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of Debt Collection Companies

Excerpt from
"White paper on the requirements of the GDPR to business activities of debt collection agencies"

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2. Principles of Data Processing According to the General Data Protection Regulation [GDPR]

2.1 Responsibility under the GDPR

The obligations under the GDPR are aimed at the responsible entity or the "controller", the term now used in the GDPR (see Art. 4 no. 7 in connection with Art. 24 GDPR). In this respect, it is important to determine that the debt collection agency will work as a controller within the meaning of this provision. Contrary to the processor's work, the debt collection agency will not be subject to instructions. More so, the debt collection agency will also define the purpose of the data processing. The debt collection agency will process data to enforce the claims of clients and within the scope of its (own) debt collection management system. Furthermore, it will determine which specific measures will be taken to enforce the claims and which data will be processed within the limits contractually agreed with its clients. It also manages the specific measures taken to optimize its debt collection processes related to data. The debt collection agency does therefore not work as a processor for its clients but as a controller within the meaning of Art. 4 no. 7 GDPR. Furthermore, the debt collection agency does also not have joint responsibility with the clients. In this respect, the debt collection agency should and must act independently within the limits contractually agreed with its clients.

2.2 Ban with the possibility of authorization

The GDPR adheres to the "ban with the possibility of authorization". Accordingly, any processing of personal data is initially banned per se, unless there is an authorization or a statutory permission takes effect (see Art. 6 GDPR).

2.3 Consent (Art. 6 (1) lit. a GDPR)

Personal data may generally be processed based on consent. This may materialize in different constellations, e.g. online merchants, as clients of the debt collection agency, may obtain certain statements of consent from customers for data processing in advance. However, generally such statements of consent do not apply broadly and are the exception. For this reason and for the purposes of this White Paper, the presumption that the data processing by the debt collection agency must be carried out as permitted by statutes continues to apply.

2.4 Statutory permissions (Art. 6 (1) lit. b and f GDPR)

Data processing may be permitted to perform a contract (Art. 6 (1) lit. b GDPR) and to preserve legitimate interests (Art. 6 (1) lit. f GDPR).

2.5 Purpose limitation (Art. 5 (1) lit. b GDPR)

Regardless of the general justification of processing based on consent or statutory permissions, personal data may only be collected for "specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes" (Art. 5 (1) lit. b GDPR). The requirement of this "compatibility" of

the new with the current purpose is regulated in para. 6 (4) GDPR. Accordingly, a purpose limitation still applies, which is mainly relevant to determine whether the data originally collected for a specific purpose may later be processed for further purposes (e.g. debt collection management).

3. Debt Collection Agency's Right to Process Personal Data

Below we will show based on the afore-mentioned principles whether and under which conditions the typical data processing carried out by debt collection agencies within the scope of (i) the enforcement of claims and (ii) debt collection management is in compliance with the GDPR. In addition, light is shed on the issue whether the debt collection agency is entitled to create probability values within the scope of managing the collection procedures in order to use these values to assess whether a debtor is likely to make a payment in response to the collection procedures. Here, the legal requirements regarding the typical processing steps should be examined chronologically as follows:

• Collection agency's right to collect data (item 3.1)
• Right to subsequent processing of the data collected by the collection agency (item 3.2)

3.1 Collection agency's right to collect data

The initial question is whether and to what extent debt collection agencies are entitled to collect the data required for collecting the debt. The data mainly originates from clients. Furthermore, the debt collection agency may also generate its own data. In particular, it collects said data from sources accessible to the general public or receives them from credit agencies upon request, sometimes even from debtors themselves. If the data contain personal information, disclosure by the client is a transfer subject to justification, which has to be legitimized by the client. Correspondingly, the receipt and storage of data by the debt collection agency justifies processing of this data (see Art. 4 (2) GDPR). Such a processing is allowed if permitted by statutes. The circumstances applicable for the debt collection agency should therefore be investigated subsequently.

3.1.1 Collection for performance of a contract (Art. 6 (1) lit. b GDPR)

As shown above, debt collection agencies mainly process data that each client transmits to the debt collection agency in connection with unpaid debts or claims for reimbursement of damages under a contract with the debtor. Claims for reimbursement of damages especially include claims based on delayed performance (e.g. costs for reminders, debt collection and other legal proceedings caused by the default). The data transmitted in particular includes name, address, communication data of the debtor, amount of the debt and, if applicable, the legal grounds for the debt.

In this regard, an applicable statute granting permission to be initially considered is Art. 6 (1) lit. b GDPR.

Accordingly, processing of personal data is permitted if *"processing is necessary for the performance of a contract to which the data subject is party …"*

Insofar it is questionable whether the debt collection agency, as the "controller" may even use the fact that it is performing a contract as justification, since the contracts, e.g. for the sale of goods, were not concluded with the debt collection agency but with the clients. Here attention must be paid that the provision is only applicable to the position of the affected person, i.e. the debtor, as a contracting party. The additional contracting party is not mentioned. Consequently, the controller, in this case the debt collection agency, does not have to be the counterparty to the contract with the debtor. This conclusion is drawn not least on the basis of the provision set out in Art. 22 (2) lit. a GDPR, which in other contexts also establishes regulations

for the issue under which circumstances a contract can be used as a legal basis granting permission. This article refers to "*performance of a contract between the data subject and a data controller*". Art. 22 GDPR thus mentions both parties to the contract. By implication, this leads to a binding interpretation that the debt collection agency, as the controller, may argue that Art. 6 (1) lit. b   GDPR supports its actions, even if the contract with the debtor was not concluded between the debt collection agency and the debtor, but between the client and the debtor.

Within the scope of the statutory permission of contract performance, the data transfer to the debt collection agency, and therewith its collection of data, has to be a continued requirement to "perform" the contract between the debtor and the client.

The performance of such a contract also includes the enforcement of unpaid debts and claims for reimbursement of damages based on a contract. For example, an online purchase agreement is not yet fulfilled when the goods ordered have been delivered to the customer. More so, in such a case the obligation to provide the consideration, i.e. payment of the purchase price, has not been fulfilled. As long as these debts, if applicable also secondary claims associated with reminders and other costs associated with the default, have not yet been paid, the contract has also not been fully performed. For this reason collection of data for carrying out debt collection measures would in this case also be "required" for performance of the contract. This requirement is generally satisfied since efficient debt collection, especially as a bulk business, requires the involvement of professional service providers. Not least an optimized debt collection procedure is also in the (direct) interest of the affected debtor, since it decreases costs and serves to reduce the extent of the obligation to provide reimbursement for damages due to the measures necessary as a consequence of the default. Against this background the debt collection agency can use the statutory permission of contract performance to justify its activities, provided these measures are taken within the scope of a specific client relationship with a specific client.

3.1.2 Collection based on legitimate interests (Art. 6 (1) lit. f GDPR)

Furthermore, and in addition, it is always an option to resort to the statutory permission of a balancing of interests. This may be necessary if the legally arisen primary claims will be collected by the debt collection agency, i.e. if there is no contractual relationship with the debtor. Pursuant to the applicable Art. 6 (1) lit. f GDPR, processing and therewith also a collection of personal data is permitted if it is "*necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data*".

There is no question that the enforcement of claims is a "justified interest" within the meaning of this provision. Depending on the specifics of the case it is immaterial whether the interests involve the debt collection agency's own interests, e.g. in case the debts are purchased, which is part of the services offered by some debt collection agencies, or the interests of clients if the agency was only engaged to collect the debt. The statutory permission expressly provides that the interests either refer to interests of the controller or a third party (the client). Furthermore, the collection of the respective data (name and address of the debtor, amount of the debt, etc.) must be required to safeguard the interests of the debt collection agency or the clients. In terms of the "requirement", the above statements about contract performance apply accordingly (see item 3.1.1), i.e. the requirement is generally satisfied.

Even though generally an assessment of the individual case is required to balance interests in data protection law, it is permitted to use a generalized consideration due to the consistency of the processes used in the

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debt collection sector. There are no indications that there is a general outweighing interest of the debtor. However, in borderline cases a consideration of specific facts of the case is required to carefully balance the affected interests. This especially applies if especially sensitive data, for example from the health sector, is involved.

3.1.3 Findings regarding collection of data by the debt collection agency
It has been shown that the collection of personal data by the debt collection agency can be justified by the statutory permissions set out in Art. 6 (1) lit b or lit. f GDPR. On one side data collection is an option for performance of a contract, and on the other side it is legitimized by the justified interest in implementing debt collection measures as a generally recognized service in the interest of a functioning business world. In regard to the actual structure, only the principle of necessity needs to be observed.

3.2 Right of further processing of the collected data by the debt collection agency
The next issue is whether the debt collection agency may thereafter process the collected data to implement debt collection procedures and to optimize these measures within the scope of a debt collection management system. Each involves processing of personal data that is subject to justification.

Generally, the above statements regarding the collection of data by the debt collection agency also apply to the implementation of collection procedures overall as well as to their optimization supported by data within the scope of debt collection management. Again, the statutory permissions set out in Art. 6 (1) lit. b and lit. f GDPR provide the legal basis and can also be applied cumulatively.

The debt collection agency must be able to design its actions in a reasonable and economical manner in its own interest, and indirectly in the interest of the client, and even in the interest of the debtor for consideration of increasing efficiency and cost efficiency. Generally, there are no indications that outweighing and conflicting interests of the affected debtors exist.

The approach to want to reject debt collection procedures in general, which could conceivably be used, is not considered an interest acknowledged by the legal system. More so, the affected party would have to assume that it will always and in each case be subjected to the entire arsenal of enforcement measures if the debt collection agency was not able to reasonably implement the measures within the scope of its debt collection activities.

4. Purposes of Data Processing
4.1 Processing to enforce claims
When processing data, debt collection agencies pursue the original purpose of the claim's creditor by enforcing the creditor's claims based on the collected data within the meaning of the purpose of performing the contract or asserting rights in consideration of balancing of interests (see above under item 3.1.1 and 3.1.2 regarding the relevant statements about statutory permissions). Generally, a majority of this data is processed to pursue the original purpose, especially in regard to such data that was directly collected from clients within the scope of the contractual relationship with the debtor. For example, if the buyer of goods provides its name and address to the seller, and the debt collection agency processed this data, on behalf of the seller or the client, to identify the debtor in default and to collect the actual debt, such processing is carried out to perform a contract pursuant to Art. 6. (1) lit. b or to assert rights justifiably (if the claim does not have a contractual basis) pursuant to Art. 6 (1) lit. f GDPR. In this case, the purpose does not change, which would be subject to justification.

4.2 Processing for debt collection management

Aside from asserting claims of clients, the data collected is also simultaneously used for another, closely linked purpose – the debt collection management system of the debt collection agency. This purpose also includes data-based analysis and optimization of processes used in the debt collection agency. In particular, in debt collection management it is important to efficiently control the measures implemented, possibly also on the basis of calculated probability values (also see item 5 separately). Any enforcement or preparatory measures that do not lead to the desired result should be avoided in the interest of all involved.

Generally, debt collection agencies thus (at first) pursue two simultaneous purposes in data processing. This is permissible under the GDPR since it continually mentions processing for legitimate purposes (plural) and acknowledges the pursuing of parallel purposes, see
Art. 5 (1) lit. b GDPR or Art. 6 (1) lit. a GDPR.

4.2.1. Change of purpose

Data processing for the parallel purpose of "debt collection management" requires a separate justification. An example: For example, the debt collection agency has knowledge of debtor S from a contract with client A and processes this knowledge thereafter to efficiently enforce claims by client B owed by the same debtor S. For such a multiple debtor, other measures that trigger costs do not have to be taken again, but the already known data may be used again pursuant to the obligation to minimize damages. However, it could be argued that the data originating from client A is used for a different purpose than the one originally intended when later processed within the scope of collecting claims for client B. From an economic perspective, the same purpose is still pursued in debt management as when the data was originally collected and used, namely to assert unpaid debts. Based on a more detailed legal analysis it can be presumed that the purpose gradually changes since the debt collection agency does now no longer only pursue the (derived) purpose of enforcing a very specific claim, but also uses the data to optimize the processes and data for other clients or (for the original client) beyond the specific outstanding debt. For example, in this way it can be avoided to apply measures that do not promise success, which neither serve the debt collection agency nor the client or debtor. Therefore, a change of purpose does not immediately make this measure illegal. More so this only applies if the data is no longer processed in a manner that is compatible with the original purpose (Art. 5 para. 1 lit. b) GDPR).

4.2.2 Compatibility of purposes

Looking to the GDPR, the requirements for the "compatibility" of purposes is regulated in Art. 6 (4) GDPR. The provision was heavily disputed when it was originally stipulated.

Many of the aspects listed that must be considered in the assessment show that they rarely permit reliable predictions which forms the change of purpose can take to be admissible under the GDPR or where the limits of inadmissibility are drawn.

However, in view of the actual circumstances involved in debt collection it can be assumed that the processing of data for process analysis and optimization during debt management is a change of purpose that is compatible with the original purpose and therefore admissible.

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This assessment is especially based on the circumstance that the affected debtor is obligated to make payment under the law of obligations, which means that its interest is generally subordinate to the justified interests of the creditor.

The reason and purpose of debt management is to keep unpaid debts as low as possible, to preserve the necessary liquidity of economic enterprises and therewith keep any additional costs charged to the debtor, who is obligated to provide reimbursement, as low as possible. In this sense, the debt collection agency pursues a legitimate purpose with its "debt management activities" and the interests of the debtor are without doubt considered and safeguarded. The interest in data processing for the purpose of debt management therewith generally outweighs the interest of the data subject. For the same reasons, the requirement of compatibility of the purpose of debt management with the original purpose is generally met for the collection of data by the client (among other within the meaning of Art. 6 (4) lit. b GDPR).

The purpose of preserving the liquidity of economic enterprises is at any rate a necessary consequence of the relationship between the client and the data subject as the debtor. In this connection debt management also aims at keeping the costs charged to a debtor, who is obligated to provide reimbursement, as low as possible. For this reason, it can be presumed that there is a compatibility of purposes as required under Art. 6 (4) GDPR.

5. Special case: Right to process for profiling (Art. 4 no. 4, 22 GDPR)
Finally, it must be clarified whether creating probability values as an aspect of enforcing claims or within the scope of debt management is subject to specific provisions. In this respect, the GDPR include provisions for automatic decision-making and so-called profiling. The term profiling is defined as follows in Art. 4 no. 4 GDPR:

"Profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements"

Whether creating probability values constitutes "profiling" within the meaning of this provision is based on the specific form these activities take. Generally, personal data is processed automatically as required under the provisions. The objective of such processing is usually to analyse certain personal aspects relating to a natural person. Specifically, this involves making a prediction how probable it is that a debtor will pay or what amount of his debt a debtor will pay off based on individual measures. Accordingly, there will a "profiling" in certain cases, dependent on the specifics of the individual case, but always based on the requirement that the data relates to a specific person. However, and this is often overlooked, the GDPR does not provide for a separate ban specifically applicable to 'profiling". In fact, admissibility of this specific form of processing of personal data is also based on the general statutory permissions set out in Art. 6 GDPR. The statutory permission for process-optimizing measures and profiling for a particular case is set out in Art. 6 (1) lit. f GDPR, because the measures are part of modern work processes used to enforce claims and to manage debt.

Here, it must be emphasized that process-optimizing measures and profiling serve the sole purpose of controlling internal processes. These purposes are in line with the constitutionally guaranteed right to enforce legitimate claims against debtors.

5.1 Forms of profiling subject to special regulations – automated decisions

However, if profiling is used to generate so-called automated decisions, the special provisions set out in Art. 22 GDPR apply. Art. 22 (1) GDPR establishes the following regulations regarding the admissibility of automated decisions:

"The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her."

It must be examined whether such an "automated decision" applies. If this is the case, it must be further examined whether it takes legal effect or otherwise "significantly affects" the debtor as the data subject.

5.1.1 Decision solely based on automated processing

At first it is relevant whether the debt collection agency makes a "decision". This should frequently be the case when the debt collection agency decides whether to initiate collection proceedings against the debtor or not. Furthermore, it is important whether this decision is based on automated processing. This should also be frequently the case since automated processing provides probability values that are essential in deciding whether the collection proceedings will be initiated.

However, the issue is whether the measure is "solely" based on automated processing. This depends on the specific form the measure takes in the individual case. In cases where, for example, the call center agent who is supplied with a probability value still has to initiate the call in the end and therefore makes an independent decision, the requirement of being "solely" based on automated processing is not met.

In small or medium-sized companies making such independent decisions should be the norm. However, there are also conceivable cases where automated processing is involved and no real intermediate decision is made but measures are initiated based on the probability value in each case. Only in this last case, an automated decision in the individual case pursuant to Art. 22 GDPR applies.

This assessment is also in line with the interpretation, which is based on Art. 15 of Directive 95/46/EC (Data Protection Directive) and contains a ban of automated decisions in the individual case.

5.1.2 Decision produces legal effect or other similar significant effects

Therewith, the important factor for automated decisions and therewith the decisive factor for the applicability of Art. 22 (1) GDPR is whether the decision *"produces legal effects"* or *"similarly significantly affects"* the debtor, since only in this case the measure would be subject to the ban set out in Art. 22 (1) GDPR. Typical cases where the "legal effect" applies should be situations where a contract with a customer is terminated. However, not every decision affecting a contract *"produces legal effects"* within the meaning of Art. 22 GDPR. The decision whether collection procedures are implemented does in this sense not affect the existence of the contract. The contractual obligation between the debtor and creditor is not affected. Since in the end only the issue whether the claims based on this contractual obligation are enforced or are (initially) not enforced for financial reasons is important. According to our opinion, the decision therefore does not have any (direct) legal effects. Any consequential effects on limitation periods (e.g. after execution of enforcement procedures) are only direct consequences based on statutory provisions and do not have any direct implication on the processing of data. More so, the relevant data processing involves an internal controlling process at the debt collection agency with the objective to optimize in-house processes and not a decision that has a direct external effect on the data subject. In this sense, legal proceedings based on automated decision-making may result in indirect effects on the data subject, especially entry of a judgment. Such

judgements including their consequences (extension of the limitation period) will however not be made within the scope of the automated decision but in distinct court proceedings.

However, the question remains whether the decision whether to initiate debt collection proceedings *"similarly significantly affects"* the debtor. Within the scope of applicability of the the Data Protection Directive 95/46/EC, the element of "significantly affecting" the debtor is satisfied in decisions associated with a relevant, negative consequence for the data subject. However, mere nuisance is not sufficient on its own. More so, the decision must have a long-term effect, for example on the financial or personal affairs of the data subject. The key criteria are the circumstances of the individual case, especially the social acceptability of the effect.

Measured by the standard of social acceptability it must be taken into consideration in favour of the debt collection agency that the result of the decision only serves to enforce existing, i.e. legitimate, claims against the debtor. In other words, the creditor is exercising its right to collect payments it is owed. Accordingly, the debtor does not have an overriding interest in protection and there is no "*significant effect*". Also, the drastic consequence of entering a judgment against the debtor or attaching bank accounts following the debt collection procedures cannot be interpreted as an effect that is not socially acceptable. The debtor exposed himself to such risks by defaulting on his payments, they merely materialized and do not put him in a worse position than expected considering his actions.

Measured by the standard of social acceptability of an effect it is shown that there is no unacceptable effect if the creation of a probability value leads to the initiation of automated debt collection procedures against the debtor to enforce justified claims. In particular, such a decision does not produce the same "*effect*" or "*burden*" as the objection of entering into a contract based on a probability value, which is considered negative in some cases, however this is not part of the tasks carried out by a debt collection agency.

5.1.3 Findings regarding the applicability of the ban set out in Art. 22 (1) GDPR
To conclude it can be stated that the ban set out in Art. 22 (1) GDPR does generally not apply. The procedures used may constitute a "profiling" and include "automated decision-making" dependent on how much room employees are given to make decisions. However, it has been shown that generally decisions made on the basis of probability values do not take any legal effect and do also not have similar effects. Therewith, the necessary requirement for applicability of the ban set out in Art. 22 (1) GDPR is not fulfilled.

5.2 Flexibility clauses (Art. 22 (2) lit. b and Art. 23 (1) GDPR)
Art. 22 (2) lit. b GDPR contains the authorization for the member states to provide exceptions to the basic provisions set out in Art. 22 (1) GDPR in national law provided that *"suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place"*.