtors obligations, that come with taking a loan. In other words a register that is not in its structure as is a black list.

2. Idea of Positive Credit Reporting in Estonia

The idea to create in Estonia a positive credit information system is up from the end of 2000-s, but because of the world wide financial crisis and the Euro overtaking, the making of the positive credit reporting system was put off⁶². From 2013 the making of a legitimate positive credit reporting system is up more and more. Due to that there is a slight debate in Estonia.⁶³

Ministry of Justice has said that in Estonia the creditors have raised the problem, that even though consumers must provide information about the economic status, it is left aside the fact, that creditors are the ones, who have the obligation by law to collect and evaluate the data before providing the loan.⁶⁴ Due to the raised problem, the Ministry of Justice adviser Kristiina Koll has stated on the Krediidinfo seminar on the topic "In the New Light of Consumer Credit Demands" on 31.10.2012, that Estonian law about crediting must work better and it should state clearly: a) the term "creditworthiness" must be defined as the ability to pay back the credit in the conditions set in loan contract; b) when the creditor evaluates the creditworthiness, it should be bared in mind to take into account consumers financial status, regular income and financial obligations, as well to evaluate the impact of a new loan; & c) it must be specified the creditors obligations to collect information from the consumer.⁶⁵ It can be said that the obligation to fulfil the principle of responsible

⁶⁰ Ibid, p 17

⁶¹ See the blog of Krediidinfo AS "The Possibility of the Natural Persons Credit Registry", 12.11.2012, see here (last accessed 23.11.2014): <http://blog.krediidinfo.ee/2012/11/eraisikute-krediidiregistri-voimalikkusest-estis/>

⁶² K. Gabral "Rehe: positiivne register on vana hea idee", 15.10.2013, see here (last accessed: 30.11.2014): http://www.aripaev.ee/uudised/2013-10-15/rehe_positiivne_register_on_vana_he_idee

⁶³ K. Gabral "Sester_ register teeks laenuid kättesaadavamaks ka kiiralaenufirmadele", 15.10.2013, see here (last accessed 23.11.2014): http://www.aripaev.ee/uudised/2013-10-15/sester_register_teeks_laenuid_kattesaadavamaks_ka_kiiralaenufirmadele

⁶⁴ See fn 61

⁶⁵ *Ibid*

lending should be done with no unnecessary obstacles, which may bring positive credit reporting as a solution.

On the seminar it was referred to Lithuania who has a workable positive credit reporting system, which has had a good impact on the credit market as the customers have won from it with the creditors and the decisions made in the credit market are more qualified. This has provided status in Lithuania where the debtors have less problems with over-indebtedness.⁶⁶ In Lithuania the central bank (Bank of Lithuania) is responsible for supervision of the consumer-credit market, approved the rules for calculation of the annual % rate of charge, the principles associated with responsible lending and evaluation of consumer creditworthiness, the rules for lenders' inclusion on the list of providers of credit, the guidelines on the advertisement of financial services and rules on the provision of the obligatory information to the Bank of Lithuania.⁶⁷ This kind of action raised the concern on creation of “black economy” through which people who may not be credit payable will take loan from other than legal creditors who must comply with the state's legislation. However, the banks in Lithuania welcomed the legislation.⁶⁸ As is in Lithuanian regulation, so is in Estonia, the system of consumer credit is based on the business to consumer relationship (also known as B2C). The parties to the consumer-credit contract are the consumer and the lender of consumer credit. In Lithuania the creditor is not defined only as a credit institution.⁶⁹

In Estonia a credit can be taken also from a non-credit institutions, for example the creditor is an instant loan provider. Instant loans typically have a short maturity term and the loans are provided by private enterprises.⁷⁰ These kind of private enterprises are not supervised by Estonia's Financial Supervision Authority (FSA). The FSA monitors only credit institutions – that is, entities whose main activities are to give out loans and accept deposits. As the instant-loan providers do not accept deposits, they are not regarded as credit institutions and hence are not subject to supervision by the FSA.⁷¹

⁶⁶ See fn 61

⁶⁷ D. Bublīnė “The Future of Consumer Credit in Lithuania: *Qua vadis*, Consumer Credit?” *Juridica International. Law Review. University of Tartu* (1632), 22/2014, p 152

⁶⁸ *Ibid*

⁶⁹ *Ibid*

⁷⁰ K. Sein & U. Volens “Legal Problems and Regulations related to Easy-access Non-secured Consumer Loans in Estonia”, *Juridica International. Law Review. University of Tartu* (1632). 22/2014, p 120

⁷¹ *Ibid*, p 121

Estonia has stated that with creating a positive credit registry it must be taken into account that this kind of a system will contain natural persons private data, which must be processed by the principles stated in the Personal Data Protection Act (further as PDPA).⁷²

The principles in the PDPA will be discussed later in the paper.

2.1. “No!” by Estonian Data Protection Inspectorate

Estonian Data Protection Inspectorate (DPI) has said in its opinion to Consumer Protection Board, when it released on the 10th October to the press the idea of creating a positive credit registry in Estonia.⁷³

“Data to be processed for estimating creditworthiness is personal data. Personal data processing must be carried out with the consent of the data subject. Therefore there are principles in Estonian legislation that set the rules when to process data:

1. third party has a legitimate interest to process the data;
2. data forwarder has identified the legitimate interest of the third party, checked the accuracy of the data and registered the data proceeding;
3. data proceeded is not delicate;
4. it does not overly damage the data subject's legitimate interests;
5. the breach of contract has been over 30 days;
6. the breach of contract has taken place less than 3 years.”⁷⁴

The Inspectorate states that above mentioned principles must be taken into account at the same time. The Inspectorate finds that current legislation does not allow creating a positive credit registry as the bullet points 5 and 6 cannot be carried out correctly. Bullet point 3 must be evaluated in the context.⁷⁵

⁷² See Personal Data Protection Act (last accessed 23.11.2014):
<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/509072014018/consolide>

⁷³ Data Protection Inspectorate 29.10.2014 note No 1.2.-2/14/1762

⁷⁴ *Ibid*, p 1

⁷⁵ *Ibid*

DPI finds that legitimate interest can be in situations, where the creditor assures that with the knowledge about the debtor, and will not make a contract with a person who might not be able to pay back the loan. The legitimate interest cannot be curiosity and not a potential sign of making a contract.⁷⁶ The legitimate interest must be from the credibility of the data receiver and concrete connection with a payment default person – either through possible loan offer, possible housing offer for rent, possible business partner etc.⁷⁷ This viewpoint is recognised also in the explanation of the PDPA § 11 subsection 6 where it is bared in mind legitimate interest of a third party to avoid making a contract with unreliable person is considered cogent.

DPI said in the case 3-3-1-70-11⁷⁸ that PDPA § 11 subsection 6 in accordance with § 14 subsection 1 point 4 and subsection 2 allows to publicise personal data only for evaluating creditworthiness and not for reassurance to the creditor that the contract will be fulfilled.⁷⁹ EDPI stated in its opinion that PDPA does not permit to publicise persons debts to third parties for the purpose to humiliate the debtor, since the breach of contract does not characterize the debtor permanently from the negative aspect. Due to that the creditor should not process personal data and forward it forever.⁸⁰ From that arisen case Supreme Court answered to 2 questions: 1) in what kind of balance are PDPA § 11 subsections 6 and 7 and § 14 subsection 4; & 2) does PDPA allow to publicise data to credit reporting institution and third parties without the consent of data subject or not under PDPA § 11 subsection 6.⁸¹

The Supreme Court found that PDPA § 11 subsections 6 and 7 only regulate processing data to third parties for evaluation of creditworthiness or for a similar act, but § 14 regulates processing data in any way without data subjects consent. § 11 subsections 6 and 7 are special regulations and is meant as a special way of processing data. This aim is confirmed in the DPD art 7 (f).⁸² This means that evaluating credit worthiness goes solely under § 11 subsection 6 and 7, and not § 14 subsections 1 and 2.⁸³

⁷⁶ *Ibid*

⁷⁷ *Ibid*, p 2

⁷⁸ Estonian Supreme Court Case No 3-3-1-70-11, AS EMT vs DPI

⁷⁹ *Ibid*, point 1

⁸⁰ *Ibid*

⁸¹ See 72

⁸² See fn 78, point 12

⁸³ *Ibid*

Person who forwards the (personal) data to a third party is responsible for the correct information and is therefore the responsible processor. The same applies even in the situation where the processor is authorized processor, since the data forwarder is responsible for the correct information.⁸⁴

Publicising data has a wider meaning than forwarding data to a third party who has a legitimate interest. But data forwarding means making the data available to an unspecified amount of persons and this kind of act must fulfil the requirements in § 11 subsection 6.⁸⁵ DPD art 7 (a) is the only point where the data processor must have data subjects consent, not points (b)-(f), which means that Estonian data regulation must be in accordance as close as possible, in order for no contravention with EU's regulation. Due to that the data subjects consent is not needed for the evaluation of the credit worthiness nor for the forwarding to third parties.⁸⁶

What concerns the time limit of processing data in the third parties legitimate interest, it must be taken into account that the longer the data is being processed the more it affects data subjects rights, such as the right to personal life.⁸⁷ The longer the time for data processing is needed the more must the data processor defend the need for it, as when it comes to credit worthiness and fulfilling the contract, a breach of contract cannot be seen as a permanent characteristic for the data subject / debtor.⁸⁸ Time limit for data processing in credit reporting must correspond to the General Part of the Civil Code Act⁸⁹ § 147 which is about the beginning of the limitation period and it is either 3 years or 10 years (if the breach of contract was made in purpose).⁹⁰

Collecting and updating information in the (positive) credit information registry is a data

⁸⁴ *Ibid*, point 14

⁸⁵ *Ibid*, point 16

⁸⁶ *Ibid*, point 18 & 19

⁸⁷ *Ibid*, point 22

⁸⁸ *Ibid*

⁸⁹ General Part of the Civil Code Act, see here (last accessed 29.11.2014):

<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/528032014002/consolide#be9e3042-a426-4791-8d12-3fca3b5a14ad>

⁹⁰ See fn 78, point 23

processing action.⁹¹ What can be considered as unlawful processing in the credit information registries? In the case T-259/03⁹² action for non-contractual liability based on acts and omissions of OLAF⁹³. The core of the case was a leak of information to a journalist; its annual report with information about the investigation; and its press statement.⁹⁴ In this case the court answered on the burden of proof question, personal data definition, defined the processing of personal data and lawfulness. The wrong processing of data was defined as unauthorised transmission of personal data to a journalist by someone inside OLAF and the publication of press release each constitute processing of personal data.⁹⁵ The unlawful act with the processing was about the leak, which meant that it was done as an unauthorized transmission. In this situation OLAF had to prove why this kind of leak did not violate its obligations under EU's law. OLAF had to see forward that if there is an unauthorised leak, then it may end with the fact that the public gets information that it does not need.⁹⁶

How does this case apply to (positive) credit information registry? Credit information register is meant for either only credit institutions or creditors in general. Therefore it is necessary to define what is credit and on what conditions is a person (either legal entity or natural person or both) considered as creditor. But if to bare in mind CIA idea of responsible lending, then credit information register is meant for credit institutions. Therefore the leak by using credit reporting can be made in cases when the information is accessed to a credit institution who has no interest, i.e. there is not a plan to make a contract with the debtor, or the information is leaked to a third party who does not fall under the category of a credit institution or a creditor in general. Therefore a (positive) credit reporting system must be held by an institution, who will give out credit information only on the grounds of Estonian data protection legislation and on the principle set in the CIA and LOA⁹⁷ – responsible lending. This way it is possible to avoid information leaks. Probably the best institution to run the positive credit information registry is in Estonia its

⁹¹ DPD 95/46/EC, art 2 (b)

⁹² Nikolaou v. Commission, 12.09.2007

⁹³ OLAF – European Anti-Fraud Office

⁹⁴ See fn 92, p 16

⁹⁵ *Ibid*, p 17

⁹⁶ *Ibid*

⁹⁷ Law of Obligations Act; see here (last accessed 30.11.2014):

<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516092014001/consolide#091ffc6-51ce-4679-b221-e028f921a747>

central bank Eesti Pank, whose responsibility is to ensure financial stability through the formulation of financial sector policy and the development of the financial-sector safety net and also contribution to stable and sustainable economic development in Estonia, consultation of the government and cooperation with other central banks and international institutions.⁹⁸ But it should not mean that Eesti Pank should not be controlled by the DPI for lawful and justified data processing.

Estonian Banking Association has asked from the DPI if 1) current Estonian laws are enough to create a positive credit registry in Estonia; 2) is positive credit registry in harmony with Estonian data protection legislation; & 3) would credit registry overly exhaust the data subjects rights.⁹⁹ DPI answered that in the current situation of credit market, consumers must give their consent to conditions, where the situation is already formed by the creditor. This kind of consent is indefinite, which in practice comes with the danger that given consent will be used without legitimate interest by the data processors. This means that under current legislation on data protection, positive credit registry would not comply with the law.¹⁰⁰

The DPI principle is quite noble, but it is not sure quite on what is based their opinion and if they have checked the opinion with the judicial practice. Usually it is either the data subject who claims that there has been a breach of data processing or the claim is made by the data protection authority whose obligation is to keep an eye on the lawful use of (personal) data. When the claim is made that there has been a breach on the data use, then who and what should be proofed? What is the amount of the burden of proof in data protection cases?

In the case F-30/08¹⁰¹ the application was about the damages against the Commission pursuant to art 340 TFEU¹⁰². The art 340 is about the contractual liability of the Union. In

⁹⁸ Eesti Pank website, see here (last accessed 24.11.2014): <http://www.eestipank.ee/en/eesti-pank/functions-eesti-pank>

⁹⁹ Data Protection Inspectorate letter to Estonian Banking Association in 2010. The letter does not contain an act number, neither a precise data. The letter was addressed to Mrs Katrin Talihärm as the managing director of Estonian Banking Association.

¹⁰⁰ *Ibid*, p 3-4

¹⁰¹ *Nanopoulos v. Commission*, 11.05.2010 (appeal case No T-308/10)

¹⁰² The Treaty of the Functioning of the European Union, Official Journal of the European Union, C 326/47, 26.10.2012

the same article there are regulated the situations when there is a case of non-contractual liability. In the case the centre question was the burden of proof for establishing non-contractual liability. In the case it was stated that the normal rule is that the burden of proof is on the applicant to establish: a) the illegal action of an institution; b) damages caused by such action; & c) proof that the damages were caused by the illegal action of the institution. But it should be noted that the burden of proof shifts to the institution when a fact giving rise to damages could have resulted from various causes, and the institution has not introduced any element of proof as to which was the true case.¹⁰³

EDPI has stated in its letters that with a positive credit list, where the time limit is unknown, natural persons are at risk, since third parties have access to their personal data and use the information unlawfully. For example was brought the case where for example people with previous default payments get fired in first order.¹⁰⁴ It is a little unclear the statement according to which ten years ago default payment can affect a person after ten years time, since the information must be taken down after three years since the debt was settled.¹⁰⁵ But if to think that positive credit information registry is meant for the use to credit institutions or creditors in general (depends which law will be applied when creating this kind of register), the only damage of default payment information will bring, is that the debtor will not get more credit until the creditor decides to take the risk and hand one out. The logic behind it is based on the simple truth – the business plan of a creditor, does not matter if it is a credit institution or not, is to hand out a loan and to get the loan back with profit. If a natural person will not get a loan based on the false information in the credit registry, the natural person has the right to know about contained information and also to correct it. In this kind of case, the natural persons burden of proof is to show basically the income and obligations that must be paid from the permanent income. This kind of burden of proof goes under the logic in the above mentioned case and cannot be considered as an overly exhausting burden.

Even though Estonian Banking Association has asked about the harmony, in its answer the Inspectorate should have given guidelines either how to make it work with the current

¹⁰³ L. Laudati “EU court decisions relating to data protection (in chronological order based on data case filed)”, OLAF DPO, December 2012, p 19

¹⁰⁴ See fn 99

¹⁰⁵ *Ibid*, p 3

legislation. Given the word that “the law must be specified”¹⁰⁶ is too little information as the trend in Europe is to move forward for a better credit system, which does include a better credit reporting system. ACCIS has for example stated that creditworthiness assessments should include not only an assessment of the borrowers financial ability to repay the debt, but also the likelihood that he will be willing to do so and will not delay the payments or seek to avoid them.¹⁰⁷ EU adopted on the 4th of February 2014 Mortgage Credit Directive, which aims to create a Union-wide mortgage market with high level of consumer protection. It applies to both secured credit and home loans. In this directive it has provisions of consumer information requirements, a consumer creditworthiness assessment obligation etc.¹⁰⁸ The given idea of the borrowing-lending principle refers to responsible lending.

3. Responsible lending principle

As there have been discussions about the need for creating a positive credit register, that would include all the credit information, total income of private persons, and obligations that are officially registered. It is argued that a positive credit register would offer a possibility to focus on actual creditworthiness and its sustainability by the applicant.¹⁰⁹ The greatest impact of use of a positive credit register would probably be a decrease in the credit risk for creditors. It would also aid in implementation of the principle of responsible lending. It is suggested that a positive credit register would help to decrease the amount of unpaid loans: surveys by the World Bank Group and comparison of Estonia with other countries suggest that a positive credit register could decrease unpaid loans by 50% and consumer loan's interest by about 30%. On the other hand, creation of a positive register raises privacy concerns, and there has not yet been a political decision on this issue.¹¹⁰ In Estonia is only a privately held negative credit register, which is maintained by a public limited company, AS Krediidiinfo, as one of its publicly available business services (the register of payment disorders).¹¹¹ Creditors who have interest to see if the borrower is with

¹⁰⁶ *Ibid*, p 2

¹⁰⁷ See fn 6, p 4

¹⁰⁸ See information on the Directive (last accessed 30.11.2011): http://ec.europa.eu/finance/finservices-retail/credit/mortgage/index_en.htm

¹⁰⁹ K. Sein & U. Volens “Legal Problems and Regulations related to Easy-access Non-secured Consumer Loans in Estonia”, *Juridica International. Law Review. University of Tartu* (1632). 22/2014, p 128

¹¹⁰ *Ibid*

¹¹¹ *Ibid*, p 120

defaults, may access the register by making a contract with Krediidinfo AS and ask for credit reports.

When it comes to credit reporting, it is often, if not always, referred to responsible lending principle. 'Bad' borrowers are connected to 'bad' creditors and that the 'the creditor is not forced to give out credit'.¹¹² According to a case in Estonia¹¹³, this is the core of responsible lending: if creditors were paying more attention to consumers creditworthiness when making their credit decisions in the first place, there would be many fewer defaulting consumers. The principle of responsible lending is set forth in the full harmonisation Consumer Credit Directive (CCD).¹¹⁴ CCD gives Member States a broad discretion over regulation of how exactly the creditor is to assess the consumer's creditworthiness and what the sanctions should be for the breach of contract.¹¹⁵ Under Estonian law, apart from general data-protection rules, there is no special regulation on dissemination of debtors' data. The data obtained is from the users of the register or from other creditors. Information about when and on what grounds the debt arose, when the obligation ended, and the approximate amount of the debt is held in the register.¹¹⁶

In the Estonian Supreme Court case No 3-2-1-136-12¹¹⁷ was stated:

“Under the LOA¹¹⁸ § 14 subsection 1 the creditor must analyse the creditworthiness. This means that creditor may collect data and evaluate impartially whether from the credit might become a difficulty or cause negative financial consequences. Responsible lending principle in the Credit Institution Act¹¹⁹ is § 83 subsection 3. If the creditor knows about all the major details and from the suspicious ones that may stop the creditor to give the loan, the creditor must inform the debtor under the LOA § 14 subsection 2. If the creditor does not follow the responsible lending principle, the debtor may request for the compensation of damage under LOA § 14

¹¹² Decision of Tartu County Court 2-11-4320

¹¹³ *Ibid*

¹¹⁴ Directive 2008/48/EC

¹¹⁵ K. Sein “Protection of Consumers in Consumer-Credit Contracts: Expectations and Reality in Estonia”, *Juridica International* XX 2013, p 36-37

¹¹⁶ See fn 109, p 127

¹¹⁷ See point 24-26 in the case

¹¹⁸ Law of Obligation Act, see here (last accessed 23.11.2014):

<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/516092014001/consolide>

¹¹⁹ Credit Institution Act, see here (last accessed 23.11.2014):

<https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/517062014001/consolide>

and § 115 subsection 1. This is stated for the reason to not put the debtor in a situation where he would have not been without the loan and have the right for compensation under LOA § 127 subsection 1. in other words this is the principle to not have negative interest and compensate for the fail of reliability. /.../”

The main obligations related to responsible lending are the obligations to acquire information that gives the creditor the possibility of assessing the creditworthiness of the customer, judge creditworthiness, and give the consumer corresponds to his or her needs and financial situation.¹²⁰ The same principle was stated in the Supreme Court case No 3-2-1-169-13:

“CIA § 83 subsection 3 states the responsible lending principle due to which the creditor must evaluate for the debtor his creditworthiness enough, so there would not be a situation where the credit will be given to a debtor who will not be able to pay it back from the everyday salary or other personal assets. This way should be provided a situation, where the debtor will not be a “credit slave” due to which he would be in need to take new loans, lose assets and become insolvent. If the creditor analyses the debtors situation and finds that the debtor cannot pay back the loan, the creditor may not extend the loan time-limit in which the debtor's credit obligation will be worse due to creditors taken pay for it. This kind of action is in contravention of the responsible lending principle.”

It has to be taken into account that, according to the law, the consumer has to receive enough explanations. What is enough is not defined in the law and has to be determined case-specifically.¹²¹ Estonian Supreme Court has stated clearly the importance of the responsible lending principle and the need to fulfil it by the creditors. The principle is stated in Estonian CIA, which § 1 subsection 1 sets “This Act regulates the foundation, activities, dissolution, liabilities and supervision of credit institutions.” Now, if to think of the arguments of DPI it raises the question who is the third party who may not see the credit reporting about data subject? Is the third party meant as data subject B who may not have access because of the lack of legitimate interest of data subject A? If the answer is yes, then the DPI has not quite answered the question whether it would comply with

¹²⁰ See fn 109, p 128

¹²¹ *Ibid*, p 129

Estonian legislation to create a positive credit registry.

When taking into account that responsible lending principle corresponds to credit institutions, then the access to credit reporting system should be to these kind of institutions only. Of course it must be clearly stated who is a credit institution? Should the credit institution have an exception, in order for the instant loan providers to have access to credit reporting, in order not to hand out loan to a default borrower? Part of the answer should be in CIA § 2 subsection 1 where is stated “This Act applies to all credit institutions being founded, founded and operating in Estonia, to parent companies and subsidiaries thereof, including financial holding companies, mixed-activity holding companies and mixed financial holding companies, as well as the branches and representative offices of credit institutions.” From the CIA § 2 subsection 1 it is understandable that this law and in its regulation in § 83 subsection 1 applies to credit institutions only. From these to paragraphs can be ratiocinated that Telecom companies who for example give out 700 € phone by after-payment principle should not be considered in credit reporting system as a data processor with legitimate interest. But should this be so? Stated question will be analysed below.

3.1. Art 7 in DPD

Creditors may refer to responsible lending principle in the case of data collection and processing. What is the legal ground for using data subjects information in the odds of creditor? Credit institution has no right to bring in a contract a condition by which it has the right to process and collect data as the institution feels the need. This would not be lawful towards a data subject, who has to know and have the opportunity to for-see the scope of the data processing and collecting, when making a contract with the creditor.¹²² Credit institutions usually have a general condition in contracts to which the credit institution may provide data subject's data to its collaboration partners. This is too broad conditions as the collaboration partners can be seen as anyone who owns an account in the credit institution entity.¹²³ Financial service providers must explain to data subject before demanding the consent, why the data collection and processing is necessary, in order to

¹²² M. Männiko “Right to Privacy and Data Protection”, Juura 2011, 170

¹²³ *Ibid*

make sure that the data subject has given the consent by being fully aware of the consequences.¹²⁴

95/46/EC states in art 7:

“Member States shall provide that personal data may be processed only if:

- a) the data subject has unambiguously given his consent; or
- b) processing is necessary for the performance of a contract to which the data subject is party in order to take steps at the request of the data subject prior to entering into a contract; or
- c) processing is necessary for compliance with a legal obligation to which the controller is subject; or
- d) processing is necessary in order to protect the vital interests of the data subject; or
- e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller or in a third party to whom the data are disclosed; or
- f) processing is necessary for the purposes of the legitimate interest pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under art 1(1).”

In the art 7 the right to processes data is written with the word “or”, which means that in order to process the data, the processor must not fulfil all the points a-f at once. Data can be processed when the legitimate interest corresponds at to one point. Since Estonia is a Member State in the EU, its legislation must comply with the DPD. In Estonian PDPA the rules for processing personal data is set under Chapter 2 “Permission for Processing Personal Data”, under which are § 10 – permission for processing personal data; § 11 – disclosure of personal data; § 12 – consent of data subject for processing of personal data; § 13 – processing of personal data after death of data subject; § 14 – processing of personal data without consent of data subject; § 15 – notification of data subject of processing of

¹²⁴ *Ibid*

personal data; § 16 – processing of personal data for scientific research or official statistics needs; § 17 automated decisions & § 18 – transfer of personal data to foreign countries.

Estonian data protection has set out art 7 principles into chapter 2, where creditworthiness evaluation principle is set under § 11. In the opinion letters from the DPI, it was stated that the data subject may withdraw his consent at any given point. In Estonia, Sweden and Denmark the main problem for data protection is the data subjects right to withdraw at any given point from his consent. In countries like Finland and Norway there is no such right. This kind of right to withdraw from the consent at any given point is quite unusual.¹²⁵

Consent is also seen as expression of will. In civil proceedings it is not possible to withdraw from the will at any given point.¹²⁶ Taking a loan is mostly a civil proceeding. What should be done in a credit action which has taken place in accordance with civil proceedings? Two persons, a creditor and debtor have made a contract, where the debtor has given his consent to process personal data in cases, where he fails to fulfil the obligations stated in the contract. The creditor uses his and processes debtors data to a credit reporting. After breach of contract, the debtor withdraws his consent. What should the creditor do?¹²⁷

When reading EU's directive 95/46/EC it is stated that “personal data may be processed only if” and all the following principles in art 7 are separated with the word “or”. This means that under art 7 the data subjects consent may not be a must if the action is taken under the principle art 7(f). If to read together Estonian data regulation § 14 subsection 1 p 1 “Processing of personal data is permitted without the consent of a data subject if the personal data are to be processed: 1) on the basis of law.” In the same regulation § 11 subsection 6 “Processing of personal data intended to be communicated to third persons for assessing the creditworthiness of persons or other such purpose is permitted only if: 1) the third person has legitimate interest to process personal data; 2) the person communicating the personal data has established the legitimate interest of the third person, verified the accuracy of the data to be communicated and registered the data transmission.” As is

¹²⁵ *Ibid* p 53

¹²⁶ *Ibid*, p 54

¹²⁷ *Ibid*

understood under Estonian regulation, then it is allowed to process personal data without data subjects given consent, when the law allows it and the process of data subject information is allowed when talking about estimating creditworthiness, but it is allowed only in the case, where the legitimate interest of a third party is cleared. How to find out legitimate interest?

3.2. Legitimate Interest According to Article 29 Working Party

This chapter will bring out art 29 Working Party opinion on art 7 (f) in DPD in order to analyse balancing test under Estonian PDPA. Art 7 (f) in the DPD is: “processing is necessary for the purposes of the legitimate interest pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection under art 1(1).”

Art 7 (f) is the last of six grounds for the lawful processing of personal data. In effect it requires a balancing of the legitimate interests of the controller, or any third parties to whom the data are disclosed, against the interests or fundamental rights of the data subject.¹²⁸ This provision should not be treated as “a last resort” for rare or unexpected situations where other grounds for legitimate processing are deemed not to apply.¹²⁹ In Estonia under PDPA the “last resort” would be § 11 subsection 6 point 2, where it is stated that “processing of personal data intended to be communicated to third persons for assessing the creditworthiness of persons or other such purpose is permitted only if the person communicating the personal data has established the legitimate interest of the third person, verified the accuracy of the data to be communicated and registered the data transmission”.

However, 7(f) or § 11 subsection 6 pt 2 should not be automatically chosen, or its use unduly extended on the basis of a perception that it is less constraining than the other grounds.¹³⁰ A proper assessment is not a straight forwarded balancing test consisting merely

¹²⁸ Article 29 Data Protection Working Party, 844/14/EN WP 217 “Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC”, p 3

¹²⁹ *Ibid*

¹³⁰ *Ibid*

of weighing two easily quantifiable and comparable 'weights' against each other. Rather, the test requires full consideration of a number of factors, so as to ensure that the interests and fundamental rights of data subjects are duly taken into account.¹³¹ “At the same time it is scalable which can vary from simple test include:

- the nature and source of legitimate interest and whether the data processing is necessary for the exercise of a fundamental right, is otherwise in the public interest, or benefits from recognition in the community concerned;
- the impact on the data subject and their reasonable expectations about what will happen to their data, as well as the nature of the data and how they are processed;
- additional safeguards which could limit undue impact on the data subject, such as data minimisation, privacy-enhancing technologies; increased transparency, general and unconditional right to opt-out and data portability.”¹³²

The criteria listed in art 7 are related to the broader principle of “lawfulness” set forth in art 6 (1.a), which **insists** that personal data must be processed “fairly and lawfully”. “Personal data shall only be processed based on the data subject's unambiguous consent, or if processing is necessary for:

- performance of a contract with the data subject;
- compliance with a legal obligation imposed on the controller;
- protection of the vital interests of the data subject;
- performance of a task carried out in the public interest; or
- legitimate interests pursued by the controller, subject to additional balancing test against the data subject's rights and interests.”¹³³

Art 7 (f) permits processing subject to a balancing test, which weighs the legitimate interests of the controller – or the third party or parties to whom the data are disclosed –

¹³¹ *Ibid*

¹³² *Ibid*

¹³³ *Ibid*, p 4

against the interests or fundamental rights of the data subjects. It is sometimes incorrectly seen as an “open door” to legitimise any data processing which does not fit in one of the other legal grounds.¹³⁴ Art 8 of the European Convention on Human Rights¹³⁵ adopted in 1950 incorporates the right to privacy, which prohibits any interference with the right to privacy except if by the law and if it is needful in order to satisfy certain types of specifically listed, compelling public interests.¹³⁶

3.3. Balancing Test

Cases like ASNEF and FECEMED¹³⁷ put European Court of Justice (ECJ) to observe that art 7 (f) sets out two conditions, which are cumulative and must be fulfilled in order for the processing or personal data be lawful: a) “the processing of the personal data must be necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed” & b) such interests must not be overridden by the fundamental rights and freedoms of the data subject.”¹³⁸ It followed that, in relation to the processing of personal data, art 7 (f) counteracts Member States rules which, in the absence of the data subject's consent, impose requirements that are additional to the two cumulative conditions set out in the preceding paragraph 6. But it must be taken into account that the second point of the mentioned conditions require a balancing of the opposing rights and interests concerned with depends on the single-case circumstances of the particular situation in question and in the context of which the person or the institution which carries out the balancing must take account the significance of the data subject's rights arising from art 7-8 of the ECHR.¹³⁹ Art 7 from the ECHR states briefly “no punishment without law” and art 8 from the ECHR states briefly “Right to respect for private and family life”.¹⁴⁰

So what should one consider when thinking of a balancing test under art 7 (f) under DPD? The questions to be asked are: what is necessary for the legitimate interests of the

¹³⁴ *Ibid*, p 4-5

¹³⁵ ECHR see here (last accessed 23.11.2014): http://www.echr.coe.int/Documents/Convention_ENG.pdf

¹³⁶ See fn 72, p 6

¹³⁷ Joined cases C-468/10 and C-469/10

¹³⁸ “Personal Data Processing: ECJ Judgement”, The ICT Law Community, see here (last accessed 23.11.2014): <http://www.scl.org/site.aspx?i=ne23632>

¹³⁹ *Ibid*

¹⁴⁰ See fn 135

controller or third party that must be balanced against the interests or fundamental rights and freedoms of the data subject? The outcome of the balancing test determines whether art 7 (f) may be relied upon as a legal ground for processing. Balancing test is a specific test, for cases that do not fit in the scenarios pre-defined under grounds 7(a-e). it ensures that, outside these scenarios, any processing has to meet the requirements of a balancing test, taking duly into account the interests and fundamental rights of the data subject.¹⁴¹ Legitimate interest requires a “necessity” test unlike the other grounds set forward in art 7 of the DPD.¹⁴²

It is in significant matter to determine the exact rationale of the contract, such as its substance and fundamental objective, as it is against this that it will be tested whether the data processing is necessary for its performance. Processing of basic information of the data subject, for example name, address and reference to outstanding contractual obligations, to send formal reminders should still be considered as falling within the processing of data necessary for the performance of a contract.¹⁴³ It should be marked that some processing activities may appear to be close to falling under art 7 (c) or (b) without fully meeting the criteria for these grounds to apply. This does not mean that such processing is always necessarily unlawful. It may sometimes be legitimate, but rather under 7 (f), subject to the balancing test.¹⁴⁴ When doing the balancing test, the objective should be to identify the threshold for what constitutes a legitimate interest. If the data controller's legitimate is not so legitimate, but more of illegitimate style, the balancing test will not come into play as the initial threshold for use of art 7 (f) will not have been reached.¹⁴⁵

In the short conclusion, legitimate interest must be under art 7 (f) and fulfil the ground of lawfulness, such as accordance with the EU regulation and national law; be sufficiently clearly articulated to allow the balancing test to be carried out against the interests and fundamental rights of the data subject, for example sufficiently clear and represent a real and present interest, and not be speculative. Of course it must be taken into account that

¹⁴¹ See fn 128, p 9

¹⁴² *Ibid*, p 11

¹⁴³ *Ibid*, p 17-18

¹⁴⁴ *Ibid*, p 20

¹⁴⁵ *Ibid*, p 24

what can be considered as a legitimate interest can change in time, depending on scientific and technological developments in addition to the changes in society and cultural attitudes.¹⁴⁶

3.4. Positive credit reporting and balancing test

Positive credit reporting is a system where is collected the obligations of the borrower into one big file. This kind of system helps the creditors to concentrate on customers creditworthiness and evaluate debtors ability to keep up with the loan payments. Thanks to that the creditor does not have to spend resources on finding out if the debtor is able to pay the credit. This logic helps to reduce the costs of handing out the loan, as the banks can avoid for the debtors to be over-indebted and not to give loans to customers who may not have enough income for it. Each lender of credit has an obligation to collect information proving its fulfilment of the obligation to evaluate consumer creditworthiness.¹⁴⁷

By giving the credit reporting system into central bank hands, the obligation to check the correspondence to the law, is in the states hand. But if the credit reporting system would be a private entity, then it should be monitored under the Data Protection Inspectorate's eye. There might be two options: once a month the private entity will hand out summing-ups of the requests to the Data Protection Inspectorate, who will analyse the requests; or the credit reporting system will be given into Data Protection Inspectorate at first place, who will comply with the Estonian Central Bank as to confirm the information about the legitimate interest coming from a credit institution.

The balancing test should be made available to credit institutions, where when a credit institution hands out an application, the application must contain a logical structure where the legitimate interest must be shown.

Art 7 (f) is often used in enforcement of legal claims including debt collection via out-of-court procedures. Accordingly, an interest can be considered as legitimate as long as the controller can pursue this interest in a what that is in accordance with data protection and

¹⁴⁶ *Ibid*, p 25

¹⁴⁷ See fn 67, p 158

other stated legislation. Otherwise said: a legitimate interest must be “acceptable under the law”.¹⁴⁸ Having a legal ground does not relieve the data controller of its obligations under art 6 of the DPD with regard to fairness, lawfulness, necessity and proportionality, and of course quality of the data. Legitimate interest is an alternative ground and should be sufficient if it fulfils the requirements. It should be noted that legitimate interest is a cumulative ground that must comply with all other data protection principles and requirements that may be applicable.¹⁴⁹ Responsible lending is understood as a lending activity of the lender during which consumer credit is granted in observance of certain provisions that create preconditions for the proper assessment of the consumer credit borrower's creditworthiness and precluding the consumer's possible assumption of the burden of excessive financial obligations.¹⁵⁰ Creditworthiness is evaluated by consumers sustainability of the consumer's income, the credit history of the consumer, and potential changes in income. The creditor must check all information from the data sources available to it in observance of the requirements of the law, including the requirements of data protection. For example in Lithuania there are no specific rules for creditors on how to collect data about consumer credit, debts, or debtors.¹⁵¹ The same situation is in Estonia. There are no specific rules on how to collect data other than to check Credit Info Register, which is a negative list and it is possible to access. The creditworthiness of the consumer should not be assessed in only an abstract way. The aim of the assessment is to judge the ability of the consumer to assume the specific financial responsibility that, jointly with other financial responsibilities, the consumer would be able to fulfil.¹⁵²

PDPA states in § 11 subsection 6 the concept of legitimate interest use. So first requirement is to data processor, who must process the data in the processors legitimate interest or for those of a third party to whom the processor discloses it.¹⁵³ This means that third party in credit reporting system is the system holder who gets data from the data collectors, in other words from the credit institutions. Second requirement for the legitimate interest must be balanced against the interests of the individual concerned. The condition will not be in

¹⁴⁸ See fn 128, p 25

¹⁴⁹ *Ibid*, p 11

¹⁵⁰ See fn 67, p 158

¹⁵¹ *Ibid*

¹⁵² *Ibid*, p 159

¹⁵³ “The Conditions for Processing” by Information Commissioner's Office, see here (last accessed 23.11.2014):

http://ico.org.uk/for_organisations/data_protection/the_guide/conditions_for_processing#legitimate-interests

compliance if the processing is unwarranted because of its prejudicial effect on the rights and freedoms, or legitimate interests of the individual. The data processors interests do not need to be in harmony with those of the individual for the condition to be met. But it should be bared in mind where there is a significant mismatch between competing interests, the individual's legitimate interests will come first.¹⁵⁴ So when speaking about the credit reporting system, the legitimate interest of the data processor and collector, must be in balance with the legitimate interests of the data subject. Data subject who wants a loan from the credit institutions, does not want to become a “credit slave” and should not become a “credit slave” from the point of a healthy society. Credit institutions interest is to give a loan with a profit, which means not to give out loans to debtors, who are not able to pay them back. In order to be sure that the credit will go a payable person, credit institution needs to check the back ground. In the second condition of the evaluation of the legitimate interests, all, data subjects and credit institution and third parties legitimate interests meet in a balanced form.

For example, until 2012 credit databases were not regulated by Latvian law, however, the Law on Extrajudicial Recovery of Debt, introduced special requirements applicable to negative-credit databases. According to that law, the debtor shall be included in a negative-credit database only if having delayed payment for more than 60 days. The information may be stored in the database for three years from the moment at which the debt is paid; otherwise, the information is stored in keeping with the statute of limitations, for 10 years.¹⁵⁵ A third party may receive information from such a database if there is an agreement concluded between the creditor and the third party and also if the debtor has indicated acceptance in accordance with the Personal Data Protection Law.¹⁵⁶ As is known, the creditor is not only a credit institution, when it comes to Estonia or Latvia, but the creditor is also entity who does not take deposit. In practice, each SMS creditor and debt-recovery company keeps its own credit database. In parallel and for example the Bank of Latvia maintains its own credit register. Consequently, there is no single uniform register of negative and positive credit, so highly objective information can not always be received

¹⁵⁴ *Ibid*

¹⁵⁵ I. Kačevka “A Strict Regulatory Framework for SMS Credit and Its Effectiveness in Latvia”, *Juridica International. Law Review. University of Tartu* (1632), 22/2014, p 144

¹⁵⁶ *Ibid*

about a prospective client.¹⁵⁷ In Latvia, for example, if the instant loan is less than 427 € and monthly payments do not exceed 71 €, the creditor is permitted to rely only on the information given by the consumer.¹⁵⁸

The third condition for the data processing is for it to be fair and lawful and must comply with all the data protection principles.¹⁵⁹ This condition raises the questions who should have the access to data subjects information? And why should there be an access? Now, as mentioned above, CIA sets in Estonia the responsible lending principle. The same regulation sets that responsible lending concerns credit institutions. If to think only from the CIA regulation perspective, then the fair and lawful processing would be only carried out if the data subjects information will be exchanged only between credit institutions and third party, who should be the credit system holder. But what about PDPA § 11 subsection 6? This states “third persons for assessing the creditworthiness /.../ and 2) the person communicating the personal data has established the legitimate interest of the third person, verified the accuracy of the data to be communicated and registered the data transmission.”¹⁶⁰ Now under the PDPA it is possible to read out that person who has a legitimate interest for evaluating creditworthiness should have access to process data subjects information on financial status. This means that Telecom companies who for example hand out phones on the after-payment rules, should be able to check whether the customer can pay it. This raises the conflict as states the Data Protection Inspectorate, who has expressed the concern in the letter to Estonian Consumer Protection Board. But in the stated arguments, Data Protection Inspectorate has said that for reliable contract there is only needed the information on uNoeliable persons, who cannot fulfil their monetary obligations.¹⁶¹ This statement arises the question – should credit institution or third party with the legitimate interest have the possibility to check the creditworthiness only for finding out the information about data subject, which confirms that data subject has been in payment default? If so is meant in the letters by the Data Protection Inspectorate, then it conflicts the principle of the CIA – responsible lending. By not having the chance to evaluate the situation of the borrower, it may stipulate a situation, where today's borrower

¹⁵⁷ *Ibid*

¹⁵⁸ *Ibid*, p 145

¹⁵⁹ See fn 155

¹⁶⁰ See fn 65

¹⁶¹ See fn 99, p 2

after getting tomorrow's loan may not be under-indebted on the day after tomorrow. The core idea of the responsible lending is to protect individuals and let them have money not only for paying the loans, but also to have a full and healthy lifestyle.

4. Personal Data

What is privacy? Privacy is person's private sphere, which also means private life. The right to private life is just a part of a person's general rights to define himself. This includes the right to choose how to live and what to be.¹⁶² Privacy includes in itself data subjects identity, which is name, identity number or tax number, ethnic belonging, physical characteristics and social belonging. Privacy contains also the right to have private space, which is home; social activity, which is family, the right to choose contacts and sexual orientation; and also physical definition, which is the right to make a decision about being pregnant; and protection of the environment, which can be seen as the right to demand from third parties to stop acting in a way that may cause damage to the space that the data subject is living or using.¹⁶³

Some find that PDPA is too stiff and it is not imposed in accordance with other Estonian laws.¹⁶⁴ The right to impinge privacy is allowed when it is in accordance with the law and if it is necessary in a democratic state, which means necessity for the state security, for the security of the society, for the welfare of state's economy, to prevent crime, to protect health, to prevent morality and for the protection of freedoms and rights of fellow data subjects.¹⁶⁵

What goes under the protection of state's economy welfare? This means data subjects right to have privacy may be impinged in situation where the public economy is more important than the right to have privacy. Such can be for example in a situation where the landlord wants to conk out of a rental contract. In this case, if the landlord does not explain why he needs the rented place for his own benefits, he may loose the right to conk out of a rental

¹⁶² See fn 122, p 14

¹⁶³ *Ibid*, p 18-34

¹⁶⁴ I. Pilving "Right to Personal Data Protection", *Juridica*, VIII/2005, p 534

¹⁶⁵ See fn 122, 35

contract before the end of the contract.¹⁶⁶ In this kind of situation the state has the obligation to provide tenants rights, which may in certain circumstances be higher than the will of the landlord to conk out of the rental contract, because he feels so.¹⁶⁷ What goes under the protection of the freedoms and rights of third parties? This includes the test, where there must be thought of the balance between data subject right to have data protection and third parties freedoms and rights¹⁶⁸ since the core of the data protection is to provide privacy.¹⁶⁹

In which case should it be thought of making the balancing test – the state's economy or freedoms and rights of third parties? Balancing test should be made in both cases, since they can be seen separately but as well together. The freedoms and rights of a creditor are in states concern, for example the taxes are collected from the economies circulation. Providing information on persons debt history may work against the idea of it as it may keep the debtor from having the chance to find a job.¹⁷⁰

Data protection protects the personal data, which is information about self-determination. This is information that helps to identify the data subject.¹⁷¹ It is easy to identify if the data processing has been legal since it comes from the law. The obstacle is when is talked about justified data processing. Justified data processing is when the data subject is aware of data processing and collecting. He is able to give his consent or refuse of giving the permission.¹⁷² If to think about credit reporting, especially positive credit reporting system, then could it be seen that there is a need for data subjects consent for data collection and processing? A data subject, who is a problematic debtor, may not be so keen on the idea of the data being processed for credit reporting. This provides information to third parties. The interest for a state to have a credit reporting system is understood since the logic is simple – no loan for a debtor who is not able to pay the loan. What questions should be asked when to think of the interest of credit reporting? These questions could be: 1) what is the protected right and the scope of it; 2) what kind of obligations has the state in this kind

¹⁶⁶ See *Velosa Barreto vs Portugal* 25.11.1995 case No 18072/91

¹⁶⁷ See fn 122, p 36-37

¹⁶⁸ *Ibid*, p 38-39

¹⁶⁹ See fn 164, p 535

¹⁷⁰ *Ibid*

¹⁷¹ See fn 122, p 42

¹⁷² *Ibid*, p 45

of matter; 3) has there been an interfere to one's right? If the last question gets “yes”, then there should be asked: 1) has it been legal; 2) did it have legitimate interest; 3) is it necessary in a democratic state; 4) is it proportionate with the purpose; 5) what is on scale for the data subject; & 6) are there any better solutions?¹⁷³

In the law it is provided the right to process data without data subject's consent, such as situation where the party wants to fulfil the obligations stated in the contract with data subject.¹⁷⁴ In general the data subject's right to participate in data processing means the right to know which kind of data is processed and the right to demand to correct the data and / or deleting it.¹⁷⁵ Data that is collected by credit institutions has benefits for the state, such as in prevention of money laundering.¹⁷⁶ Before handing out the loan the creditor usually checks if the debtor has any income. By knowing the income, the state has also an overview of money circulation.¹⁷⁷

Regular contact and / or cooperation between consumer groups and credit reporting institutions can be seen as a way forward to alleviate existing concerns and work toward the efficient functioning of the market for credit data.¹⁷⁸ Main concern when talking about the credit reporting systems, especially the positive credit reporting registries, is the breach of personal data. Both the EU regulation and Estonian legislation state that “processing of personal data is any act performed with personal data, including the collection, recording, organisation, storage, alteration, disclosure, granting access to personal data, consultation and retrieval, use of personal data, cross-usage, combination, closure, erasure or destruction of personal data or several of the aforementioned operations, regardless of the manner in which the operations, regardless of the manner in which the operations are carried out or the means used.”¹⁷⁹ But what is the personal data that is used and processed in positive credit reporting system? Is any personal data delicate to be processed in the credit reporting system?

¹⁷³ *Ibid*, p 48

¹⁷⁴ *Ibid*, p 55

¹⁷⁵ *Ibid*, p 144

¹⁷⁶ *Ibid*, p 164

¹⁷⁷ *Ibid*, p 165

¹⁷⁸ See fn 27, p 9

¹⁷⁹ PDPA § 5

In the light of the PDPA § 5 it could be said with anticipation that under the light of the DPI letter mentioned above¹⁸⁰, even processing the data of subjects who are in payment default decision, is illegal as the processing is made only in the interest of the data processor or third party as the last mentioned do not want to hand out a loan to somebody who may not pay it back.

Privacy and data protection means the right to respect for private life and the right to the protection of someone's personal data, both are fairly recent expressions of a universal idea with quite strong ethical dimensions, autonomy and unique value of every human being.¹⁸¹ Data Protection Convention¹⁸² defines the terms 'personal data' and 'data protection'. The last term of the two is broader than 'privacy protection' because it also concerns other fundamental rights and freedoms, and all kind of regardless of their relationship with privacy, and at the same time more limited because it merely concerns the processing of personal information, with other aspects of privacy protection being disregarded.¹⁸³ The main purpose of the Data Protection Convention is to protect individuals against unjustified collection, recording, use and dissemination of their personal details. Personal data must be accurate and up to date.

Data Protection Convention's approach is not that processing of personal data should always be considered as an interference with the right to privacy, but rather that for the protection of privacy and other fundamental rights and freedoms, any processing of personal data must always observe certain legal conditions.¹⁸⁴ There are plenty of court cases, from ECJ and ECHR, in which is ruled that the protection of personal data is of fundamental importance for a person's enjoyment of the right to respect for private life under art 8 of ECHR, where the concept of 'private life' is not entirely clear, but its scope has increased considerably. According to the case law of the ECHR¹⁸⁵ it is not limited to 'intimate' situations, but also covers certain aspects of professional life and behaviour.¹⁸⁶

¹⁸⁰ See fn 99

¹⁸¹ P. Hustinx "EU Data Protection Law: The Review of Directive 95/46/EC and the Proposed General Data Protection Regulation", 2014, p 2

¹⁸² Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Strasbourg, 28.1.1981

¹⁸³ See fn 181, p 4-5

¹⁸⁴ *Ibid*, p 6

¹⁸⁵ i.e. *Z v Finland* (ECHR 1997-I), *Klass v Germany* (1978; A-28), *Rotaru v Romania* ECHR 2000-V etc

¹⁸⁶ See fn 181, p 7

The biggest emphasis is on real responsibility of responsible organisations. Responsibility is not a concept that only comes at the end, when something has gone wrong. It also comes as a proactive obligation to develop adequate data management in practice. This comes out for example in the way it is spoken about data protection, i.e. “taking all appropriate measures to ensure compliance” and “verifying and demonstrating that those measures continue to be effective”. It implies that the burden of proof is in many cases on the responsible organisation: to demonstrate that there is an adequate legal basis for processing, that consent is real consent, and that measures continue to be effective. It also explains a more frequent use of the term 'accountability' in data protection discussions.¹⁸⁷

The search for the right balance between the need to ensure effective protection of individuals in an often dynamic environment and the need to avoid unnecessary administrative burdens. The discussion about data protection subject has largely been triggered by the fact that the relevant provisions in the proposal for the regulation did not put enough emphasis on the general principles of responsibility and accountability for controllers, but instead went too fast into specific requirements. These requirements have turned the lead to a number of specific exceptions, such as to protect small and medium enterprises from undue administrative burdens. One relevant question is for example what the controller's general obligation to take 'appropriate measures' entails in cases where the specific requirements do not apply.¹⁸⁸ To find the right answer to the 'appropriate measures' has led to 'risk-based approach'. This should be carefully distinguished from the notion of 'risk' as a threshold condition for any protection to apply.¹⁸⁹

A 'progressive' risk-based approach would suggest instead that more detailed obligations should apply where the risk is higher and less burdensome obligation where it is lower. 'Risk-based approach' has two advantages: a) it means that compliance efforts should be primarily directed at areas where this is most needed, by keeping in mind the sensitivity of the data, or the risk involved in a specific processing operation, rather than at a 'box-ticking' exercise to satisfy paper-work requirements; & b) it means that areas of minimal risk could be addressed in a more 'light touch' fashion. It should be emphasized that

¹⁸⁷ *Ibid*, p 32

¹⁸⁸ *Ibid*, p 37-38

¹⁸⁹ *Ibid*, p 38

general provisions in the current and future framework are inherently scalable and should therefore always be protected. The specific rights of the data subject should also be available regardless of the risk involved.¹⁹⁰ EU's main focus is not on where the data are, but rather on the responsibility for the data processing. Also on the impact of the data processing on the data subjects. In the scope of the Data Protection Regulation¹⁹¹, which will not only apply to all processing in the context of an establishment of the controller in the EU, but also when goods or services are offered on the European market. As well as on the behaviour of data subjects in the EU is monitored, regardless from where.¹⁹² It is here that the difference in character between the rights to respect for private life and the right to the protection of personal data may once again play an important role. If so, then art 7 of DPD will serve as a positive guarantee that the essential elements of the protection of personal data, as set out in this provision, are delivered adequately in practice.¹⁹³ Responsible organisations are inclined to see formal notification as the main obligation, rather than the obligation to comply with data protection principles. This has put undue emphasis on the role of data protection authorities at the expense of the key role of controllers to provide good data protection. The obligation to prior notify individual processing operations is now widely perceived as an ineffective and unnecessary administrative burden. Instead, in the future regulation will more emphasise on the responsibility of the controllers. As a result they will not only have to with substantive principles and data subject's rights, but also to take all appropriate measures to ensure compliance, and to verify and demonstrate that those measures exist and continue to be effective.¹⁹⁴ The set of safeguards, like essence of system of checks and balances, consisting of substantive conditions, individual rights, procedural provisions and independent supervision, applies in principle to all processing of personal data.¹⁹⁵

5. Pros and cons for credit reporting

The right of personal privacy means that everyone has the right to control their own data

¹⁹⁰ *Ibid*

¹⁹¹ General Data Protection Regulation, which will be enforce by EU in 2017 possibly, see here (last accessed 23.11.2014): <http://www.allenoverly.com/publications/en-gb/data-protection/Pages/Timetable.aspx>

¹⁹² See fn 181, p 42

¹⁹³ *Ibid*, p 46

¹⁹⁴ *Ibid*, p 47

¹⁹⁵ *Ibid*, p 50

about themselves. So one has the right to only to request keeping one's personal data confidential to the highest possible degree, but also to actively determine the handling of one's personal data and to control content and distribution of their personal data kept by the state or the market players.¹⁹⁶ Credit reporting does not take away the right to be informed of the actions when data subject's data is being processed. The data subject has the right to be informed but such actions.¹⁹⁷

Credit reporting uses information about persons' financial obligations. So when the consumer understands how they can access and use their credit data, credit files can provide them with a significant financial asset as well as a useful tool for financial planning.¹⁹⁸ So what is the use of a credit reporting system? The use of credit reporting system is: a) all credit providers should be able to access a sufficient range of financial data on their existing or proposed customers to assist them in making credit-granting decisions; b) the credit data that the creditor deems sufficient for an individual credit decision can be retrieved from different sources within the whole ecosystem of credit reporting; c) the decision as to what information should be used for the credit decision should be left to the creditor; & d) The standards for reporting and gathering data should be transparent and well understood by all stakeholders, and the main definitions should be aligned at a national level to achieve comparability.¹⁹⁹

If there exists only a black list credit reporting system, then borrowers who have defaulted or gone bankrupt in the past can be practically excluded from access to credit for the years that the information remains in their credit file. But if further for information is recorded, positive payment data can counterbalance the past negative effect.²⁰⁰ Most studies have reported that unpredicted income shocks, for example losing a job, death of spouse or a divorce, are the most common causes of over-indebtedness.²⁰¹ If only minimal data about

¹⁹⁶ See fn 13, p 4

¹⁹⁷ See fn 179, § 15 “If the source of personal data is any other than the data subject himself or herself, then after obtaining or amending of the personal or communicating the data to third persons, the processor of the personal data must promptly inform the data subject of the categories and sources of the personal data to be processed together with the information specified in subsection 12 (3) of this section.”

¹⁹⁸ See fn 3, p I and 14

¹⁹⁹ *Ibid*, p 10

²⁰⁰ *Ibid*, p 13

²⁰¹ D. Christelis, D. Georgarakos, T. Jappelli “Wealth Shocks, Unemployment Shocks and Consumption in the Wake of the Great Recession”, Working Paper No. 279, CSEF, 2011, p 11

delinquencies and bankruptcies is gathered in the credit reporting system, then it will have an effect, where consumers cannot be helped before it is too late. This will not happen if consumers voluntarily turn to the debtor when the early signs of financial distress are starting to show.²⁰² But as has said Estonia's Data Protection Inspectorate “Clearly no debtor is interested of the fact that somebody would carry on information on the debtors current or previous debts /.../.”²⁰³ Data provided in the credit reporting must be sufficient, adequate and accurate, which allows the use of credit decision system, such as statistical scoring models. These systems allow creditors not only to speed up credit decisions, thereby lowering the costs of issuing a loan, but also to base their decisions on a consistent and statistically proven model. Statistical models also standardise credit decisions, minimising the risk of manual errors in creditworthiness assessments. With statistical facilitates, the composition of borrowers reflects more closely the general population, contributing to fairer lending.²⁰⁴ Wider credit reporting provides creditors with a greater ability to rely on credit exposure, repayment history and potential rather than assets as collateral.²⁰⁵

The data reported to the Credit Requirement Regulation has gained relevance with the current indebtedness situation of the economy combined with the pressing need of economic agents in all sectors to tone up their activity, including the banking sector. This is the case for example in Portugal. Credit Requirements Regulation data combined with other micro databases has been a key factor in meeting all the data demands in the context of the economic and financial assistance programme. For an efficient use of micro data and to fully explore its value for statistical compilation and analysis two major requirements do exist, namely when combining different micro data-sources, the need for a comprehensive and up-to-date business register and flexible analytical tool to explore the information.²⁰⁶

There has been an analysis that distinct terms 'credit register' and 'credit bureau'. First means that it is a 'public' organisation, regulated and operated by some authority on a non-profit basis, whereas second one refers usually a 'private' profit oriented business. A

²⁰² *Ibid*, p 14

²⁰³ See fn 99, p 2

²⁰⁴ See fn 3, p 16

²⁰⁵ *Ibid*, p 18

²⁰⁶ P. Casimiro “A Flexible Approach to Credit Statistics: the Use of the Portuguese Central Credit Register for Statistical Compilation”, IFC Bulletin No 37, p 73

common argument in the dispute of a positive debtor's list allows for more accurate assessment of risks for the banks. By itself this argument is not particularly compelling, as it is not in the public interest to restrict a fundamental human right²⁰⁷ – the right to respect privacy. Another reason for credit reporting is that more accurate risk assessment could result in the enhance security of the banking sector, increase in the financial stability, thus improving public welfare. The decrease in the number of defaults would also contribute to the consumer protection.²⁰⁸

What about the time limit to process the data or to keep it public? DPI has raised the concern on time period that personal data is processed by (positive) credit reporting system. ECJ has ruled this year a ground-braking decision²⁰⁹. First question issued was the concern on the territorial scope of DPD. Specifically was raised the concern of 'establishment'. The court found that the answer to the question is that “art 4 (1)(a) of the Directive is to be interpreted as meaning that processing of personal data is carried out in the context of the activities of an establishment of the controller on the territory of a Member State, within the meaning of that provision, when the operator of a search engine sets up in a Member State a branch or subsidiary which is intended to promote and sell advertising space offered by that engine and which orientates its activity towards the inhabitants of that Member State.”²¹⁰

The second question issued was the concern on the extent of the responsibility of the operator of a search engine under Directive 95/46. Under this question the court analysed the legitimate interest, whereby the operator of a search engine carries out data processing under art 7 (f) of the Directive. Art 7 guarantees the right to respect for private life. The court held that the answer to question No 2 is that “art 12 (b) and sub-paragraph (a) of the first paragraph of art 14 of the Directive are to be interpreted as meaning that in order to comply with the right laid down in those provisions and in so far as the conditions laid down by those provisions are in fact satisfied, the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to

²⁰⁷ See fn 13, p 4-5

²⁰⁸ *Ibid*, p 6

²⁰⁹ *AEPD v Google*

²¹⁰ *Ibid*, pt 60

that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful.”²¹¹

And lastly, the third question was about concerning the scope of the data subject's rights guaranteed by Directive 95/46. The essence of the third questions is whether art 12 (b) and sub-paragraph (a) of the first paragraph of art 14 of the Directive “are to be interpreted as enabling the data subject to require the operator of a search engine to remove from the list of results displayed following a search made on the basis of his name links to web pages published lawfully by third parties and containing true information relating to him, on the ground that that information may be prejudicial to him or that he wishes it to be 'forgotten' after a certain time.” The court found that “/.../ when appraising the conditions for the application of those provisions, it should *inter alia* be examined whether the data subject has a right that the information in question relating to him personally should, at this point time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name. However that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the predominant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question.”²¹²

Even though credit reporting systems is not quite the same as is Google search engine, the core idea of the legitimate interest applies on both situations. When to think about the time limit in positive credit registry, the idea is that the creditor could estimate the creditworthiness of the debtor, by seeing already existing obligations. For how long should

²¹¹ *Ibid.* pt 73 & 88.

²¹² *Ibid.*, pt 89 & 99

a creditor see the obligations? Legitimate interests comes with the word 'necessity', which means then that the obligation the debtor has should be as long as the obligation is not erased. When the obligation had been fulfilled with no obstacles, it should be erased within 1 month from the credit reporting system. If the obligation had obstacles during fulfilling time, the time of erasing the obligation should depend on the seriousness of the default, but no longer than 3 years. As it is stated currently in the negative credit list that Estonia has.²¹³

The main argument against the credit reporting is the process of personal data. Positive credit reporting exhausts more personal data, as it usually contains all information about the debtors: taken obligations and it shows the payment archive, default and good one. Data Protection Inspectorate has stated that there is no current legislation on how long the data can be contained. The claim that people suffer because of being on the black list 14 years ago, is absurd.²¹⁴ If there has been such a situation, then Data Protection Inspectorate has may be failed to protect the data subject right. The loop in the legislation or a clear statement in the legislation which would specifically state for how long can be maintained the data in the credit reporting system, can be fixed by implying a law about the credit reporting system or by adding one point into either PDPA or Credit Institution Act. The loop in current legislation is that the breach of contract must be longer than 30 days and less than 3 years. This idea can be adopted and if implementing credit information system, then the information about an obligation can be up up to 3 years. The claim that everybody who considers themselves as third parties, is little misunderstood in the opinion of the author. Since the legitimate interest has to be shown by the creditor, then third parties who claim to be creditors based on “oral contract” should not have an access to the credit reporting system. Creditors who have written contracts and who's credit starts from 200 €.²¹⁵

²¹³ Credit Information Registry website, see here (last accessed 23.11.2014):

<http://www.krediidiinfo.ee/index.php?m=3> ; the information is only in Estonian, that natural person debt will be taken off after 3 years. In English the information is provided about legal entities, whose debt time is 7 years after the breach of contract settling the debt.

²¹⁴ See fn 99, p 3

²¹⁵ Directive 2008/48/EC art 2 (c). This sum should be considered in Estonia, as the minimum wage is in 2014 355 € and from 1st of January 2015 390 €. With this amount of minimum wage, 200 € makes a total of the salary in 2014 56,34% and in 2015 51,28%. If the obligation is higher than 50% of the minimum wage, then this kind of information should be seen in the credit reporting system as these people are vulnerable for over-indebtedness. See here (last accessed 23.11.2014): <https://www.riigiteataja.ee/akt/103122013004#para1>

Conclusion

Credit reporting has a lot of positive sides. The main one is that it helps to fulfil the obligation to comply with the principle of responsible lending. It should be noted that credit reporting should be open to creditors, who are qualified as creditors under law. When qualifying creditors, the aim should not be set only to credit institutions as there are creditors who do not take deposits as do credit institutions. Some creditors provide instant loans, easy money to people who have the need for quick money.

Personal data that is used in credit reporting system, should be specified under the law and if Estonia will make a decision in the future to create a positive credit institution, it should take into account, that not all personal data is sensitive and also necessary for the creditor to know. Creditor should know when checking the background on the debtor, which kind of financial obligations the debtor has, for how long are the obligations, have there been default payments and if they were in a small period of time before applying for new credit. Evaluation of the debtor's creditworthiness should not fulfil creditor's personal interest, only business one as the responsible lending principle is aimed to protect the lenders and the borrowers.

Estonian data protection legislation does not provide any obstacles on creating a positive credit reporting registry. The aim to not show too much information in order to protect the debtor from losing the job or somewhat similar, should not be the cause to prevent moving forward for positive credit reporting system. Yes, it can be argued that one is not needed as there should be enough from the information if the debtor has had defaults and whether they have or have not been settled. But this kind of excuse is out of date, as the financial crisis that took place in the end of 2000-s proved that people might set them in over-indebtedness as they do not know the boundaries. Credit institutions, creditors over-all do see the boundaries as it is in their interest to get back the loan with the profit.

Positive credit reporting registry should be under the supervision of the Central Bank, as it does not have such business interest as has a commercial creditor. Central Bank should cooperate or be under the supervision of the DPI when it comes on running the credit

reporting as the DPI's prime obligation is to prevent data breaches.

It can never be perfect the credit reporting, as the registry is run humans and humans tend to make mistakes. As long as they will work on credit reporting with honesty and careful mind on mistakes, the positive credit reporting registry will bring benefits both to consumers and business entities in Estonia.

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