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

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I. INTRODUCTION AND BACKGROUND

The integration of European Union (EU) credit markets is crucial for the efficient functioning of the EU financial system, for the EU economy as a whole, and for the full achievement of the four freedoms guaranteed by the EU's internal market.[1] Neither the consumer nor the mortgage-credit markets are an exception to this need for integration, and EU policymakers are paying increased attention to them. Concurrently, the market for loans available to consumers—both consumer loans and mortgage-credit loans—has grown rapidly in the last decade across the EU and is becoming increasingly sophisticated. However, the development of retail and mortgage-credit markets has increasingly left European consumers in debt. This growth of consumer indebtedness is becoming a concern for national and EU policymakers alike.

The ongoing, global credit and financial crisis has raised important issues regarding: the protection of consumers in financial markets; the scope, amount, and effectiveness of regulation in financial markets; and the need for additional safeguards to stem the social problems that the crisis has exacerbated. Consumers are still bearing the costs of the financial-market failures, as evidenced by policy documents revealing the severe consequences not only for individual homeowners losing their homes in foreclosure procedures, but also for society as a whole, considering "their impact on financial and social stability."[2] Moreover, a large number of member states have imposed austerity

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1. *See Single Market Act: Twelve Levers to Boost Growth and Strengthen Confidence*, at 3, COM (2011) 206 final (Apr. 13, 2011) [hereinafter *Single Market Act*], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0206:FIN:EN:PDF. The four freedoms are the free movement of goods, capital, services, and people. *Id.*

2. *National Measures and Practices To Avoid Foreclosure Procedures for Residential Mortgage Loans*, at 3, SEC (2011) 357 final (Mar. 31, 2011), *available at* http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/sec_2011_357_en.pdf.

measures as a core strategy to overcome the current debt crisis. Nonperforming personal and mortgage loans are expected to remain at high levels or even increase, indicating that overindebtedness is likely to persist or intensify. Therefore, the promotion of responsible lending and borrowing policies to limit the overindebtedness of European consumers is high on the EU agenda, alongside the advancement of measures for the cross-border provision of credit and the abolition of obstacles to the free movement of goods, persons, services, and capital in order to achieve further integration.[3] Likewise, European policymakers closely scrutinize the relationship between borrowers and financial institutions.

Responsible lending and borrowing is a recent policy in the EU. Documents reveal that the EU's policy makes reference to the delivery of responsible and reliable markets—as well as to the restoration of consumer confidence—where credit products are appropriate for consumers' needs and are tailored to their ability to repay debts.[4] The policy envisages a framework that could "ensure that all lenders and intermediaries act in a fair, honest and professional manner, before, during and after the lending transaction."[5] Similarly, it is expected that in order to obtain credit, "consumers should provide relevant, complete and accurate information on their financial conditions."[6] They are also "encouraged to make informed and sustainable borrowing decisions."[7] The European Commission recently consulted all stakeholders on responsible lending and borrowing in the EU to find measures to adequately assess—by all appropriate means—borrowers' creditworthiness before granting them a loan, in order to tackle overindebtedness.[8] The consultation covered, among other things: the advertising and marketing of credit products; the information provided to borrowers prior to granting any loans; ways to assess product suitability and borrower creditworthiness; advice standards; responsible borrowing; and issues relating to the framework for credit intermediaries.[9]

At present, consumer-credit data sharing and database consultation at the national level are the available market solutions before granting loans to individuals. At the same time—considering the integration of retail credit markets and the harmonization of the rules governing them—the EU requires

3. *See Communication for the Spring European Council: Driving European Recovery*, vol. 1, at 15, COM (2009) 114 final (Mar. 4, 2009), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0114:FIN:EN:PDF.

4. *See Public Consultation on Responsible Lending and Borrowing in the EU*, at 3 (June 15, 2009) [hereinafter *Public Consultation*], *available at* http://ec.europa.eu/internal_market/consultations/docs/2009/responsible_lending/consultation_en.pdf.

5. *Id.*

6. *Id.*

7. *Id.*

8. *See Public Consultation*, *supra* note 4, at 3.

9. *See generally id.* Issues relating to intermediaries include disclosure, registration, licensing, and supervision. *See id.* at 14.

full compliance with its existing legal framework, especially its data-protection rules.[10] Against that background, this Article aims to present the legal framework of EU consumer-credit information and scoring systems under a single retail credit market while attempting to identify pitfalls and challenges ahead.

So far, the EU presents a fragmented picture; credit bureaus operate nationally with isolated and limited cross-border initiatives. Credit bureaus are present in most EU member states, but institutional structures vary depending on their policy objectives and the functions they perform in each economy and society. Examples of these policy objectives are: the stability of the member states' financial systems; the fight against consumer overindebtedness; and risk-management in the interest of the profitability of the retail-credit industry. In the EU, there are both public and private credit bureaus, distinguished by the role of credit-information providers. While the former are institutionally designed to address the stability of the financial system and to monitor the indebtedness of consumer households, the latter offer risk-management tools to the market to enhance economic efficiency and the profitability of credit providers. This holds true regardless of whether the credit bureaus are banks lending money from third-party depositors, or any other entity doing business through the provision of credit in return for a profit.[11]

First, this Article will review the function of consumer-information sharing and scoring within the EU context. Then, it will present the corresponding institutional arrangements and laws in an attempt to understand if they provide sufficient protection for consumers vis-à-vis responsible lending policies, as well as established fundamental rights and principles enshrined in EU law. Because important legal rights and liberties are involved, this Article ultimately takes the stance that the function of credit bureaus should be to inform the design and use of the underlying information and scoring systems, as well as the institutional form they take. Whether credit bureaus perform a public function or a function in the private interest of credit providers, this distinction makes a very important difference in policy, legal, and institutional terms.

10. *See White Paper on the Integration of EU Mortgage Credit Markets*, at 7, COM (2007) 807 final (Dec. 18, 2007), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0807:FIN:EN:PDF.

11. *See generally* FEDERICO FERRETTI, THE LAW AND CONSUMER CREDIT INFORMATION IN THE EUROPEAN COMMUNITY: THE REGULATION OF CREDIT INFORMATION SYSTEMS (2008).

II. A REVIEW OF CREDIT BUREAUS THROUGH ECONOMIC LITERATURE

Economic theory has long stressed the importance of information in credit markets. Scholars have created a large body of theoretical studies aimed at demonstrating that asymmetric information between borrowers and lenders creates problems regarding bad debt, moral hazard, and adverse selection. They suggest that lack of information on borrowers can prevent the efficient allocation of credit in a market, and one way lenders can improve their knowledge of borrowers is through observation of clients over time.[12]

Lenders evaluate credit applications and creditworthiness by pooling their own credit information about customers or applicants into centralized databases managed by third-party providers—credit bureaus. Thus, credit bureaus play a pivotal role as a borrower-discipline device because borrowers know that a default in repayment compromises their reputation with all potential lenders in the market. The result for the borrower is credit with more costly terms, or the inability to get credit entirely. According to this economic theory, information sharing makes it easier to predict with a certain degree of confidence the future payment behavior of applicants, allowing lenders to attract good borrowers and offering them better terms and conditions. In turn, this promotes market competition that could ultimately result in benefits to consumers.[13]

Information sharing has also been examined in the context of market competition and the entry of new market players, particularly foreign lenders. In fact, the problem of asymmetric information and adverse selection becomes greater for new market entrants. This is particularly relevant for the creation of the single market in the EU and the cross-border entry of market players from other member states, or the cross-border provision of financial services by lenders established in other member states. In addition to the competitive disadvantages related to the possibility of incorrectly estimating a borrower's credit risk, new market entrants are likely to attract those who were rejected by existing lenders in the market if they do not have relevant information about the borrowers. These circumstances have provoked recent literature to conclude

12. *See* Allen N. Berger & Gregory F. Udell, *Relationship Lending and Lines of Credit in Small Firm Finance*, 68 J. BUS. 351, 367 (1995), *available at* http://scholarcommons.sc.edu/cgi/viewcontent.cgi?article=1009&context=fin_facpub; Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information*, 71 AM. ECON. REV. 393, 393-94 (1981). The adverse selection problem occurs when lenders fail or are unable to distinguish good or profitable borrowers from bad or unprofitable ones. In that case, all accepted borrowers would be charged an average interest rate that mirrors their experience. Therefore, the distinction between good and bad borrowers allows lenders on the one hand to offer more advantageous prices to low-risk borrowers while on the other hand offering higher interest rates or refusing credit to higher-risk borrowers.

13. *See* Anat R. Admati & Paul Pfleiderer, *Forcing Firms To Talk: Financial Disclosure Regulation and Externalities*, 13 REV. FIN. STUD. 479, 479-83 (2000); Douglas W. Diamond, *Monitoring and Reputation: The Choice Between Bank Loans and Directly Placed Debt*, 99 J. POL. ECON. 689, 689-91 (1991); Tullio Jappelli & Marco Pagano, *Information Sharing, Lending and Defaults: Cross-Country Evidence*, 26 J. BANKING & FIN. 2017, 2017-18 (2002).

that information sharing, market structure, and competitive conduct are intrinsically intertwined in the financial services market. From the standpoint of industrial organizations, the availability of information shared within the sector can affect not only a foreign lender's choice to enter another jurisdiction, but also the mode of so doing; whether through the cross-border provision of services, by setting up branches or subsidiaries, or through mergers and acquisitions.[14]

In addition, credit-reporting systems are instrumental tools in expanding the breadth and depth of financial markets and in strengthening the financial system. They reduce transaction costs, loan-processing costs, and the time required to process applications. Credit-reporting systems improve lenders' client-portfolio quality by monitoring it and identifying potential problems. They also provide cost-efficient, standardized, and objective criteria for credit analysis; facilitate distant transactions (including e-finance or Internet transactions); provide opportunities for new financial products to reach consumers; and enable lenders to serve consumers who would be underserved or ignored otherwise. All of these aspects, in turn, result in the development and sale of new products as well as tailored pricing, targeting, and marketing that ultimately contribute to the lenders' profitability.[15]

Take, for example, the securitization of lenders' portfolios of consumer loans, including mortgages. Leaving aside discussions on the financial system's complexity because it is beyond the scope of this Article, investors in asset-backed securities need information on the quality of the underlying assets, which requires information pooling and sharing. Without this information, investors would not risk investing, or they would require a risk premium, which would signify higher refinancing costs for lenders and ultimately be passed onto consumers as higher borrowing costs.[16] Information exchanges and data pooling become tools for financial markets, and the real economy felt further repercussions, as observed during the 2008 financial crisis.[17]

A more recent reason for interest in credit bureaus is that, through extensive

14. CATERINA GIANNETTI, NICOLA JENTZSCH & GIANCARLO SPAGNOLO, EUR. CREDIT RESEARCH INST., INFORMATION-SHARING AND CROSS-BORDER ENTRY IN EUROPEAN BANKING 1-2 (2010), http://aei.pitt.edu/14442/1/ECRI_RR_No__11.pdf. The cross-border provision of services occurs when a firm established in one member state offers services in another member state without setting up an establishment in that other member state.

15. *See* Cesare Calari, *Foreword* to CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY, at vii (Margaret J. Miller ed., 2003); *see also* Margaret J. Miller, *Introduction* to CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY, *supra*, at 1-2 (discussing purpose and importance of credit-reporting systems).

16. *See* DG INTERNAL MARKET & SERVICES, REPORT OF THE EXPERT GROUP ON CREDIT HISTORIES 7 (2009), http://ec.europa.eu/internal_market/consultations/docs/2009/credit_histories/egch_report_en.pdf (arguing investors need accurate and reliable information).

17. *See generally* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS (2011).

and detailed collection and sharing of personal data, they provide useful services in the fight against overindebtedness for borrowing individuals. In policy terms, these practices could provide the credit industry with the tools for responsible lending, which could in turn protect individuals from borrowing beyond their means.[18] However, this aspect is not free from controversy, especially when private credit bureaus are involved rather than public authorities or supervisors. Recent experience shows that credit bureaus were not effective and did not help lenders to foresee the financial crisis originating from household indebtedness. This was particularly true in the United States and, to some extent the United Kingdom, where credit bureaus are most sophisticated. On the contrary, considering the amount and type of data that they collect as well as the detail of the information supplied, credit bureaus were used to foster and encourage the segmentation of credit markets. Credit bureaus were also used to create prime and subprime markets. Those borrowers who were at a disadvantage in the subprime market were offered more costly loans that were more burdensome related to the risk-taking of lenders (rather than the alternative, where those at a disadvantage would pay less in order to meet their repayment obligations).[19]

It should be noted, however, that credit bureaus take decisive advantage of their ability to provide firsthand information and knowledge by offering additional services to the industry, with the use of consumer-credit data as the basis for their provision. Such additional services include, among others: credit scoring, consulting, application processing, small-business-information reports, market and consumer research, debt collection, marketing, fraud prevention, and identity verification of credit applicants (including identity-theft detection and verification for money laundering). Additionally, credit bureaus provide other private transactions, such as: commercial transactions, property rentals, telecommunication subscriptions, insurance contracts, and employment screening.[20]

In particular, it is worth mentioning the practices of exchanging consumers' financial information and scoring applicants or existing customers. This is a related, yet distinct, use of personal, financial information that avails itself of ad hoc technologies that add features and integrate credit data with other data sources for additional purposes. Credit scoring, in fact, is a classification and

18. *See* TREASURY COMMITTEE, RESPONSES TO THE COMMITTEE'S SECOND REPORT OF SESSION 2004-05: CREDIT CARD CHARGES AND MARKETING (HC 274), 2004-5, H.C. 508, at 6-10 (U.K.).

19. *See generally* Federico Ferretti, *A European Perspective on Consumer Loans and the Role of Credit Registries: The Need To Reconcile Data Protection, Risk Management, Efficiency, Over-indebtedness, and a Better Prudential Supervision of the Financial System*, 33 J. CONSUMER POL'Y 1 (2010).

20. *See About Us*, EXPERIAN, http://experian.co.uk/about-experian/capabilities.html (last visited Nov. 11, 2013); *see also* CALLCREDIT, http://www.callcredit.co.uk (last visited Nov. 11, 2013); EQUIFAX, http://www.equifax.co.uk (last visited Nov. 11, 2013). For literature in business studies, see generally HELEN MCNAB & ANTHEA WYNN, PRINCIPLES AND PRACTICE OF CONSUMER CREDIT RISK MANAGEMENT (2000).

profiling technique. It is a way of recognizing different groups in a population according to certain features, expressed by a combination of personal data—including financial information and other nonpersonal information—and differentiating them based on parameters and classifications set a priori from statistics for a predictive purpose. In technical terms, credit-scoring models are mathematical algorithms or statistical programs that determine the probable debt repayments by consumers, assigning a score to an individual based on information processed from a number of data sources and categorizing credit applicants according to risk classes. They involve data-mining techniques that include statistics, artificial intelligence, machine learning, and other fields aimed at getting knowledge from large databases.[21]

There is a final justification for exchanging consumers' financial information and pooling it in centralized databases, which deserves attention. While it has, or at least should have, little to do with the role of private credit bureaus doing business for profit, it is relevant for supervisors of the financial system as a whole. As will be demonstrated in this Article, this justification is based on an economic and regulatory function that has often been confused or underestimated, and is related to the stability of the financial system and prudential supervision. In fact, in the EU, information exchanges among lenders via centralized public databases are commonly used to supervise the financial system. Prudential, financial supervision encompasses a number of complex issues and elements that are far beyond the scope of this Article.

What is relevant in this context, however, is that among the tools to achieve the requisite oversight, it is necessary for the applicable regulatory authorities to have adequate and timely information about the behavior, leverage, and condition of banks vis-à-vis the whole system. Among the various types of information the authorities need—asset quality, capital adequacy, liquidity, internal systems of control and security, income and dividends, foreign operations, etc.—is regular reporting of past-due and nonperforming loans. This not only allows supervisors to be in control—affording them information on the condition and performance of the supervisees—and to be able to intervene promptly should problems arise, but also serves as an instrument to promote transparency, favoring greater reliance on market discipline. As far as this latter component is concerned, banks benefit from supervision in that they are provided with the tools to control the quality of their loans during daily

21. *See generally* JOSEPH P. BIGUS, DATA MINING WITH NEURAL NETWORKS: SOLVING BUSINESS PROBLEMS FROM APPLICATION DEVELOPMENT TO DECISION SUPPORT (1996); Vijay S. Desai et al., *Credit-Scoring Models in the Credit-Union Environment Using Neural Networks and Genetic Algorithms*, 8 IMA J. MANAGEMENT MATHEMATICS 323 (1997); Herbert L. Jensen, *Using Neural Networks for Credit Scoring*, 18 MANAGERIAL FIN. 15 (1992); M.B. Yobas et al., *Credit Scoring Using Neural and Evolutionary Techniques*, 11 IMA J. MANAGEMENT MATHEMATICS 111 (2000); Meliha Handzic et al., *How Neural Networks Can Help Loan Officers To Make Better Informed Application Decisions*, INFORMING SCI. (June 2003), http://proceedings.informingscience.org/IS2003Proceedings/docs/024Handz.pdf.

operations. To encourage this policy, centralized, publicly managed databases provide banks and supervisors with aggregate information about the level of borrowers' indebtedness relative to the entire financial system.[22] The exchange of private financial information in this context may become clearer with a discussion of the institutional form that information providers take in the EU, and their role in the economy.

III. CREDIT BUREAUS IN THE EU

Credit bureaus are third-party public or private entities that provide shared positive and negative information to lenders in an organized form and manage centralized databases. They exist in most EU member states, but their institutional structure varies depending on different policy objectives and the functions they perform in the economy and society. Similarly, databases are organized, and the types of information are provided, according to the policy objectives that they are meant to address. As seen earlier, examples of such objectives are the stability of the financial system, the fight against consumer overindebtedness, and risk-management balancing in the interest of the profitability of the retail-credit industry. Distinguishing the role of credit-information providers reveals the key distinction between public and private credit registries. The former is normally part of a national central bank or supervisory authority, and both institutionally and legally designed to address the stability of the financial system and monitor the indebtedness of consumer households. The latter offers the market risk-management tools to enhance economic efficiency and the profitability of credit providers, irrespective of whether these are banks lending the money of third-party depositors, or any other entity doing business through the provision of credit in return for profit.[23]

The state of affairs in Europe appears to be a mixed one: in certain markets, such as Belgium and France, only public entities operate. In the majority of markets—Cyprus, Denmark, Estonia, Finland, Greece, Hungary, Ireland, Malta, the Netherlands, Poland, Sweden, and the United Kingdom—the business of information providers has been left to free-market forces. However, in Austria, Bulgaria, the Czech Republic, Germany, Italy, Latvia,

22. *See generally* RICHARD A. BREALEY ET AL., FINANCIAL STABILITY AND CENTRAL BANKS: A GLOBAL PERSPECTIVE (2001); PETER CARTWRIGHT, BANKS, CONSUMERS AND REGULATION (2004); ROSA MARÍA LASTRA, CENTRAL BANKING AND BANKING REGULATION (1996); Rosa M. Lastra & Heba Shams, *Public Accountability in the Financial Sector*, *in* REGULATING FINANCIAL SERVICES AND MARKETS IN THE TWENTY FIRST CENTURY 165 (Eilís Ferran & Charles A. E. Goodhart eds., 2001).

23. *See* Tullio Jappelli & Marco Pagano, *The Role and Effects of Credit Information Sharing*, *in* THE ECONOMICS OF CONSUMER CREDIT 347, 347-48 (Giuseppe Bertola et al. eds., 2006) [hereinafter Jappelli & Pagano, *The Role and Effects*]; Tullio Jappelli & Marco Pagano, *Information Sharing in Credit Markets: The European Experience* 7-10 (Ctr. for Studies in Econ. & Fin., Working Paper No. 35, 2000) [hereinafter Jappelli & Pagano, *Information Sharing*], *available at* http://www.csef.it/WP/wp35.pdf. *See generally* FERRETTI, *supra* note 11.

Lithuania, Portugal, Romania, Slovakia, Slovenia, and Spain, private and public credit registries coexist.

A. Private Credit Bureaus

The main feature of private credit bureaus is that they are profit-seeking companies subject to the same rules and regulations as every incorporated company doing business in the marketplace. Typically, they have a broad range of client members, from banks to nonbank lenders and include a wide array of businesses and agencies. The law does not require lenders to consult their databases prior to the underwriting of credit, and they do so on a voluntary basis. Significantly, neither law nor regulation imposes rules relating to the functioning of the system, but instead a typical supplier-client relationship contracts for these rules under private law because participation by lenders in a privately owned, consumer-credit-information system is not compulsory. The negotiating power of a lender changes from country to country depending on a number of factors, including competition in that market and maturity of the system, i.e., a start-up lender with few or no client members has disparate bargaining power compared to well-established lenders with extensive market participation. The credit data collected and processed are supplied to the centralized database by the lenders, who exchange information and build the database. The lenders supply information on a reciprocal basis by way of a contractual agreement. In other words, lenders can access the database only if they contribute to it for the benefit of all other contributing member lenders. Databases may be supplemented by noncredit data collected from other sources.

Crucially, client members may be lenders operating outside the banking or traditional consumer-credit sector, including telecommunications, utility and mail-order companies, and any other business advancing goods or services to consumers paying for them at a later stage. In this way, financial and nonfinancial entities have access to consumer information across different economic segments. From a different perspective, accessibility to full credit and other noncredit data may affect the inclusion, exclusion, or sorting within different economic spheres of the consumers.[24]

Private credit bureaus also provide their clients with additional related services, in particular statistical models that produce and sell credit-scoring services by rating borrowers according to their credit history and profile, which are derived from processing information gathered from different data sources. Where a wide range of data is available, the models may be increasingly used for purposes other than the assessment of borrowers' creditworthiness, such as

24. *See generally* FERRETTI, *supra* note 11; Jappelli & Pagano, *The Role and Effects*, *supra* note 23; Jappelli & Pagano, *Information Sharing*, *supra* note 23.

for scoring customers to promote financial products and price loans, or managing customer credit limits. Very importantly, these actions are effectively business intelligence and marketing activities that help lenders segment the market and client base—as well as price loans—which also enables the sorting of consumers in prime and subprime categories.

B. Public Credit Bureaus

Public credit registries are institutions typical of continental Europe, where they first originated and developed with the objective of providing an information system for supervisors to analyze bank portfolios and monitor the health and soundness of the overall financial system of a country, including the level of borrower indebtedness. As a result, they exercise a public function by furthering the general stability of the banking and payment system and monitoring levels of indebtedness. On a microeconomic level, lenders can detect and tightly control their credit provisioning as well as the amount of overdue and defaulted debt in circulation, while the public credit registries supervise and control the level of indebtedness on a macroeconomic basis.[25] Only banks participate in the public credit system and are subject to the underlying rules, unlike credit bureaus which also take in nonbank lenders as their clients and which are conceived as open systems with the incentive of bringing an increasing number of subscribers and information into play.

In the public-credit-bureau system there is also a two-way flow of consumers' credit data between lenders and the centralized database. The first flow is from the participating institutions to the public credit registry. The latter, in turn, consolidates the data on the loans granted to the same borrower by each bank in order to calculate and ultimately report the aggregate indebtedness. However, the key difference between public and private credit bureaus is that financial institutions under the supervision of a country's central bank or supervisory authority are required to report certain credit data regularly to the country's public credit registry by law. Therefore, considering participation in the system is compulsory, its rules are imposed by law or

25. For similar considerations about the value of public credit registries, see generally Andrew Powell et al., *Improving Credit Information, Bank Regulation and Supervision: On the Role and Design of Public Credit Registries* (World Bank Policy Research, Working Paper No. 3443, 2004). Further, the recommendations of the Basel Committee for Banking Supervision (so-called Basel II, followed by Basel III) on the methods aimed to determine the necessary capital requirements of banks permit, for the first time, the latter to group their loans to private individuals into a retail portfolio to be audited by the competent, supervisory authorities. BASEL COMM. ON BANKING SUPERVISION, INTERNATIONAL CONVERGENCE OF CAPITAL MEASUREMENT AND CAPITAL STANDARDS: A REVISED FRAMEWORK 23 (2006), *available at* http://www.bis.org/publ/bcbs128.pdf. Credit bureaus clearly do not and cannot have a role because of the aims and design of credit-reporting systems (information sharing is alien to the analysis of an existing portfolio) and because they lack the necessary authority. On the risk relating to retail credit portfolios, see generally DAVID KALTOFEN ET AL., EUR. CREDIT RES. INST., RETAIL LOANS AND BASEL II: USING PORTFOLIO SEGMENTATION TO REDUCE CAPITAL REQUIREMENTS (2006).

regulation, not under contract as occurs with private information sharing providers. This compulsory nature also means that public credit registries have complete coverage of the financial institutions of a country. Under this system, no bank lenders are left out as may happen when parties are free to negotiate whether to take part in a system or not, or which system to be part of if more than one exists.[26]

Further, public authorities have a legal basis for demanding that reporting lenders remedy possible inaccuracies or make available missing data. Failure to comply can result in sanctions that may be imposed by law, such as penalty fees followed by supervisory actions like suspension or license withdrawal.[27] Indeed, these rules of participation represent a fundamental difference between public credit registries and credit bureaus, and they have a decisive impact on the legal framework of the relevant information systems.

From a different perspective, the assessment and monitoring of the level of borrowers' indebtedness means that, unlike credit bureaus, public credit registries have universal coverage of all loans above a threshold amount determined by law or regulation. This information consists of credit data disseminated in a consolidated form. Accordingly, lenders have access to the total loan exposure of each borrower, there is no detail on individual loans, and no merger with other personal data or data mining occurs. Another important feature is that public providers operate under strict confidentiality for participating banks, and the banks provide data disseminated in aggregate form. No secondary uses, data mining, or data manipulation are attached to the system.[28] Consequently, no scoring activity arises from this information.

Based on the information described herein, it seems indisputable that public credit registries and private credit bureaus cannot be substitutes to the extent that the former exercise functions in the public interest that the latter are not entitled to perform. Public credit registries, however, can substitute for private credit bureaus to the extent that the lenders' debt-provisioning remains tightly controlled and the amount of overdue or defaulted debt is controlled. When a borrower who deals with a bank is already indebted, the public registry sends the borrower's aggregate position to the concerned lender vis-à-vis the entire banking system. To the contrary, as far as decision-making, support, marketing, and other commercial activities are concerned, public registries cannot substitute for private credit bureaus. In the end, the choice of one or the other, or both, largely depends on the policy goals or other private interests that

26. *See generally* FERRETTI, *supra* note 11; Jappelli & Pagano, *The Role and Effects*, *supra* note 23; Jappelli & Pagano, *Information Sharing*, *supra* note 23.

27. *See* Margaret J. Miller, *Credit Reporting Systems Around the Globe: The State of the Art in Public Credit Registries and Private Credit Reporting Firms*, *in* CREDIT REPORTING SYSTEMS AND THE INTERNATIONAL ECONOMY, *supra* note 15, at 25, 35-49.

28. *See generally* FERRETTI, *supra* note 11; Jappelli & Pagano, *The Role and Effects*, *supra* note 23; Jappelli & Pagano, *Information Sharing*, *supra* note 23.

member states aim to achieve. Consequently, the design of the relevant database should forward the goals to be achieved.

IV. EU POLICY AND THE LEGAL FRAMEWORK OF CREDIT FOR CONSUMERS

At the EU level, creation of an efficient and competitive single consumer-credit market in an environment in which consumers receive adequate protection is a high-priority concern on the agenda for the completion of the internal market. Unfortunately, Council Directive 87/102 on consumer credit (Directive 87/102), which aimed to reach this goal, proved ineffective.[29] Adopted in 1986, Directive 87/102 established a legal framework for consumer credit throughout the EU with the aim of promoting a common market for credit and creating an environment in which consumers receive adequate protection.[30] However, Directive 87/102's minimal-harmonization approach resulted in the fragmentation and segmentation of credit markets into separate, national entities. Appropriately, research conducted on Directive 87/102's inefficacy to establish a common market in consumer credit concluded:

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

The underlying information-sharing and scoring arrangements were excluded from the provisions of Directive 87/102, leaving them under the application of comprehensive law, such as data-protection legislation.

In the effort to create a single market for consumer credit—and after years of intense discussions—the European Commission and the European Parliament

29. *See* Council Directive 87/102, for the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Consumer Credit, 1986 O.J. (L 42) 48, 48-53 (EC) [hereinafter Directive 87/102], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31987L0102:EN:PDF.

30. *See id.*

31. *See* Karel Lannoo & Almudena de la Mata Muñoz, *Integration of the EU Consumer Credit Market: Proposal for a More Efficient Regulatory Model* 5-6 (Ctr. for European Policy Studies, Working Document No. 213, 2004), *available at* http://aei.pitt.edu/6647/1/1174_213.pdf.

finally approved the text of Directive 2008/48, mandating implementation by the member states before May 10, 2010.[32] Among its provisions, Article 8 provides that:

> Member States shall ensure that, before the conclusion of the credit agreement, the creditor assesses the consumer's creditworthiness 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*. Member States whose legislation requires creditors to assess the creditworthiness of consumers on the basis of a consultation of the relevant database may retain this requirement.[33]

It is interesting to observe how substantially this provision differs from previously proposed versions of Directive 2008/48. Each member state would have ensured its own operation of a central database for the purpose of registering consumers and guarantors who have already defaulted, which would have taken the form of a network database. Moreover, creditors should have consulted the database prior to any commitment on the part of the consumer or guarantor, subject to previous notice of such consultation and without charge. Access to the central database in another member state should have been ensured under the same conditions as for lenders and individuals in that member state, either directly or via the central database of the home member state.[34] Directive 2008/48 additionally introduced the principle of responsible lending, based on the requirement that a lender had "previously assessed, by any means at his disposal, whether the consumer and, where appropriate, the guarantor can reasonably be expected to discharge their obligations under the agreement."[35] The Legal Affairs Committee of the European Parliament

32. *See generally* Directive 2008/48 of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for Consumers and Repealing Council Directive 87/102/EEC, 2008 O.J. (L 133) 66 (EC) [hereinafter Directive 2008/48], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:133:0066:0092:EN:PDF.

33. *Id.* art. 8(1) (emphasis added).

34. *See Proposal for a Directive of the European Parliament and of the Council on the Harmonisation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Credit for Consumers*, at 39, COM (2002) 443 final (Sept. 11, 2002), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0443:FIN:EN:PDF (proposing Article 8 to ensure member states' operation of central consumer database). Importantly, the proposal further specified, in the third provision of Article 8:

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

Id. Article 8 then concludes by clarifying that "[t]he central database referred to in paragraph 1 may include the registration of credit agreements and surety agreements." *Id.*

35. *Id.* at 40 (proposing Article 9).

expressly rejected—and the European Commission consequently withdrew—the proposed provisions affecting consumer-credit reporting and scoring.[36] The explanatory statement of the amended version, later adopted into law, made clear that the obligation to set up national credit reference databases was removed because it would have surpassed the purpose of Directive 2008/48.[37]

In the end, all that is left from previous proposals of the law now in force is an obligation on lenders to assess an undefined "creditworthiness" of consumers. Also, Directive 2008/48 excludes from its application agreements for the provision, on a continuing basis, of services or the supply of goods of the same kind.[38] This obligation excludes the applicability of Article 8 to insurance services, telecommunications, or landlords.[39] Moreover, further exemptions are listed in Article 2 of Directive 2008/48, excluding certain types of agreements from its scope.[40] Examples include: credit agreements secured by either a mortgage or another comparable security, interest-free credit or credit repaid within three months, hiring agreements, certain leasing contracts, credit agreements where the total amount of credit is below two hundred euros or above seventy-five thousand euros (the large majority of mortgage credit), and overdrafts.[41]

At first sight, one may think that there is an explicit requirement to consult either private or public credit bureaus for all of the remaining types of credit agreements not excluded by the law. However, what the wording of the provision of Article 8(1) of Directive 2008/48 suggests is that the law requires lenders to assess the consumer's creditworthiness on the basis of sufficient information. This can be done by obtaining the information directly from the consumer where appropriate and only *where necessary* by consulting the relevant database.[42] The requisite "where necessary" makes reference to those member states whose own legislation requires lenders to assess through centralized databases, i.e., public credit registries. In fact, as author Peter Rott points out, "the total harmonisation character of the Directive prohibits Member States from introducing such an obligation in all cases (even where

36. *See* Second Report on the Proposal for a European Parliament and Council Directive on the Harmonisation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Credit for Consumers, EUR. PARL. DOC. (COM 443) 4 (2004), *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2004-0224+0+DOC+PDF+V0//EN.

37. *See id*. at 79-84. Issues relating to data protection are already dealt with in the existing data protection Directive 95/46. *See id.* at 89-90; *see generally* Directive 95/46, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 1995 O.J. (L 281) 31 (EC) [hereinafter Directive 95/46].

38. *See* Directive 2008/48, *supra* note 32, at 67.

39. *See id.* art. 8.

40. *See id.* art. 2(2)-(5).

41. *See id.*

42. *See* Directive 2008/48, *supra* note 32, art. 8(1).

this is not 'necessary' in the individual case)."[43] Consultation of databases managed by private credit bureaus, therefore, remains nonmandatory. As far as database access is concerned, EU legislators' concern is that, in the case of cross-border credit, member states must ensure access to databases for lenders from other member states on a nondiscriminatory basis. Again, this does not mean that the consultation of all types of databases is mandatory, but that, to prevent competition distortion among EU lenders, the conditions for access of lenders from other member states shall be nondiscriminatory.[44] Article 9(4) affirms that database access shall be without prejudice to the application of Directive 95/46 on the protection of personal data.

The European Commission appointed an Expert Group on Credit Histories (EGCH) following a number of European Commission communications and recommendations.[45] The European Commission established the EGCH to identify solutions that maximize the circulation of credit data within the EU.[46] The EGCH was created under the assumption that it is important to access consumers' credit histories when promoting competitive retail-financial-services markets.[47] The EGCH provided an unbalanced composition of its members in favor of the credit industry, and no independent or academic experts were involved.[48] Eventually, the EGCH produced a report that contained a number of recommendations aimed at presenting proposals and informing European policymakers about identifying all legal, regulatory, administrative, and other obstacles to accessing and exchanging credit data at the EU level.[49] Although the EGCH report did not depart from the discussed European Commission assumptions, it failed to address a number of important

43. Peter Rott, *Consumer Credit*, *in* HANS-W. MICKLITZ ET AL., UNDERSTANDING EU CONSUMER LAW 177, 199 (2009).

44. *See* Directive 2008/48, *supra* note 32, at 66, 77; *see also* Case C-238/05, Asnef-Equifax v. Asociación de Usuarios de Servicios Bancarios, 2006 E.C.R. I-11145 (ruling system cannot restrict competition and conditions of access cannot discriminate); *Communication from the Commission: Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements*, 2011 O.J. (C 11) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2011:011:0001:0072:EN:PDF.

45. *See* Commission Decision 2008/542, Setting Up an Expert Group on Credit Histories, 2008 O.J. (L 173) 3 (EC) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:173:0022:0024:EN:PDF (establishing EGCH); *see also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Single Market for 21st Century Europe*, at 6, COM (2007) 724 final (Nov. 20, 2007), *available at* http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0724en01.pdf (discussing actions needed for better consumer access to quality retail financial services); *Initiatives in the Area of Retail Financial Services*, at 3, SEC (2007) 1520 (Nov. 20, 2007), *available at* http://ec.europa.eu/citizens_agenda/docs/sec_2007_1520_en.pdf (arguing for better access and availability of credit date).

46. *See* Commission Decision 2008/542, *supra* note 45, at 22.

47. *See id.* at 2 (prioritizing access and availability of credit data).

48. *See id.* at 3-4 (explaining EGCH composition and appointments).

49. *See* DG INTERNAL MARKET & SERVICES, *supra* note 16, at 20 (discussing conditions that impact cross-border data exchange).

issues, including conflicts with data-protection legislation, privacy and confidentiality, and institutions' involvement in financial systems or society. Significantly, consumer representatives, though under-represented, did not agree with the entire report and refused to endorse it precisely because of concerns regarding data protection, as well as the usability and relevance of credit data.[50] The report was followed by another consultation with the relevant stakeholders, after which the European Commission decided not to take any further action vis-à-vis credit data and centralized databases whose regulation at the EU level are therefore still unresolved and in less than an embryonic status.[51] Nevertheless, further harmonization or convergence for an integrated retail credit sector seems essential in the areas of responsible lending in general, and consumer-credit information databases—particularly data sharing.

The issue of failing to regulate and harmonize credit data at the EU level is replicated in other areas where responsible lending policies are expressed. Indirectly, for example, the proposed Capital Requirements Directive provides an incentive to financial institutions to lend responsibly to ensure that their capital holdings are commensurate with the credit risks that they undertake.[52] Likewise, on March 31, 2011, the Commission adopted a proposal for a Directive on credit agreements relating to residential property.[53] The proposal was designed against the background of the financial crisis and as part of an effort to create an internal market for mortgage credit.[54] Its main aim is to address irresponsible lending and borrowing.[55] It focuses on boosting consumer confidence and tackling the lending practices responsible for the development of property bubbles, as well as the increase in overindebtedness, defaults, and repossession cases across Europe.[56] Ultimately, the proposal aims to ensure that borrowers are offered affordable loans, thereby reducing the need for recourse to the foreclosure of properties.[57] To achieve its goals, the

50. *See id.* at 1 (recognizing three consumer representatives did not endorse report).

51. *See Credit Histories*, EUR. COMM'N, http://ec.europa.eu/internal_market/finservices-retail/credit/history/index_en.htm (last updated Nov. 8, 2013).

52. *See Proposal for a Directive of the European Parliament and of the Council on the Access to the Activity of Credit Institutions and the Prudential Supervision of Credit Institutions and Investment Firms and Amending Directive 2002/87/EC of the European Parliament and of the Council on the Supplementary Supervision of Credit Institutions, Insurance Undertakings and Investment Firms in a Financial Conglomerate*, at 2, COM (2011) 453 final (July 20, 2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0453:FIN:EN:PDF (transposing Directives 2006/48 and 2006/49 into EU law).

53. *See Proposal for a Directive of the European Parliament and of the Council on Credit Agreements Relating to Residential Property*, at 2, COM (2011) 142 final (Mar. 31, 2011), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0142:FIN:EN:PDF (outlining proposal's objectives with respect to addressing mortgage credit in light of EU financial crisis).

54. *See id.* at 2-3.

55. *See id.* at 2.

56. *See id.*

57. *See Proposal for a Directive of the European Parliament and of the Council on Credit Agreements*

proposal contains rules concerning advertising, pre-contractual information, advice, information on risks, comparison of mortgage-loan conditions among providers, early repayment rights, and the assessment of creditworthiness.[58] Of course, the absence of specific regulation of credit data and private credit bureaus that manage centralized databases does not mean that the market remains unregulated; instead, the general provisions of comprehensive law apply. Hence, the following Part stresses the importance of the existing EU data-protection legislation in light of the ongoing reference made to it in the provisions analyzed so far.

V. EU DATA-PROTECTION LAW

In almost every European country, in one form or another, the development of the credit-information industry has reflected the intuitions developed in economic theoretical literature, with the addition of the industry's substantial investments in technologies that were not in place when data sharing was initially considered. Concurrently, EU legislators have not responded with the same speed to such mechanisms, leaving them under the regulatory umbrella of the general principles of existing legislation. They mainly rely on one law that has a significant impact on data sharing—Directive 95/46 as transposed into the national law of the member states.[59]

Personal-data protection is a distinctive European innovation in law that over the years has achieved a mixed fortune outside the EU. It has gained acceptance and emulation in a number of non-EU jurisdictions such as Australia, but faced criticism and disputes from others, like the United States. Data-protection law derives from the protection of privacy, which after World War II was elevated as a human right in reaction to the atrocities of Nazism, fascism, and communism. At the international level, it was enshrined in the 1948 Universal Declaration of Human Rights and, at the European level, it was incorporated in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[60] In particular, data protection emerged in the 1970s as a complementary need of the ECHR to meet the challenges of emerging technologies. The protection of individuals' personal data also became enshrined in the constitutions and legislation of many continental European countries. These countries were committed to preventing the reoccurrence of their recent odious histories and the undesirable

Relating to Residential Property, supra note 53, at 2.

58. *See generally id.*

59. *See* Council Directive 95/46, *supra* note 37, at 31. Other laws, regulations, or codes of practice at the national level may have an impact on consumer credit reporting, although they do not regulate it directly or comprehensively.

60. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

consequences arising from surveillance of their citizens and intrusion on individual liberties through the use of information technologies. Indeed, there was an almost universal consensus to formulate rigid policies to minimize the threats posed by free and unregulated use and manipulation of personal information.[61]

Certainly, the horrors of recent European history and the subsequent international conventions played an important role in the development of data-protection laws across Europe. However, Directive 95/46 was enacted on common-market grounds to serve the double purpose of both ensuring the free movement of personal data in the EU internal market and guaranteeing a high level of normative protection for data subjects.[62] The EU member states must meet the minimum requirements set by Directive 95/46 and cannot go beyond or fall short of these minimum standards. Nevertheless, the EU institutions consistently adopted a rigorous, fundamental, human-rights approach when drafting the law. This stance was particularly important because it signaled that data protection automatically trumped other interests and could not be traded-off for economic benefits.[63] Article 16 of the Treaty on the Functioning of the European Union (TFEU) recently made explicit any possible discussion about this standpoint, which elevated the data protection provision to the status of

61. *See* COLIN J. BENNETT & CHARLES D. RAAB, The Governance of Privacy: Policy Instruments in GLOBAL PERSPECTIVE 3-28, 117-50 (2006); DOROTHEE HEISENBERG, NEGOTIATING PRIVACY: THE EUROPEAN UNION, THE UNITED STATES, AND PERSONAL DATA PROTECTION 1-49 (2005); Spiros Simitis, *From the Market to the Polis: The EU Directive on the Protection of Personal Data*, 80 IOWA L. REV. 445, 449-52 (1995). *See generally* Viktor Mayer-Schöenberger, *Generational Development of Data Protection in Europe*, *in* TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE 219 (Philip E. Agre & Marc Rotenberg eds., 1998). For example, data protection is embedded in the constitutional charters of Estonia, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Slovakia, Slovenia, and Spain.

62. *See* Directive 95/46, *supra* note 37, at 31.

63. *See* Simitis, *supra* note 61, at 447. *See generally* HEISENBERG, *supra* note 61; Mayer-Schöenberger, *supra* note 61. Indeed, the draft relied heavily on German and French data-protection laws, reflecting views that data privacy could not be traded-off against commercial interests or other rights, such as freedom of expression. Moreover, there was a strategic element to the choice of labeling data protection as a fundamental human right. The European Court of Justice (ECJ) ruled that it must abide by the constitutional traditions of the member states and could not uphold measures incompatible with fundamental rights recognized and protected by the constitutions of those states. Thus, according to the ECJ, the European Commission could not take away member states' guaranteed rights. Therefore, there arose a legal duty not to harmonize at the lowest level in order to avoid conflicts between EU law and the member states' constitutions. *See* Case 4/73, J. Nold, Kohlen-und Baustoffgrosshandlung v. Comm'n, 1974 E.C.R. 492, Case 11/70, Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1126. Not all member states approved the described fundamental human-rights approach taken by Directive 95/46. In particular, the United Kingdom sided with its business community, complaining that the new standards were much higher than the law existing at the time. The United Kingdom maintained a utilitarian stance in disagreeing that data protection should not be traded-off for economic benefits. Isolated in its position, the United Kingdom abstained from voting on this Directive, signaling to its business community that it opposed the strict provisions. On the United Kingdom's utilitarian approach, see Andrew T. Kenyon & Megan Richardson, *New Dimensions in Privacy: Communications Technologies, Media Practices and Law*, *in* NEW DIMENSIONS IN PRIVACY LAW: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 1, 1-10 (Andrew T. Kenyon & Megan Richardson eds., 2006).

"provisions having general application" under Title II alongside other fundamental principles of the EU.[64] It also imposed a requirement on EU legislators to establish a certain and unequivocal legal framework for data protection.[65] Equally with the Treaty of Lisbon, the Charter of Fundamental Rights of the EU became binding, and its Article 8 recognized the protection of personal data as an autonomous right distinguished from privacy.[66]

Indeed, data protection refers to the regulation of personal information pertaining to an identified or identifiable individual—the data subject. Individuals do not own information about themselves. Information does not preexist its expression or disclosure, but it is always, to some extent, constructed or created by more than one agent.[67]

Normally, no copyright or proprietary rights exist on personal information. Personal information pertains to individuals, but in a proprietary sense it does not belong to them. Those who process personal data, called data controllers, have the right to process data pertaining to data subjects as long as such processing is lawful. Data controllers must abide by procedural rules set by a law with the objective of protecting individual citizens—not against data processing per se but against unjustified collection, storage, use, and dissemination of the data pertaining to them.[68] As recent scholarship persuasively shows, data protection cannot be reduced to a "late privacy spin-off" that echoes a privacy right with regard to personal data, but formulates the conditions under which information processing is legitimate.[69] While privacy laws derive their normative force from the need to protect the legitimate opacity of the individual through prohibitive measures, data protection forces personal-data-processing transparency while enabling data subjects to take full control where the processing is not authorized by the law. In short, data-protection law focuses on the activities of the processors and enforces their accountability, thus regulating an accepted exercise of power.[70]

To appreciate the difference between the two concepts in practice, take the

64. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 16, Oct. 26, 2012, 2012 O.J. (C 326) 47, 53-55 [hereinafter TFEU], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:EN:PDF.

65. *See id.* at 55.

66. *See* Charter of Fundamental Rights of the European Union, art. 8, 2000 O.J. (C 364) 1, 10 (EC).

67. *See* Antoinette Rouvroy & Yves Poullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy*, *in* REINVENTING DATA PROTECTION? 45, 53-54 (Serge Gutwirth et al. eds., 2009).

68. For discussions about individuals not owning information about themselves, see *id.* at 50. *See generally* Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 HARV. J.L. & TECH. 229 (2004).

69. *See* P. De Hert & S. Gutwirth, *Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalism in Action*, *in* REINVENTING DATA PROTECTION?, *supra* note 67, at 3, 3-14.

70. *See id.* at 3-44. For a criticism of the view that data-protection acts are seldom privacy laws, but rather information laws that protect data before people, see generally Simon G. Davies, *Re-Engineering the Right to Privacy: How Privacy Has Been Transformed from a Right to a Commodity*, *in* TECHNOLOGY AND PRIVACY: THE NEW LANDSCAPE, *supra* note 61, at 143.

example of the telephone operator's customer. She has given away her personal data in order to benefit from the required service. Now suppose two different scenarios in which the customer needs to contact the telephone operator: (a) the customer widely uses the service and she is a big spender, and (b) the customer makes moderate use of the telephone and spends little money on it. In scenario (a) she manages to access the operator of the call center immediately or with little wait. In scenario (b), by contrast, she is held on the line for a long time before an operator answers, at times to the point that the customer hangs up the telephone in frustration. The telephone company, without the customer knowing, has invested in software that screens customers by their spending, and accordingly prioritizes phone calls from those who usually spend more. This would hardly be a violation of the customer's privacy because she has voluntarily provided her personal data, for reasons including customer support. However, many find that this practice involves the telephone company making discriminatory use of the data it holds.

It is well known that technologies have the potential capability of aggregating an enormous amount of data in a short time, and manipulating, storing, retaining, and disseminating it to an indefinite number of third parties that may access it from many different points. Such data may be inaccurate, outdated, out of context, and expressed in an unintelligible form. Information technology makes it possible to: follow one's information trail step by step; manipulate one's economic decisions; profile and categorize individuals; sort and discriminate among individuals; impede forgetfulness (the possibility to forget as well as being forgotten); inhibit one from changing or progressing; and infringe or steal one's identity.[71] In practice today is an unprecedented scale of personal data left on the Internet for commercial purposes.

Over the Internet, databases may be created to store personal data, and these databases may undergo data-mining techniques. Accordingly, "ways of collecting personal data have become increasingly elaborated and less easily detectable."[72] For example, these ways of collecting data can be used for

71. *See* Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence of Market Manipulation*, 112 HARV. L. REV. 1420, 1422-28 (1999) (describing evidence of market and consumer manipulation); Christopher Kuner, *Privacy, Security and Transparency: Challenges for Data Protection Law in a New Europe*, 16 EUR. BUS. L. REV. 1, 1 (2005); Michael Levi & David S. Wall, *Technologies, Security, and Privacy in the Post-9/11 European Information Society*, 31 J.L. & SOC'Y 194, 194-220 (2004); Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 967-77 (2003).

72. Commission of the European Communities, *A Comprehensive Approach on Personal Data Protection in the European Union*, at 2, COM (2010) 609 final (Nov. 4, 2010) [hereinafter *Comprehensive Approach*], *available at* http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf (explaining personal-data-access problem in EU). *See generally* LONDON ECON., STUDY ON THE ECONOMIC BENEFITS OF PRIVACY-ENHANCING TECHNOLOGIES (PETS): FINAL REPORT TO THE EUROPEAN COMMISSION DG JUSTICE, FREEDOM AND SECURITY (2010), http://ec.europa.eu/justice/policies/privacy/docs/studies/final_report_pets_16_07_10_en.pdf (outlining solutions to personal-data issues).

targeting certain individuals, excluding others from certain products or services, determining risk assessment when dealing with certain individuals, and analyzing on what terms they may be used for tailored pricing. In soft cases, consumers may be annoyed for receiving unsolicited offers or having their email inbox full of undesired commercial messages. On a more serious note, consumers may be offended by having been profiled differently from how they perceive themselves, or for not having been treated equally to other customers; for example, consumers may be classified at a lower level from other consumers, as in the case of scoring, or ignored when other consumers are not. Even worse, consumers may be forced to pay more than others for the same products or services (such as telephone and Internet facilities or utilities). Also concerning is that they may even be excluded from certain products or services (such as online facilities, credit, mortgages, or renting a home). It is undeniable that such forms of actual or predictive profiling, classification, or discrimination may lead to serious social consequences when applied in the commercial sphere. In short, information processing and technologies have a clear potential to dramatically influence the lives of people, and this influence puts an exceptional power in the hands of those who use information processing and technologies; this is a risk only recently perceived by business and consumer associations alike.[73]

Like privacy, data protection finds its roots in the idea that democratic societies should not rest on control, surveillance, actual or predictive profiling, classification, social sorting, and discrimination. The issue of data control is not only a matter of individual liberty, intimacy, and dignity, but also a wider personality right aimed at developing peoples' social identity as citizens and consumers alike. Hence, one must conclude that, although "[d]ata protection principles might seem less substantive and more procedural compared to other rights . . . but they are in reality closely tied to substantial values and protect a broad scale of fundamental values" that on many occasions may overlap or intersect but remain separate from those of privacy.[74] For that reason, data control also has important connotations for society as a whole and constitutes an important legislative tool to protect both the collective social good and the fundamental values of a modern, democratic order where a citizen freely develops her personality and autonomy. Therefore, both privacy and data-protection regimes—seclusion and legitimate opacity on one side, and inclusion and participation on the other—represent a bundle of legal protections and tools to pursue the common goal of a free and democratic society where citizens develop their own personality autonomously, and for collective, deliberative,

73. *See* LONDON ECON., *supra* note 72, at ix-xi (examining impact of data collection on consumers and data collectors).

74. De Hert & Gutwirth, *supra* note 69, at 44.

decision-making regarding the rules of social cooperation.[75]

From this perspective, granting individuals control over their personal information is a tool to allow them control over the *persona* they project in society free from unreasonable or unjustified associations, manipulations, distortions, misrepresentations, alterations, or constraints on their true identity. Control is also a fundamental value for humans to keep and develop their personalities in a manner that allows them to fully participate in society without having to conform their thoughts, beliefs, behaviors, or preferences to those of the majority.[76]

In this sense, the rights conferred by data-protection legislation are participatory rights of informational self-determination. The cornerstone of the legislation is its requirement of individual consent for the processing of data, unless the processing is: *necessary*; subject to notice; for the performance of a contract to which the data subject is a party; for compliance with a legal obligation of the data controller; to protect a vital interest of the data subject; for the public interest; or for overriding rights of the data controller or third parties.[77] As such, requiring consent as the tool to grant participatory rights rests on the expression of a classical liberal conception of autonomy and individualism.

The provisions of Directive 95/46 reflect all of these principles. Legislators set the scope of the law, which applies to any operations performed upon personal data, in order to provide for good data-management practices by those entities that determine the purposes and means of processing personal data. Directive 95/46 applies to all data controllers processing personal data; it is a comprehensive law that creates a regime where the same rules and principles apply to everyone across all industries.[78] Consumer-credit reporting and scoring are no exception. On the contrary, data-protection legislation constitutes the principal legal framework, which has an enormous impact on how, and even whether, the industry develops.

Directive 95/46 contemplates a sequence of general rules on the lawfulness of the processing of personal data, including the following obligations:

- To inform data subjects about the identity of the data controller and the use, purpose, and recipients of personal data so that data subjects do not lose control over them;[79]
- To process personal data only upon obtaining the unambiguous, freely given, specific consent of data subjects after having informed them of

75. *See* Rouvroy & Poullet, *supra* note 67, at 58-64.
76. *See id.*
77. *See* Directive 95/46, *supra* note 37, art. 7.
78. *See id.* art. 3.
79. *Id.* arts. 10-11.

the data processing, or without consent if the processing is necessary for: the performance of a contract; compliance with a legal obligation of the data controller; the protection of a vital interest of the data subject, or the performance of a task carried out in the public interest or in the exercise of a public authority;[80]

- To process personal data only for "specified, explicit and legitimate purposes" in order to limit data controllers to the purpose for which the data were collected;[81]
- To use personal data that are "adequate, relevant and not excessive in relation to the purposes for which they are collected and/or further processed";[82]
- To process accurate and up-to-date personal data, taking any reasonable step to ensure the rectification or erasure of inaccurate data;[83]
- To keep the personal data in a form that permits identification of data subjects for no longer than necessary based on the purpose for which they were processed and the nature and type of data in consideration;[84]
- To guarantee the security of the data against accidental, unauthorized access or manipulation;[85]
- To provide notification to the national supervisory authority before carrying out all or certain types of data processing operations.[86]

For the purpose of this Article, it remains to be noted that Directive 95/46 contains a specific provision designed for credit scoring.[87] Article 15 on automated individual decisions provides that in certain cases, including the evaluation of a person's creditworthiness, data subjects have the right not to be subject to a decision based solely on the automatic processing of data.[88] Nevertheless, member states are given the ability to provide that a person may be subjected to an automated decision as long as the decision

> is taken in the course of the entering into or performance of a contract, provided the request for the entering into or the performance of the contract . . . *has been satisfied* or that there are suitable measures to safeguard his *legitimate interests*, such as arrangements allowing him to put his point of view . . . .[89]

80. *Id.* art. 7.
81. Directive 95/46, *supra* note 37, art. 6(b).
82. *See id.* art. 6(c).
83. *Id.* art. 6(d).
84. *Id.* art. 6(e).
85. Directive 95/46, *supra* note 37, art. 17.
86. *See id.* art. 17.
87. *See id.* art. 15.
88. *See id.*
89. Directive 95/46, *supra* note 37, art. 15(2)(a) (emphasis added).

Member states may allow automated decision-making if authorized by a law that also lays out measures to safeguard a data subject's legitimate interests.[90] In the absence of this type of law, Article 15(2)(a) of Directive 95/46 applies. Interestingly, the key terms *satisfied* and *legitimate interests* have not been specifically defined, leaving uncertainty, especially if one considers that the right to data protection should be satisfied in the first place. One must consider, however, that credit scoring is built on consumer-credit reporting. Therefore, before the application of Article 15, the data that was used to generate a score would have been processed according to the other provisions of Directive 95/46.

Measures or debates over the impact of credit scoring on communities of color and other protected groups, including minorities, are almost absent in the EU. It is true that Directive 95/46 includes a special provision of consent for processing one's data concerning race or ethnic origin, political opinions, religious beliefs, trade-union membership, health or sex life, or criminal convictions.[91] It is also true that the Racial Equality Directive[92] prohibits discrimination on the basis of race or ethnicity, and the Gender Goods and Services Directive[93] prohibits discrimination on the basis of gender in the context of access to goods and services.[94]

All such legislation targets either direct discrimination or, on a case-by-case basis to be individually demonstrated, indirect discrimination. It does not, however, cover or address the concealed forms of discrimination that credit scoring may generate, especially indirectly by not using such sensitive data. Accordingly, it is impossible for a consumer to demonstrate a cause-and-effect relationship on an individual basis, between the data used, the data-mining technique employed, and the discriminatory decision affecting an entire group.

90. *Id.* art. 15(2)(b).

91. *Id.* art. 8.

92. *See* Council Directive 2000/43 of 29 June 2000, Implementing the Principle of Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin, 2000 O.J. (L 180) 22, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:pdf.

93. *See* Council Directive 2004/113 of 13 December 2004, Implementing the Principle of Equal Treatment Between Men and Women in the Access to and Supply of Goods and Services, 2004 O.J. (L 373) 37, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:373:0037:0043:en:PDF.

94. At present, sexual orientation, religious belief, disability, and age are protected grounds only in the context of employment discrimination. A proposal to extend protection for these grounds to the area of access to goods and services is currently being debated in the EU institutions. *See Proposal for a Council Directive on Implementing the Principle of Equal Treatment Between Persons Irrespective of Religion or Belief, Disability, Age or Sexual Orientation*, at 2, COM (2008) 426 final (July 2, 2008), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0426:FIN:EN:PDF. *See generally* EUROPEAN COURT OF HUMAN RIGHTS & EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW (2010), *available at* http://fra.europa.eu/sites/default/files/fra_uploads/1510-FRA-CASE-LAW-HANDBOOK_EN.pdf.

VI. PITFALLS AND CHALLENGES

A. Creditworthiness or Overindebtedness?

As noted above, most of the EU secondary, actual or proposed legislation addressing consumer overindebtedness and responsible-lending policies makes reference to the assessment of creditworthiness as one of the measures to tackle the problem. In this instance, the EU legislature has perilously confused overindebtedness with creditworthiness, but the two concepts are different. Someone who—in the language of the credit industry—is creditworthy may still be overcommitted, i.e., overindebted. The higher pricing usually associated with risk-taking seems to support this phenomenon. Someone deemed to be a higher default risk and to have more difficulty repaying debts is priced more rather than less. Higher loan pricing may make the consumer more creditworthy, but it would hardly help his or her level of indebtedness. The problem with overcommitment is that it may lead to a default in the repayment of debts. From the moment of default, this occurrence will be perpetuated in an individual's credit history, thereby affecting creditworthiness.

Moreover, responsible lending seems to imply that the responsibility to make optimal decisions for sustainable management of one's financial capability needs to be shifted from the consumer to the lenders. Or, as some commentators have opined, the responsibility is shared between the parties involved, although it is difficult to see what responsibility is left to consumers if lenders ultimately make the unilateral decision to grant credit.[95] Ruling out situations of higher loan pricing for borrowers with higher levels of risk, responsible lenders would therefore be allowed to grant credit only to those consumers who are *objectively* deemed able to sustain their spending. This paternalistic view is debatable as it presupposes, first, that all consumers are incapable of making optimal decisions, and second, that lenders, despite a clear conflict of interest, would be better caretakers.[96] Moreover, acting as good, responsible lenders would mean always offering the best possible deal to borrowers. It is unclear, however, what responsible lending would entail in the event of a breach of such a duty. In the end, to make an objective judgment of a lender's practices, a complete and intimate knowledge of consumers—including factual and situational circumstances of a personal nature—is necessary.

95. *See generally* SHARON COLLARD ET AL., CONSUMER FINANCIAL CAPABILITY: EMPOWERING EUROPEAN CONSUMERS 1 (European Credit Research Inst. ed., 2006), *available at* http://www.ces.uc.pt/myces/UserFiles/livros/430_FinCap_Workshop_I_papers%5B1%5D.pdf (discussing importance of consumer financial capability).

96. *But see* IMPROVING FINANCIAL LITERACY: ANALYSIS OF ISSUES AND POLICIES, ORG. FOR ECON. COOPERATION & DEV. (2005), *available at* http://www.oecd.org/document/28/0,2340,en_2649_15251491_35802524_1_1_1_1,00.html (noting low education level among European consumers regarding their budgets and financial management).

Certainly, the industry should not be exempt from responsibilities regarding consumer overindebtedness, but other more important issues should be addressed before stimulating the use of information-sharing devices. Priorities would include: informing and educating consumers; refraining from misleading advertising and aggressive marketing; creating unnecessary needs of consumption; and desisting from generating an instant-credit culture. In fact, recent findings suggest that the increase in consumer indebtedness is due to greater competition between lenders and the resulting ease of consumers to obtain credit.[97]

Other major causes of consumer overindebtedness and default are contingent, poor market conditions in the economy as well as life-changing events such as divorce, loss of employment, illness, death of a family member—issues not addressed by a creditworthiness assessment.[98] This is likely to affect consumers under the current crisis, along with the harsh austerity measures taken by European governments to reduce public debt and bail out banks. Moreover, academic research has unveiled that in the United Kingdom a number of individuals brought into court for their debts have refused to pay because "they felt they had been cheated."[99] Researchers Michael Adler and Edward Wozniak found that default debtors generally seem to be unfortunate, rather than amoral or unethical.[100]

Lastly, a recent quantitative study concluded that the vast majority of people who became overcommitted had every intention to pay on time, but could not due to lack of resources.[101] Only a marginal number of people failed to pay and became voluntarily overcommitted.[102] This evidence is important to understand the main reasons for overindebtedness. As author Iain Ramsay explained:

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97. *See* CARTWRIGHT, *supra* note 22, at 228-34; *see also* Anita Campion, *Client Information Sharing in Bolivia*, 3 J. MICROFIN. 45, 46 (2001) (noting value of public credit bureaus with respect to consumer overindebtedness); Craig McIntosh & Bruce Wydick, *Competition and Microfinance*, 78 J. DEV. ECON. 271, 274-76 (2005) (surveying effects of competition between lenders).

98. *See* MICHAEL ADLER & EDWARD WOZNIAK, THE ORIGINS AND CONSEQUENCES OF DEFAULT: AN EXAMINATION OF THE IMPACT OF DILIGENCE (SUMMARY) 49-52 (1981); RICHARD BERTHOUD & ELAINE KEMPSON, CREDIT AND DEBT: THE PSI REPORT 159-67 (1992); DAVID CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES 105-15 (1967); IAIN RAMSAY, CONSUMER LAW AND POLICY: TEXT AND MATERIALS ON REGULATING CONSUMER MARKETS 578-80 (2007); Nigel Balmer et al., *Worried Sick: The Experience of Debt Problems and Their Relationship with Health, Illness and Disability*, 5 SOC. POL'Y & SOC'Y 39, 39-51 (2006); NICOLA DOMINY & ELAINE KEMPSON, PERS. FIN. RESEARCH CTR., UNIV. OF BRISTOL, CAN'T PAY OR WON'T PAY?: A REVIEW OF CREDITOR AND DEBTOR APPROACHES TO THE NON-PAYMENT OF BILLS (2003), http://www.bristol.ac.uk/geography/research/pfrc/themes/credit-debt/pfrc0307.pdf. *See generally* ANTONY ELLIOTT, NOT WAVING BUT DROWNING: OVER-INDEBTEDNESS BY MISJUDGEMENT (2006); CONSUMER CREDIT AND CONSUMER INSOLVENCY: PERSPECTIVES FOR LEGAL POLICY FROM EUROPE AND THE USA (Günter Hörmann ed., 1986).

99. RAMSAY, *supra* note 98, at 578 (discussing rationales for refusal to pay debts).

100. *See id.* at 578-80. *See generally* ADLER & WOZNIAK, *supra* note 98.

101. *See* DOMINY & KEMPSON, *supra* note 98, at v.

102. *See id.* at v-vii.

> For example, if individuals have overspent, are addicted to credit or have misused credit then policies aimed at reducing these pathologies—for example education or responsible lending and borrowing—might be appropriate. If debtors have generally suffered from an unfortunate change of circumstances, such as unemployment, then harsh legal sanctions are unlikely to be an appropriate response.[103]

Similarly, sanctions carried out through the assessment of creditworthiness, such as those deriving from the use of credit bureaus, would be inappropriate as well. Moreover, in data-processing terms, the concepts of creditworthiness and overindebtedness have somewhat compatible yet different purposes, with all of the following legal consequences imposed by data-protection legislation.

B. The Absence of a Harmonized EU Framework

Another problem affected by consumer credit reporting is rooted in market integration. The informational structure behind European capital and credit markets for consumers still remains a national affair. There is neither a common market nor European cross-border, consumer-data exchange to support such a European integration. This is an important element that, to some extent, jeopardizes the EU's policy goals. Financial-service provisions and credit arrangements in the EU, in fact, may occur at various levels:

- The free movement of people, such as workers and families moving to another member state and accessing services in that member state;
- Cross-border service provisions, such as cross-border Internet financial services, e-commerce within the EU, or receipt of goods or services under EU law's free-movement-of-services provisions, where services are provided from—or received in—different member states;
- Consumer consumption in other member states, when a consumer goes to another member state and buys goods or services and then returns to his or her home member state; or
- Market penetration and a commercial presence in another member state under EU law's freedom-of-establishment provision, where companies from a member state set up a physical presence in another member state through subsidiaries, branches, or mergers and acquisitions.

The free movement of people within the EU is one of the four freedoms forming the foundations of the Common Market.[104] At first, this freedom was

103. RAMSAY, *supra* note 98, at 578.
104. *See Single Market Act*, *supra* note 1, at 1.

limited to workers. It entailed the right to move to another member state and live there as a prerequisite to job-market access. Several social and ancillary rights were the natural corollary to remove the barriers and disadvantages to the worker, which arose from the exercise of the right of free movement to ensure migrants and their family members integrate into the host member state.[105] The freedoms of movement and residence granted under TFEU Article 45, together with the related social and other ancillary rights, were also granted to the self-employed and to entrepreneurs.[106] These freedoms were granted as an exercise of the right of establishment, and to provide services within the EU. Any restrictions on these freedoms have been abolished accordingly.[107]

The EU has now expanded the right of free movement in the internal market to all persons. Thus, all nationals and lawfully migrant residents of the member states benefit from this right, regardless of economic activity. In particular, TFEU Article 21 provides that "[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States . . . ."[108] Secondary legislation gives effect to the free movement and residence of persons: the Citizenship Directive, drawing on early EU legislation as well as relevant jurisprudence from the European Court of Justice (ECJ), has renewed

105. *See* TFEU, *supra* note 64, at 65-66. As required under TFEU Articles 45(3)(d) and 46, secondary legislation was introduced to give substance to the free movement of workers. Four principal interventions arose in this context. *See generally* Regulation 1251/70 of the Commission of 29 June 1970 on the Right of Workers to Remain in the Territory of a Member State After Having Been Employed in That State, 1970 O.J. (L 142) 24 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31970R1251: EN:PDF; Council Directive 68/360 of 15 October 1968 on the Abolition of Restrictions on Movement and Residence Within the Community for Workers of Member States and Their Families, 1968 O.J. (L 257) 13 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31968L0360:EN:PDF; Regulation 1612/68 of the Council of 15 October 1968, on Freedom of Movement for Workers Within the Community, 1968 O.J. (L 257) 2 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CELEX:31968R1612:en:PDF; Council Directive 64/221 of 25 February 1964 on the Co-Ordination of Special Measures Concerning the Movement and Residence of Foreign Nationals Which Are Justified on Grounds of Public Policy, Public Security or Public Health, 1964 O.J. (850) 117 (EC), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31964L0221:EN:PDF. A number of these measures were later repealed or updated by the so-called "Citizenship Directive." *See* Directive 2004/58 of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members To Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No. 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L 158) 35 (EU) [hereinafter Citizenship Directive], *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123: EN:PDF. The term "worker" has been broadly construed by the European Court of Justice. *See* Case 139/85, Kempf v. Staatssecretaris van Justitie, 1986 E.C.R. 1746; Case 53/81, Levin v. Staatssecretaris van Justitie, 1982 E.C.R. 1037; Case 75/63, Unger v. Bestuur der Bedrijfsvereniging voor Detailhandel en Ambachten, 1964 E.C.R. 178. For the free movement of students, see Case 197/86, Brown v. Sec'y of State for Scotland, 1988 E.C.R. 3237; Case 39/86, Lair v. Universität Hannover, 1988 E.C.R. 3190.

106. *See* TFEU, *supra* note 64, art. 45.

107. *See id.* arts. 49-55. (providing right of establishment); *id.* arts. 56-62 (establishing right to provide services).

108. *See id.* art. 21(1).

and integrated the earlier framework.[109] The Citizenship Directive applies to all European citizens and legitimate third-country nationals irrespective of any test of economic sufficiency; it removes restrictions on the movement and residence of natural persons within the Union.[110] Consequently, the rights contained in the Citizenship Directive extend the network of protection offered to all European citizens, who now enjoy the same related social and ancillary rights as the nationals of the host member state.[111]

In turn, TFEU Article 56 states that restrictions on freedom to provide and receive services within the Union are "prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended."[112] Without prejudice to the right of establishment, the person providing a service may temporarily pursue his or her activity in the state where the service is provided under the same conditions imposed by that state on its own nationals.[113] The scope of TFEU Article 56 includes the scenario in which people move to another member state to receive services.[114] Against this background, the TFEU expressly makes discrimination on the grounds of nationality illegal.[115] A common requisite of the free-movement provisions and the achievement of the Common Market—including a single market in credit for consumers—is the prohibition of all forms of discrimination on the grounds of nationality. This prohibition has been central to the interpretation and development of EU credit law throughout the years.

From its inception, the ECJ has adopted a broad approach to the discrimination issue, including challenges to rules that were not unequivocally discriminatory, but that still had an adverse impact on people's ability to exercise their free-movement rights. The prohibition of discrimination, in fact, applies to any rules that constitute a barrier to the free-movement rights, although expressed to operate without distinguishing between individuals.[116] The discrimination prohibition has a twofold focus: professional and personal rights. Thus, together with the former rights, EU law covers all social

109. *See* Citizenship Directive, *supra* note 105, at 113.

110. *See id.*

111. *See generally* Case C-456/02, Trojani v. Centre Public d'Aide Sociale de Bruxelles, 2004 E.C.R. I-7595; Case C-138/02, Collins v. Sec'y of State for Work and Pensions, 2004 E.C.R. I-2733; Case C-413/99, Baumbast v. Sec'y of State for Home Dep't, 2002 E.C.R. I-7136; Case C-85/96, Martínez Sala v. Freistaat Bayern, 1998 E.C.R. I-2708.

112. TFEU, *supra* note 64, art. 56.

113. *See id.* art. 57.

114. *See generally* Case C-68/89, Comm'n v. Netherlands, 1991 E.C.R. I-2651; Joined Cases 286/82 & 26/83, Luisi v. Ministero del Tesoro, 1984 E.C.R. 379; Case 118-75, Watson v. Belmann, 1976 E.C.R. 1185. Citizenship rights greatly impact this area of law. *See* Case C-60/00, Carpenter v. Sec'y of State for Home Dep't, 2002 E.C.R. I-6305.

115. *See* TFEU, *supra* note 64, art. 19.

116. *See* Case C-415/93, Union Royale Belge des Sociétés de Football Ass'n v. Bosman, 1995 E.C.R. I-5040.

advantages whether or not attached to contracts of employment.[117]

In contrast, for a provider of a service under TFEU Articles 56 and 57, it is less clear whether there is a right to claim full equality rather than equal access to—and equal conditions of—work in the host member state. The related freedom to receive services requires equal treatment of personal rights, at least as far as it concerns rights applicable to providing or receiving those services in a host member state free from discrimination on the grounds of nationality.[118] The Citizenship Directive extends the equality-of-treatment provisions and related jurisprudential interpretations to all EU citizens and third-country nationals lawfully residing, as well as providing or receiving services, in the territory of the host member state.[119] In conclusion, the impact of citizenship can be observed in full on the prohibition of discrimination based on nationality, enabling those who move and reside within the EU to enjoy the same treatment irrespective of their nationality, where direct or indirect barriers to such free-movement provisions shall be removed.[120]

Arguably, even if no law or regulation provides for the right to credit, access to credit constitutes a precondition for the equality of treatment among EU citizens and lawful third-country nationals to fully enjoy the rights granted by the EU's freedoms. At the very least, when a national or resident of a member state applies for credit from a lender in another member state, whether in the exercise of the freedom-of-movement right or the right to receive services, he or she should benefit from the same treatment that nationals of the host member state enjoy. For example, a consumer lawfully residing in one member state should be able to buy goods under the same terms and conditions as anyone else living in other member states, including the possibility of taking advantage of the credit and installment-purchase facilities offered. It would be discriminatory to offer better deals to people only on the basis of nationality,

117. *See generally* Case 207/78, Ministère Pub. v. Even, 1979 E.C.R. 2020. For a case of particular interest to the subject matter of this Article, see Case 65/81, Reina v. Landeskreditbank Baden-Württemberg, 1982 E.C.R. 33 (holding social advantages cover benefits granted on discretionary basis). In *Reina*, an Italian couple living in Germany claimed a special state-financed childbirth loan from a bank, which was payable only to German nationals living in Germany. *See id.* ¶ 4. The bank claimed that the loan was not a social benefit because it was not granted as a social right, and was granted as every other loan is—on a discretionary basis. *See id.* ¶ 16 (arguing treatment difference justified by difficulties in recovering loans from workers leaving for home country). The ECJ held that the loan should have been granted by reason of the claimant's objective status and that social advantages covered not only benefits granted as of right, but also those granted on a discretionary basis. *See id.* ¶ 17; *see also* Case C-3/88, Comm'n v. Italian Republic, 1989 E.C.R. 4035 (holding discounted mortgage facility for Italian nationals available to all EU nationals living in Italy).

118. *See generally* Case 293/83, Gravier v. City of Liège, 1985 E.C.R. 593; *Luisi*, 1984 E.C.R. 377.

119. *See* Citizenship Directive, *supra* note 105. However, this extension has some limitations applying to those who are not economically active—excluding family members of economically active people—during the first three months of residence, or while seeking work. *See id.* ¶ 21.

120. *See* Case C-258/04, Office Nat'l de l'Emploi v. Ioannidis, 2005 E.C.R. I-8293; Case C-138/02, Collins v. Sec'y of State for Work and Pensions, 2004 E.C.R. I-2733; Case C-184/99, Grzelczyk v. Centre Public d'Aide Sociale D'Ottignies-Louvain-La-Neuve, 2000 E.C.R. I-6193.

especially if one considers that a number of expensive goods may be purchased only on credit terms. Consequently, any direct or indirect barrier to equality must be removed.

Indeed, the problem with consumer-credit reporting and scoring is that it may represent a barrier to credit access for foreign EU nationals, undermining the full enjoyment of basic EU freedoms and the basis of market integration. The inconsistency is highlighted by a migrant's lack of credit history the first time he or she accesses a host member state's credit market. Discrimination based on nationality becomes obvious when credit applications are turned down, or the credit received is at higher rates. At the same time, this situation could also disadvantage lenders, who risk losing out on the migrant-consumer market, or who may grant credit to individuals with a bad credit history or overindebtedness in another member state.[121] This will remain the present scenario, unless lenders contradictorily recognize that they do not attach much importance to consumer-credit reporting.

C. The Imbalance Between the Interests of the Financial-Services Industry and the Fundamental Rights of Citizens Granted Under EU Law

Establishing whether private credit bureaus truly abide by the law is problematic. There are critical concerns about the necessity, adequacy, and relevance of the type and amount of data involved regarding the assumptions upon which consumer-credit reporting and scoring are based. Of interest are determinations on the predictability of individual human behavior, and the real financial capability of borrowers.

In particular, doubts arise as to the legal compliance of the notice to be given to data subjects required by Directive 95/46 Articles 10 and 11. The general objectives of transparency and informational self-determination set by Directive 95/46 seem seriously compromised by the amount and vagueness of information that should be provided to individuals, the type and amount of personal data processed by credit bureaus, the indefinite number of actors involved in a spill-over data dissemination, and the secondary uses of the same data. Indeed, a critical element of both credit reporting and scoring often raised by European consumer organizations is a lack of transparency because—for competition concerns—lenders do not disclose the type and amount of data used, the impact of information on personal data, the criteria and data-mining techniques employed in data processing, or the criteria used in decision-making.

As far as other requirements set by Directive 95/46 are concerned—processing purposes, adequacy and relevance of data, accuracy, or data-

121. This scenario may also arise for nationals of the same member state as the lender, who have a bad credit history or are overindebted in other member states where they have been a resident.

retention periods—ultimately, the whole system seems to rely predominantly on the consent of the data subjects. Credit bureaus need to rely on the informed consent of data subjects who unequivocally agree to all the game rules set by the credit industry unilaterally and nontransparently. Consent, as conceived by the law, is a key element that permits the processing of personal data by data controllers that would otherwise be forbidden. When a data subject gives valid consent, data controllers are released from the restrictions provided by law in a fashion that can be described as an opt-in system. In other words, the processing becomes lawful from the moment consent is unambiguously expressed. Despite the apparently robust legal protection afforded to data subjects, consent may be obtained by a number of methods and has proved problematic as a basis for personal-data processing because it can be easily abused, confused, or conflated.[122]

The complexities of the credit bureaus' business model, data-collection practices, vendor-customer relationships, or technological applications may make them impossible for consumers to understand. Alternatively, these complexities may render consumers unable to freely and actively decide to accept the consequences of consenting to data processing, particularly when faced with a perceived immediate economic benefit. In practice, these occurrences result from the inclusion of a notice to consent to data processing within the standard contractual terms for credit. However, treating consent as a transactional moment using standard form agreements may constitute a mechanical or perfunctory means of obtaining overarching consent for data processing.[123]

The inclusion of data-processing consent in the general terms and conditions of a credit application can be a common yet elusive method of obtaining consumer consent. A central tenet of an agreement is that one agrees voluntarily; consent is therefore associated with the legal paradigm of contract. Moreover, the lending, contractual relationship is a situation with a clear imbalance between the consumer and the business counterpart. Consumers do not have much choice but to abide by the credit bureaus' rules if they wish to receive credit. A consumer's consent regarding the credit bureaus' use of databases is either mandatory or assumed. Lenders claim that lack of consent would impede them from taking the credit application any further. The same occurs for the use of credit scoring. In the end, concerns regarding the suitability of the law to address consumer-credit reporting and scoring result in a number of phenomena to avoid: economic and social classification; profiling;

122. In theory, consent that does not meet the requirements of the law or is vitiated should be regarded as void, and should invalidate all data processing *ex tunc*—from the outset. *See* Opinion 15/2011 on the Definition of Consent, 01197/11/ENWP187 (July 13, 2011), *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2011/wp187_en.pdf.

123. *See* Roger Brownsword, *Consent in Data Protection Law: Privacy, Fair Processing and Confidentiality*, *in* REINVENTING DATA PROTECTION?, *supra* note 67, at 83, 87-92.

generalization; segmentation; and consumer sorting. These actualities lead to various types of economic discrimination—from pricing to access and inclusion—with repercussions in the social sphere.

Moreover, even if the use of credit reporting and scoring is increasingly seen as a tool to prevent overindebtedness in the push for a responsible lending policy throughout the EU, there is a recognized tension between the two that leads to contradiction and controversy. Responsible lending would require lenders to refrain from lending money to overcommitted consumers. Additionally, scoring potential customers to price loans and calculate profits means that for higher-risk applicants, a higher rate of interest is charged on top of the charges borrowers pay in case of default, further penalizing vulnerable people. Apart from the inherent conflict of interest faced by lenders, this problem requires a more individualized lending process that avoids any form of generalization or classification.[124] Also, warnings exist concerning both the increased use of credit data and the scoring of individuals across different economic segments where credit risk is used as a proxy for other types of risks—insurance claims, workplace trustworthiness, rent payment, telecommunications, or utilities pricing. This use of credit data creates an additional concern unresolved by the law: To what extent does data sharing between industries lead to exclusion from nonfinancial services or wider economic—and ultimately social—discrimination?

These issues are even more important in a voluntary system because there is no requirement, either legal or natural, to justify the unilateral sharing of data for the performance of a contract that is the core of the lending business. Lending money in exchange for profit is perfectly possible and probably lucrative even without the intervention of credit bureaus. At most, data sharing is useful and more profitable in the same manner as using personal data for marketing purposes is useful and profitable. Certainly, one may reasonably think that credit bureaus induce an increased volume of lending, thus indirectly providing important benefits to those with good credit. Accordingly, it would be reasonable to expect that increased lender profits unequivocally result in more favorable credit conditions for those who fall within the classification of "good consumers." This presumption reflects the view that there is relative equivalence between pursuing lenders' self-interest in maximizing profits and promoting the general interest resulting in lower prices for consumers—an idea dating back to Adam Smith and his notion of the "invisible hand."

The economic assumption implied is that in perfectly competitive markets,

124. *See* Karen Gross, *Expanding the Use of Credit Reports and Credit Scores: The Need for Caution and Empiricism*, *in* THE YEARBOOK OF CONSUMER LAW 2008, at 327, 327-36 (Christian Twigg-Flesner et al. eds., 2007); Iain Ramsay, *From Truth in Lending to Responsible Lending*, *in* INFORMATION RIGHTS AND OBLIGATIONS: A CHALLENGE FOR PARTY AUTONOMY AND TRANSACTIONAL FAIRNESS 47, 47-65 (Geraint Howells et al. eds., 2005).

marginal private benefits equal marginal social benefits, and marginal private costs equal marginal social costs. Accordingly, self-interest always promotes the interest of the community even though it is not part of the original intention.[125] The traditional assumptions of Smith's perfect-competition theory, however, are that all market actors act rationally in their own self-interest with good and full information, that all goods and resources are freely transferable, that all markets permit free and easy entry and exit, and that prior distributions of wealth and resources do not unfairly impact competition.[126] It is well-accepted today that such assumptions practically never hold true in the real world, a circumstance of which Adam Smith was aware.[127]

Economic arguments on this subject are numerous and they touch upon contentious areas. The economic advantages appear to be for some consumers only—the "good" ones—while others would be excluded or penalized by paying more. These "other" consumers do not qualify as "good" consumers because they do not fit into predefined criteria, and they would ultimately have more difficulty repaying their debts and avoiding default. At any rate, whether credit bureaus really serve the interest of debtors seems inconsequential if one embraces the idea that economic efficiency does not stand in isolation, but that there are greater social concerns relating to the position of individuals in society. Namely, where they are not merely equated to consumers but valued as citizens in a free and democratic society. As it stands, the law does not resolve the question of how far consumers should be forced to sacrifice their own rights in the interest of the credit industry, bearing in mind that the "utilitarian" concerns of the credit industry cannot necessarily prevail over civil liberties and fundamental-rights concerns. Therefore, it remains open to debate whether the institutional form of credit bureaus and the design of databases advances the desired policy goals, or whether the level of aggregation and detail of information exceeds the purpose for which it is shared, especially with respect to EU citizens' fundamental rights.

D. Proposed Comprehensive Reform of EU Data-Protection Rules

The scale of data sharing and scoring has brought new challenges for protecting personal data. The legal framework of EU data-protection law is now being reformed. The European Commission recently proposed new, comprehensive legislation, with the declared objective to protect personal data in all areas of the EU's activities while continuing to guarantee a high level of

125. *See generally* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (Liberty Classics 1981) (1776).

126. *See generally* ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING (2004).

127. *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (Liberty Classics 1976) (1759); JOSEPH E. STIGLITZ, MAKING GLOBALIZATION WORK (2007).

protection for individuals.[128] A regulation is the legal instrument used for the proposed reform.[129] Due to its direct applicability in accordance with TFEU Article 288, the Proposed Data Protection Regulation is considered to be the most appropriate legal instrument to reduce legal fragmentation across the EU. It provides greater legal certainty by introducing a harmonized set of core rules, thereby improving the protection of individuals' fundamental rights and contributing to the functioning of the internal market.

Whether the Proposed Data Protection Regulation will effectively address the pitfalls discussed above remains to be seen and, given its hasty release by the European Commission, it merits a separate analysis beyond this Article. It is noteworthy that the declared objectives are to give individuals more control over their personal data, and to promote transparency by improving the quality of information they receive regarding what happens to their data once they decide to share it. The European Commission intends for consent to be reinforced. Consent must be explicit; the Proposed Data Protection Regulation clarifies the conditions for valid consent as a legal ground for lawful processing.[130] Under the proposal, lenders and credit bureaus will bear the burden of proof as to the data subjects' consent to the processing of their personal data for specific purposes.[131] Also, consumers will have the right to withdraw their consent at any time.[132] Nevertheless, this right will not affect the lawfulness of processing based on one's consent before withdrawal.

Importantly, however, the Proposed Data Protection Regulation provides that consent will not give a legal basis for data processing where there is a significant imbalance between the positions of the data subject and the controller.[133] As this is clearly the case for consumers, it remains unclear what the basis for data processing will be, in the absence of criteria for lawful processing set forth in the provision of Article 6 of the Proposed Data Protection Regulation.[134]

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128. *See Comprehensive Approach*, *supra* note 72; *see also* Article 29 Data Prot. Working Party, Working Party on Police & Justice, *The Future of Privacy: Joint Contribution to the Consultation of the European Commission on the Legal Framework for the Fundamental Right to Protection of Personal Data*, at 2, 7-8, 02356/09/ENWP168 (Dec. 1, 2009), *available at* http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp168_en.pdf; *see also* EUR. COMM'N DG RESEARCH, CONSULTATION ON THE LEGAL FRAMEWORK FOR THE FUNDAMENTAL RIGHT TO PROTECTION OF PERSONAL DATA, http://ec.europa.eu/justice/news/consulting_public/0003/contributions/organisations_not_registered/hide_rise_consortia_en.pdf (last visited Nov. 11, 2013).

129. *See generally Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, COM (2012) 11 final (Jan. 25, 2012) [hereinafter *Proposed Data Protection Regulation*], *available at* http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf.

130. *See id.* at 45 (establishing conditions for consent under Article 7).

131. *See id.* at 22.

132. *See id.* at 22-25.

133. *See Proposed Data Protection Regulation, supra* note 129, at 34.

134. *See id.* at 43-44 (stating regulations for lawful processing under Article 6). Article 6 of the Proposed Data Protection Regulation is identical to Article 6 of Directive 95/46. *Compare id.* (addressing lawful

Another innovation that may profoundly impact credit bureaus is that data subjects will have the right to data portability.[135] Where personal data is electronically processed in a structured and commonly used format, consumers will have the right to obtain a copy of data undergoing processing from the controller.[136] Moreover, where consumers have provided their personal data, and the processing is consensual or contracted for, the data subjects will have the right to transmit their personal data—and any other information they have provided, which an automated processing system retains—in a commonly used electronic format without intervention from the controller who withdraws the data.[137] Will this mean that consumers have the right to substitute credit bureaus? Although the answer is unclear, this seems highly unlikely.

Finally, the provision addressing profiling measures may be the most significant.[138] Every person will have the right to be free from measures with significant legal effects on them.[139] Specifically, every person will be free from measures that are based solely on automated processing intended to evaluate certain personal aspects, or to analyze or predict: work performance, economic situation, location, health, personal preferences, reliability, or behavior.[140] Subject to other provisions of the Proposed Data Protection Regulation, a person may be subject to a profiling measure if the following conditions are satisfied:

> (a) [The data processing measure] is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention; or
>
> (b) is expressly authorized by a Union or Member State law which also lays down suitable measures to safeguard the data subject's legitimate interests; or
>
> (c) is based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards.[141]

Importantly, the proposal mandates that automated processing of personal data intended to evaluate personal aspects of an individual must not be based solely on race or ethnic origin, political opinions, religion or beliefs, trade-union membership, genetic data, data concerning health or sex life, or criminal

processing conditions), *with* Directive 95/46, *supra* note 37, at 53 (providing principles relating to data quality).

135. *See Proposed Data Protection Regulation*, *supra* note 129, art. 18.

136. *See id.*

137. *See id.* (creating right to data portability).

138. *See id.* art. 20.

139. *See Proposed Data Protection Regulation*, *supra* note 129, art. 20.

140. *See id*. art. 20(1).

141. *See id.* art. 20(2).

convictions.[142]

Despite some ambiguities and potential backward steps in terms of consumer protection, the proposal appears promising in addressing new issues in data processing, and in empowering consumers with the ability to control their personal data. In this sense, the efforts of the European Commission are to be appreciated. Nevertheless, it remains doubtful that a comprehensive legislative measure is capable of tackling the specific issues raised by the sophisticated mechanisms and practices of consumer credit reporting and scoring. The Proposed Data Protection Regulation appears to be a missed opportunity to integrate consumer-credit reporting into the EU informational market structure at the expense of EU citizens. Although the European Commission recently released the Proposed Data Protection Regulation, the proposal faces lengthy legislative debate and is subject to subsequent changes by the European Parliament and Council. Moreover, further analysis and reaction from stakeholders is necessary before drawing more precise conclusions. At a minimum, whether the Proposed Data Protection Regulation solves or properly addresses the many pitfalls discussed in this Article is dubious.

VII. CONCLUSION

This Article addresses the pitfalls and challenges of consumer-credit reporting and scoring in the EU through both the creation of a single, retail credit market and respect for established fundamental rights and principles enshrined in EU law. Legitimate questions remain as to whether the EU needs a specific credit-reporting directive or regulation to address the many pitfalls outlined above. To assess these questions, the EU should further reflect on the fact that despite the efforts to integrate European capital and credit markets, the informational structure behind these markets is still a national affair and there is no common market or European cross-border, consumer-data exchange to enhance European integration. To some extent, this affects the free movement of goods, capital, people, and services upon which the EU is built. In addition, it also levels the playing field between the member states.

Last but not least, this Article provides an assessment of credit reporting and scoring vis-à-vis consumer protection. It questions whether these instruments properly address the problem of consumer overindebtedness in the EU. It asks to what extent these instruments provide a fair balance with the fundamental right of personal data protection and the values of freedom, participation, and democracy that it aims to defend. Considering important legal rights and liberties are at stake, the ultimate stance of this Article is that the function of credit bureaus should inform the design and use of the underlying information

142. *See id.* art. 9(1).

systems, as well as the institutional form and specific legislation for this sector. Whether and to what extent credit bureaus perform a public function or a function in the interest of the credit industry makes a vital difference, in both legal and institutional terms, for a free society that grants full participation to its members.