

Complaint to the Ombudsman

Complainant

Sven Giegold, MEP

Which EU body or institution do you wish to make a complaint about?

The European Central Bank (ECB)

Which decision / what subject do you wish to make a complaint about? When did you find out about this?

Legal background:

Decision of the European Central Bank of 24 February 2014 concerning the organisation of preparatory measures for the collection of granular credit data by the European System of Central Banks (ECB/2014/6).

The ECB is currently drawing up a regulation to form the legal basis for implementation of 'AnaCredit', the European Analytical Credit Dataset. As the legal basis for the regulation on AnaCredit, the ECB cites Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.

The subject:

The ECB plans to establish a central granular credit database for dealing with questions on monetary policy, financial stability, research, market operations and SSM (multi-purpose approach). The collection of information will be done by national central banks in the Eurozone on the basis of an ECB statistical regulation. This envisages data collection on a loan-by-loan basis.

As discussions currently stand (06/2015), AnaCredit comprises some 175 credit, credit risk and accounting attributes (including identifiers; in reality, 125 attributes). National supervisory authorities may supplement these with country-specific attributes. In the first stage, starting in late 2017, the ECB will record all loans in excess of EUR 25 000 made by credit institutions to legal persons together with basic details, i.e. records will not be anonymised. Starting from 2019, the scope is set to be broadened to include claims by insurers as well as leasing and factoring providers. From 2020, private individuals' home equity loans are scheduled to be included and will be anonymised.

Some of the attributes to be reported are client-specific and contain information which is partly confidential and subject to data protection law (for example, name and address of the borrower, ratio of debt-to-income ratio, number of employees, balance sheet totals, annual turnover, annual gross income, market values of collateral and securities).

In your view, what did the EU body or institution do that was wrong?

The complaint described below is common to a number of supporters from the banking industry. A list of these will be submitted separately to the Ombudsman.

The complaint is being sent to the Ombudsman as the European Central Bank is able to make rules independently, the legal nature of which affects the Member States and their citizens, without the involvement of the usual European-level legislative bodies in these decisions.

Grounds for the complaint

- (a) Violation of the fundamental right to personal data protection
- (b) Violation of the legal principle of proportionality
- (c) Violation of the principles of good administrative behaviour
- (d) Violation of the legislation in force

Specifically

- (a) Violation of the fundamental right to personal data protection

Legal basis:

Article 7 of the Charter of Fundamental Rights of the EU states, with regard to the right to respect for private and family life:

Everyone has the right to respect for his or her private and family life, home and communications.

Article 8 of the Charter of Fundamental Rights of the EU states, with regard to data protection:

- (1) Everyone has the right to the protection of personal data concerning him or her.

(2) Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Article 6 of the Data Protection Directive (95/46/EC) defines the principles applying to the quality of data:

(1) Member States shall provide that personal data must be:

(a) (...)

(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; (...) Further processing of data for historical, statistical or scientific purposes shall not be considered as incompatible provided that Member States provide appropriate safeguards;

(c) adequate, relevant and not excessive in relation to the purposes for which they are collected

and/or further processed;

Justification:

AnaCredit enables extremely sensitive data to be collected and stored in a central data pool at the ECB. Many of the details to be sent are not available at the banks. Others must be gathered from various systems at the banks. The use of such data for AnaCredit and their transmission to the ECB constitutes a change of purpose.

Additional data of legal persons collected under the project will to be forwarded in a non-anonymised form to the ECB. Since some of these data are confidential (for example, name and address of the borrower, ratio of debt-to-income ratio, number of employees, balance sheet totals, annual turnover, annual gross income, market values of collateral and securities), the procedure gives rise to considerable data protection problems.

The data of natural persons will be forwarded in a non-anonymised form to the ECB. However, this in no way changes the fact that the bank in question must record the data in a non-anonymised form, which means that even at this stage there is a diminution of the fundamental right to personal data protection.

Even anonymisation might lead to the de facto assignment of all the data in the ECB's central data pool to a borrower by way of criteria such as place of residence or postcode. In combination, for example, with the probability of default, which allows conclusions to be drawn about the borrower's creditworthiness, and the collateral for loans which must be stated, the result is the collection of data on every borrower which is on a par with data collection by internet companies. Since all assets, such as collateral and securities, also

have to be listed, data consultation through AnaCredit amounts more or less to the disclosure of the economic situation to the ECB. It is not clear that the collection of certain personal data (e.g. annual income of borrowers, details of conditions) is important for the achievement of AnaCredit's purpose, namely to support the fulfilment of Eurosystem tasks. On the contrary, the amount of data to be recorded exceeds the purpose of AnaCredit.

(b) Violation of the legal principle of proportionality

Legal basis:

Article 5(4) TEU (together with the protocol on the application of the principles of subsidiarity and proportionality) requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'.

Article 6 of the European Code of Good Administrative Behaviour lays down that:

1. When taking decisions, the official shall ensure that the measures taken are proportional to the aim pursued. The official shall in particular avoid restricting the rights of the citizens or imposing charges on them, when those restrictions or charges are not in a reasonable relation with the purpose of the action pursued.
2. When taking decisions, the official shall ensure a fair balance between the interests of private persons and the general interest.

The Commission's better regulation guidelines state that:

'The European Commission is determined (...) to ensure that its proposals meet policy goals at minimum cost and deliver maximum benefits to citizens, businesses and workers while avoiding all unnecessary regulatory burdens.'

Justification:

The registration requirements associated with the AnaCredit project will entail high initial installation costs and high operating costs for financial institutions and data centres. Small and medium-sized banks will be disproportionately affected, a situation which might distort competition in the financial services market. If they are to fulfil a possible future registration obligation in line with the ECB's requirements, all banks will have to collect the necessary information when accounts are opened. This is not standard procedure, and to the extent required here, in all cases of business relations based on loans. In addition, registration with AnaCredit means that information on existing customers must be gathered or, where

appropriate, ascertained subsequently from different business fields and systems (auditing and accounting, reporting, risk management), which is an additional burden. The collection of market values for securities in particular is extremely burdensome. The usefulness of a European credit register is debatable in the light of the compliance costs. It is doubtful whether the data collected by AnaCredit will fulfil the objective of recognising macro-prudential risks. Data collection is only reasonable and proportionate if it can be used to draw significant conclusions for promoting financial market stability. It has not yet been made clear that the AnaCredit project does not entail an unnecessary administrative burden and that the data collection follows the principles of necessity and simplicity. Since the relationship between the burden and the usefulness is not justifiable, the AnaCredit project in its current form is an inappropriate measure.

It is extremely doubtful whether the collection of sensitive personal data is necessary to fulfil the objectives of AnaCredit.

The AnaCredit Regulation makes it possible for national central banks to include not only home equity loans but also consumer credit and overdrafts of natural persons. It is doubtful whether granular data on consumer credit and overdrafts can achieve the objective of AnaCredit, given their comparatively small volume (around 3.5% of all loans made by monetary and financial institutions in Germany). The right to select data therefore includes a disproportionate broadening of the scope.

(c) Violation of the principles of good administrative behaviour

Legal basis:

Article 4 of the protocol on the application of the principle of subsidiarity and proportionality states that:

The Council shall forward draft legislative acts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank and amended drafts to national Parliaments.

Article 4(3) of Council Regulation (EU) 1024/2013 of 15 October 2013 on creating a single supervisory mechanism (the SSM Regulation) lays down that:

'Before adopting a regulation, the ECB shall conduct open public consultations and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency.'

In accordance with Article 41(2) of the Charter of Fundamental Rights of the European Union, the Right to Good Administration covers in particular:

- (a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
- (b) (...)
- (c) the obligation of the administration to give reasons for its decisions.

Justification:

The ECB claims that the AnaCredit project is a purely statistical undertaking, and that therefore neither a public consultation nor justification for the need to have over 120 data fields is necessary.

AnaCredit is not, however, a purely statistical undertaking, as claimed by the ECB. Rather, it is a multi-purpose tool which also has a monitoring function. It is therefore unacceptable to cite Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank as the legal basis for the regulation on AnaCredit. Instead, there should be a public consultation, as laid down in Article 4(3) of Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (the SSM Regulation).

The ECB also argues that the comprehensive collection of data means that special requests can be avoided in the future. The blanket collection of data which might be relevant at a later date cannot be reconciled with the principle of data minimisation, especially as new, specific questions will always arise over time, and these cannot be answered using an already-existing statistic.

(d) Violation of the legislation in force

Legal basis:

Recitals concerning Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (the SSM Regulation):

(19) Nothing in this Regulation should be understood as changing the accounting framework applicable pursuant to other acts of Union and national law.

(39) (...) The ECB's request for information to perform its calculation should not force the institutions to apply accounting frameworks differing from those applicable to them pursuant to other acts of Union and national law.

Justification:

Some of the attributes listed regarding AnaCredit are based on International Financial Reporting Standards (IFRS), although this is in violation of Council Regulation (EU) No 1024/2013 of 15 October 2013 (the SSM Regulation). Users of national accounting standards, in particular small and medium-sized banks, do not currently have IFRS data and would be forced to obtain these standards, in spite of their rights as documented. This would entail a considerable burden for precisely those institutions which should be protected by the proportionality principle.

In your view, what should the body or institution do to rectify the problem?

It should show that the aims pursued by means of AnaCredit cannot be achieved with a less stringent measure. In particular, the thresholds (EUR 25 000 or EUR 100 for non-performing loans) need to be reconsidered. In accordance with Section 14 of the Banking Act (KWG), the ceiling for borrowers is currently EUR 1 million in Germany. This already provides sufficient coverage for the necessary macro-prudential analysis to be carried out.

There must be a public consultation and transparency when drawing up the AnaCredit Regulation. There should, in particular, be a thorough analysis of the project focusing on data protection rights which is publicly accessible.

There needs to be a reason given for each data field, stating why those data are being collected (principle of data minimisation), and only essential data should be collected. The ECB should be required to collect only data for which there is a specific and reasonable use and which are covered by authorisations already available to the ECB. There should be no costly data collection for purely statistical purposes.