



6.3.2024

## NOTICE TO MEMBERS

**Subject: Petition No 0794/2023 by M. H. (German) on the transparency of the score of the German credit rating agency ‘Schufa’**

### 1. Summary of petition

The petitioner demands that the score of the German credit rating agency “Schufa” be made fully transparent. At present, parts of the calculation basis are secret, which, according to the petitioner, violates democratic principles. According to the petitioner, low-income households are discriminated against because citizens living in structurally weak regions are rated lower. The petitioner fears that a large proportion of citizens with a migration background are disadvantaged in the granting of loans.

### 2. Admissibility

Declared admissible on 21 November 2023. Information requested from Commission under Rule 227(6).

### 3. Commission reply, received on 6 March 2024

Directive 2008/48/EC on credit agreements for consumers lays down rules concerning the provision of credit by creditors to consumers. Article 8 of Directive 2008/48/EC regulates creditworthiness and establishes that the creditor shall assess the creditworthiness of the consumer on the basis of sufficient information, where appropriate obtained from the consumer and, where necessary, on the basis of a consultation of the relevant database. However, Directive 2008/48/EC does not provide additional rules addressing credit scoring.

Directive 2023/2225 on credit agreements for consumers and repealing Directive 2008/48/EC establishes that, before concluding a credit agreement, the creditor has to carry out a thorough assessment of the consumer’s creditworthiness. Directive 2023/2225 will enter into application in November 2026. As laid down in Article 18 of Directive 2023/2225 the creditworthiness

assessment shall be carried out in the interest of the consumer with the objective of preventing irresponsible lending practices and over-indebtedness and shall take appropriate account of factors relevant to verifying the prospect of the consumer meeting his or her obligations under the credit agreement.

With regard to the categories of data that may be used for the processing of personal data for credit worthiness purposes, Article 18(3) of Directive 2023/2225 provides that the assessment of creditworthiness shall be carried out on the basis of relevant and accurate information on the consumer's income and expenses and other financial and economic circumstances which is necessary and proportionate to the nature, duration, value and risks of the credit for the consumer. That information may include evidence of income or other sources of repayment, information on financial assets and liabilities, or information on other financial commitments. That information shall not include special categories of data referred to in Article 9(1) of Regulation (EU) 2016/679. The information shall be obtained from relevant internal or external sources, including the consumer and, where necessary, on the basis of a consultation of a database referred to in Article 19 of this Directive.

With regard to the issue of automated decision making, referred to in this Petition, Article 18(8) of Directive 2023/2225 establishes that where the creditworthiness assessment involves the use of automated processing of personal data, Member States shall ensure that the consumer has the right to request and obtain from the creditor human intervention, consisting of the right to: (a) request and obtain from the creditor a clear and comprehensible explanation of the assessment of creditworthiness, including on the logic and risks involved in the automated processing of personal data as well as its significance and effects on the decision; (b) express the consumer's own point of view to the creditor; and (c) request a review of the assessment of the creditworthiness and the decision on the granting of the credit by the creditor.

Directive 2023/2225 establishes also that the creditor only makes the credit available to the consumer where the result of the creditworthiness assessment indicates that the obligations resulting from the credit agreement are likely to be met in the manner required under that agreement.

These rules complement Article 22 of the Regulation (EU) 2016/679<sup>1</sup> that provides, in paragraph 1, for the prohibition of automated decision-making including profiling that produces legal or similarly significant effects on the data subject. The prohibition is lifted if one of the exceptions of paragraph 2 of Article 22 is fulfilled, namely: where the automated decision-making is necessary for entering into, or performance of, a contract between the data subject and a data controller; is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or is based on the data subject's explicit consent. Paragraph 3 provides that, even in such exceptional situations, the data subject must have the right to obtain human intervention and to express his/her point of view. In addition, Articles 13, 14 and 15 of that Regulation provide that meaningful information about the logic involved, as well as the significance and the envisaged consequences must be provided where the above-mentioned automated decision-making is performed.

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

Considering the above, the Commission has three (3) intermediary observations:

First, Directive 2023/2225 does not regulate credit scoring as such; the Directive merely provides a non-exhaustive list of categories of personal data that may be used when the creditor is processing personal data for creditworthiness purposes.

Second, compared to Directive 2008/48/EC on consumer credit agreements, Directive 2023/2225 refers to automated decision making and provides consumers with a number of rights referred to above – hence it adds elements of transparency whenever there is a decision based on automated decision making.

Third, when personal data are processed to assess creditworthiness, this processing has to also comply with Regulation (EU) 2016/679; hence, it is paramount that both Directive 2023/2225 and Regulation 2016/679 are observed by the creditor when carrying out a credit worthiness assessment.

The Commission also takes note of the reference in the Petition to Cases C-634/21, and C-26/22 and C-64/22 to which the Court of Justice of the European Union (CJEU) delivered its judgements on 7 December 2023. The Commission notes that in C-634/21 the CJEU found that the “*the automated establishment, by a credit information agency, of a probability value based on personal data relating to a person and concerning his or her ability to meet payment commitments in the future constitutes ‘automated individual decision-making’ within the meaning [Article 22(1) of the Regulation (EU) 2016/679], where a third party, to which that probability value is transmitted, draws strongly on that probability value to establish, implement or terminate a contractual relationship with that person.*” In such situations, the controller must ensure that the prohibition of Article 22(1) has been lifted by virtue of one of the three exceptional situations listed in Article 22(2) of General Data Protection Regulation (GDPR). Moreover, the right to receive information as provided by Articles 13, 14 and 15 of the Regulation (EU) 2016/679 applies. The Commission notes that the CJEU has been further asked to clarify the notion of ‘meaningful information’ about the logic involved referred to in the above-mentioned articles in case C-203/22, currently pending.

With regard to the comments raised in the Petition by the Federal Commissioner for Data Protection and Freedom of Information (BfDI) as regards Paragraph 31 of the German federal law on data protection<sup>2</sup> (BDSG), the Commission notes that in C-634/21 the CJEU requires “*the referring court to verify whether Paragraph 31 of the BDSG can be classified as a legal basis authorising, under Article 22(2)(b) of the GDPR, the adoption of a decision solely based on automated processing. If that court were to reach the conclusion that Paragraph 31 of the BDSG constitutes such a legal basis, it would still be up to it to verify whether the conditions set out in Article 22(2)(b) and (4) of the GDPR and those laid down in Articles 5 and 6 of that regulation are fulfilled in this case.*”

## Conclusion

Against this background, regarding the elements concerning the protection of personal data, in particular Cases C-634/21, and C-26/22 and C-64/22, the Commission awaits the assessment of the referring court.

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<sup>2</sup> Bundesdatenschutzgesetz vom 30. Juni 2017 (BGBl. I S. 2097)

With regard to the wider issue of credit scoring and transparency, the Commission highlights that the current and future applicable legislative framework aims at ensuring procedures, such as those laid down in Article 22 GDPR and Article 18 of Directive 2023/2225, that are as transparent as possible and allow for human intervention.