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Chris Graham
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Dear Chris,

Google v Agencia Española de Protecciòn de Datos

Follwing the European Court of Justice's decision in the Google Spain case, I would like to reopen an issue that I raised with both your predecessors: if a bank supplies a credit reference agency with incorrect or disputed derogatory information on a data subject, then who is the data controller – the bank, or the credit reference agency? Both Elizabeth France and Richard Thomas took the view that it was the bank, but that position is no longer tenable.

Lenders and debt-collection agencies frequently use a threat to blacklist data subjects as a means of extracting payment, even where liability is in dispute. If someone pretends to be you, borrows money and makes off with it, then the bank who was a victim of this fraud by false representation will routinely pretend that you were the victim of 'identity fraud' and blacken your good name with the agencies, and cause you to go to a lot of trouble to clear your name. As you know, this is nonsense; it's not your identity that's been stolen, but the banks' money.

Data subjects who suffer this indignity can be put to great effort, expense and inconvenience; you can find it impossible to rent a car, for example. As the credit reference agencies market their services to ever more businesses, the impact of their unlawful business practices will only increase. The growth in phishing and malware attacks is likely to make such disputes more common.

My interest in this was fired by an unpleasant incident some ago. We bought a washing machine in 1992 from a local retailer, and were given 90 days' free credit; there were problems and so we didn't pay; the finance company (a subsidiary of the NatWest) sued in the county court; we defended the case and won, in 1995; and yet in 1997 my wife had a credit card application refused as the bank had blacklisted us for the 'debt'. When we complained, the bank told us we had to pay the outstanding amount to clear our record; and the credit reference agencies said they would do nothing without the bank's say-so, notwithstanding the judgement in our favour.

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It was a clear breach of section 22 of the 1984 Data Protection Act for the agencies to relay false information about us once this had been brought to their attention, but Elizabeth France didn't want to know, saying she'd agreed with the agencies that the banks would be the data controllers. (In the end we resolved the matter by approaching the NatWest's CEO and threatening to raise a stink in the press.)

After Richard Thomas took over I raised the matter with him too. He said he'd think about it but all we got was his technical guidance note, 'Filing defaults with credit reference agencies'. This confesses that he consulted 'lenders, agencies and trade associations' but makes no mention of consumers or NGOs.

This week's judgement makes clear that your predecessors were not just lobbied, but were wrongly advised on the law. The credit reference agencies are indeed data controllers, as they collect, retrieve, record and organise the data in question, and determine the purposes and means of processing, just as Google does. Furthermore, the UK operations of Experian, Equifax and Callcredit are 'establishments' within the meaning of the directive even if they do their processing overseas, as with Google Spain. Third, without their services the information about data subjects' debt histories with a large range of firms could not be interconnected, or only with great difficulty.

Thus the effect of the judgement is that a victim of 'identity fraud' can now take up a complaint with the credit reference agency as well as the bank, and demand that information which is untrue and defamatory not be relayed at all to the agency's customers. If she or he does not receive satisfaction, the issue can then be raised with you as an alternative to the court system.

I wonder if you can kindly confirm that this is the case?

Also, will you make a public announcement that Richard Thomas' note is no longer operational in light of the court's judgement?

Your predecessor's note had better be rewritten; sections 42–54 (at least) are now clearly unsatisfactory. They show that he was well aware of many of the circumstances in which lenders supply incorrect data to the agencies in order to apply improper pressure to data subjects. It is not now acceptable for any replacement guidance you issue to permit the agencies, as his section 45 does, to record and broadcast a disputed default, even with a note that a default is 'disputed', as that will still have the effect of causing an innocent data subject to be unable to conduct a normal life. It immediately makes the agencies a party to the dispute and opens them to both legal and regulatory action.

Finally, I hope you will agree that your priority as regulator must be to protect the data subject rather than to place a large club into the hands of unscrupulous lenders. So when you do eventually consult on replacement guidance, then I trust that the views of consumer groups and other NGOs will carry at least as much weight as the industry's lobbyists, and that civil society will have at least as much access to you during the process.

Yours sincerely,

Ross Anderson