The Creditreform Solvency Index (Bonitätsindex) as an Unregulated Economic Policy Instrument an Overview of Developments in Recent Years, with a Focus on the Post-Covid 19 Situation and Considerations for an Appropriate Regulatory Framework

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INTRODUCTION

The Covid-19 pandemic resulted in a significant drop in sales for many companies. However, running costs often continued. A wave of bankruptcies would have been the logical consequence but did not occur in Germany. The reasons for this are obvious: The state was quick to support the economy with massive aid. It has done this until (as things stand at present) the summer of 2022 with bridging aid of various types and forms. Large companies have been given easier access to credit and loans. Smaller companies have received emergency aid in the form of direct, non-repayable payments up to a certain limit. In addition, the German state intervened in the market in a variety of other ways. For example, short-time work was made possible in various waves in a simple manner and also for previously excluded sectors (e.g., service providers in the area of temporary employment AÜG). The legislature also adopted an exemption for companies not to have to file for insolvency in certain cases, despite the fact that insolvency was ripe. In this way, the state used a series of economic policy instruments, the enactment of which it is entitled to per se and de lege lata, and the effect of which arises from a state-designed economic order.

The rapid recovery after the end of the Covid 19 pandemic also failed to materialize in spring 2022, as new concerns were already clouding the global economy in parallel with the decline in severe Covid 19 cases: the Ukraine war, broken supply chains, China's isolation including its adherence to the zero Covid strategy, and inflation worries. As a result, the importance of risk-averse behavior in everyday economic life is increasing sharply and, consequently, so is the overall caution and distrust of counterparties. Credit reports, credit agencies providing them and the methods of "decision intelligence"[1] are much in demand and at the same time the lack of any regulation in this area seems at least out of time, if not dangerous. The market leader Creditreform alone conducts two million annual credit analyses[2] and it seems that these take place in a legal vacuum, although the consequences are felt daily by virtually every company operating in Germany: Banks refuse to apply for state subsidies for their customers from a Creditreform score of worse than "300", suppliers no longer supply materials on account from "300", clients no longer place orders from "400". Those who have fallen to "500" can actually close down. Is this right, suitable, necessary and appropriate? What would a possibly necessary control have to look like? How should the assessment be justified? To what extent does the company concerned have veto rights? Or should it be left to Creditreform and the credit reporting oligopoly to decide who must leave the economy and who may stay - in other words, should credit agencies be allowed to pursue concrete economic policy? The following text tries to put light onto the subject matter in necessary detail and depth and seeks some initial solutions or at least a foundation for further (political) discussion to and on these questions.

BACKGROUND TO THE BUSINESS INFORMATION INDUSTRY IN GERMANY

Any granting of credit requires sound knowledge of the borrower's creditworthiness. This also applies when it comes to applying for loan based subsidies, i.e. funding needed by companies that either want to grow (growth financing), or need to restructure (i.e. have problems but do not yet constitute a "company in difficulty" according to the EU definition of Article 2 Number 18 of Regulation (EU) Number 651/2014 (General Block Exemption Regulation AGVO)[3]). Whereas in long-standing business relationships, there is usually extensive data and experience regarding a borrower (But here, too, there are now many standard processes that provide for regular queries of credit reports and delete exist-

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[1] Decision Intelligence is a technical science that complements Data Science with theories from the social sciences, decision theory, and economics.

[2] According to Creditreform's own data, retrieved 6/16/22 from https://www.creditreform.de/darmstadt/loesungen/bonitaet-risikobewertung.

[3] See also KfW fact sheet on "Enterprises in Difficulty," accessed 6/16/22 at https://www.kfw.de/PDF/Download-Center/Förderprogramme-(Domestic Funding)/PDF-Documents/6000004661_M_Unternehmen_in_Schwierigkeiten.pdf.

ing lines in the event of changes - some credit agencies do not even make a new query necessary, but notify any changes to all those who had already obtained information about the company concerned). If a customer is not known, reliable information is usually needed to form a picture before a credit decision is made, whether, for example, for delivery on account, another credit transaction, or in some cases before an order is placed by a company in the field of temporary employment (AÜG), because of possible liability for social security contributions and contributions to the employers' liability insurance association. Such information, on which credit decisions can be based, is provided by credit agencies.

A credit agency is a company operating on a private-sector basis that provides business-related data on companies and private individuals to their business partners. The relevant information is systematically collected and evaluated from various sources: in addition to generally accessible public registers, directories and publications, surveys, databases, in-house analyses or reports from cooperation partners are also used.

There are several major credit reporting agencies in Germany. Here is a brief overview of the most important providers.

SCHUFA HOLDING AG[4]

Schufa, headquartered in Wiesbaden, Germany, is the authoritative credit agency when it comes to information on private individuals. It has a database of almost half a billion individual items of information on more than 66 million natural persons in Germany. Since 2006, Schufa has also been offering information relevant to creditworthiness in the commercial sector. The focus here is on companies entered in the commercial register, freelancers, the self-employed and small businesses. Schufa cooperates with Bürgel Wirtschaftsinformationen in this business area.

FEDERATION OF ASSOCIATIONS CREDITREFORM E.V.[5]

Unlike Schufa, Creditreform, which is headquartered in Neuss, focuses on business information. It is the undisputed market leader in this field with a market share of over 70%[6] . The credit agency's company database is said to contain more than fifteen million balance sheets of three million companies operating in Germany. In addition, there are around 130 million payment documents and 42 million payment experiences[7] . Creditreform provides similar information on private individuals as Schufa, but the database is smaller. Creditreform has a local presence throughout Germany and Europe with its own member companies. Virtually every major city has its own Creditreform subsidiary.

CRIF GMBH, FORMERLY BÜRGEL WIRTSCHAFTSINFORMATIONEN[8]

Munich-based CRIF also focuses on company-related business and creditworthiness information. The data pool contains four million company data from Germany and 30 million international company information. In addition, business information on private individuals is also provided.

BISNODE AB / DUN & BRADSTREET GERMANY GMBH[9]

Bisnode, headquartered in Sweden, is an international provider of digital business information. In Germany, it has taken over the business of Hoppenstedt, a credit agency that has long been active in the market, and operates under the D&B brand with headquarters in Darmstadt. The Hoppenstedt company database, which still exists, includes around 300,000 companies in German-speaking countries. It primarily offers contact information on contacts at the top management levels. In addition, business data and creditworthiness information is also provided.

THE TYPICAL COMMERCIAL REPORT AT A GLANCE

Even if the company information differs in detail, the structure and content are very similar. They essentially include:

1. Contact details (company, address, communication options, website)
2. the legal form (entry in the Commercial Register, date of incorporation, acting and liable persons)
3. the purpose of the company (description of activities, industry)
4. Branches and operating facilities
5. Investments and real estate holdings
6. Bank details
7. economically relevant key figures (e.g. sales, results, number of employees, structural data from the balance sheet analysis, etc.)
8. Information on the financial situation and creditworthiness (existing negative features, payment history and business conduct, credit rating).

In the case of private individuals, the information is primarily focused on possible negative features, payment history and details of current payment obligations. A summary assessment of creditworthiness (via scoring procedures) is also determined.

Background to the Creditreform Solvency Index

Credit rating with mathematical-statistical methods

The assessment of creditworthiness plays a central role in lending decisions. Credit agencies therefore offer their cus-

[4] English home page retrieved 06/16/22, https://www.schufa.de/schufa-en/.
[5] English home page retrieved 06/16/22, https://www.creditreform.com/en/.
[6] According to Creditreform's own data, retrieved 6/16/22 from https://www.creditreform.de/darmstadt/loesungen/bonitaet-risikobewertung.
[7] op. cit.
[8] English home page retrieved 06/16/22, https://crif.de/en/.
[9] English home page retrieved 06/16/22, https://www.dnb.com/en-gb/contact/.

tomers a summary assessment of creditworthiness, which is derived from various company data using mathematical-statistical methods. The aim here is to present a statement on creditworthiness and credit default risks that is as selective and reliable as possible.

CREDITREFORM SOLVENCY INDEX, THE MOST WIDESPREAD BUSINESS B2B CREDITWORTHINESS INDEX

For this purpose, Creditreform was the first credit agency to introduce the so-called Creditreform Solvency Index (*Bonitätsindex*) as their creditworthiness index for company reports back in 1984, which condenses the available information relevant to creditworthiness accordingly. Since then, it has been and continues to be developed further. In the meantime, the other major credit agencies also offer similar creditworthiness indices. The objective is the same, the differences lie mainly in the scaling, the scientific methodology and the way the information is processed. The index systems are constantly being developed and adapted.

According to Creditreform[10] , the Creditreform Solvency Index (*Bonitätsindex*) is the central component of the Creditreform credit report and other information formats for assessing corporate creditworthiness.

The index can assume values between "100" and "500" or "600". "100" stands for the best credit rating (excellent creditworthiness), "600" for the worst. It corresponds to suspension of payments or insolvency. At "500", there is already a massive delay in payment. Default probabilities are assigned to the determined creditworthiness values. In the best credit rating class, for example, with index values between "100" and "155", this risk is 0.13 percent. By comparison, the risk for values between "376" and "499" is 15.29 percent, i.e. more than one hundred times as high.

Among other things, these characteristics are used to determine the Creditreform Solvency Index (*Bonitätsindex*)[11] :

- Credit Opinion
- Payment method
- Year-end data
- Industry risk
- Corporate Development
- Sales
- Legal form
- Company age
- Regional risk
- Order situation
- Capital
- Management experience
- Number of employees
- Ratio sales / employees
- Capital / sales ratio

All features relevant to creditworthiness are evaluated individually as part of a qualitative and quantitative analysis and condensed into an overall score, the Creditreform Creditworthiness Index. The importance of the individual features for the creditworthiness rating varies. They are therefore weighted according to their relevance.

The Creditreform Solvency Index (*Bonitätsindex*) can (and is) used by lenders as a criterion for lending decisions. This is particularly true if no other comprehensive credit history is available. The results from the index can also be transferred to the banks' internal rating procedures. For the Creditreform Solvency Index (*Bonitätsindex*), for example, there is a corresponding reconciliation scheme. The creditworthiness index has another important function. It can be used as a basis for setting terms and conditions. From the lender's point of view, the default risk is a cost factor. The higher the risk and the lower the security of the loan, the less favorable the terms must be. This also applies to most loan-based subsidies. The house bank almost always plays a decisive role in the application process; it must assess the financing project and evaluate the creditworthiness. The credit rating of the house bank is therefore decisive for the granting of subsidies - and more importantly, if the house bank's credit rating is not sufficient, even though the relevant KfW program would still allow it, for example, it will refuse to cross-sign the subsidy application. This means that the entrepreneur no longer has the opportunity to apply for the subsidies. Creditworthiness is also important in terms of subsidy conditions. A number of programs provide for a graduation of conditions depending on creditworthiness. The house bank must make a corresponding classification before application.

As an interim conclusion, it should be noted that Creditreform is of central importance on the German market for credit agencies, and that the *Bonitätsindex* is Creditreform's main assessment tool with regard to corporate creditworthiness.

Like all credit bureaus, Creditreform does not disclose the exact composition of the weighting of the Solvency Index and the exact parameters, as well as thresholds or upgrading and downgrading criteria, and refers to a decision of the Federal Court of Justice[12] , according to which the so-called score formula, i.e. the abstract method of score calculation, does not have to be disclosed.

It is questionable whether this secrecy is unobjectionable in the case of business information on companies, because a right to information on the types of data used to calculate the probability values could give the assessed company the opportunity to correct incorrect data or to refute the probability value calculated for it. Individual calculation bases could make it possible for affected companies to understand which characteristics have been included in the concrete calculation result and to be able to explain circumstances that deviate

[10] Retrieved 6/16/22, https://www.creditreform-produktmatrix.de/datasheet/WIRTSCHAFTSINFORMATIONEN/Kundenueberwachung/Flyer_Bonitaetsindex_C2012_NEU.pdf.

[11] op. cit.

[12] BGH judgment of January 28, 2014, VI ZR 156/13, MMR 2014, 489.

from the statistical viewpoint to the bodies that decide - for example - on the granting of a loan. It is precisely the latter that would, in case of doubt, enable affected companies to (continue to) participate in the market in the first place, be it when applying for a loan, requesting subsidies, purchasing materials or winning orders.

PROBLEMATIC EXAMPLES FROM PRACTICE

While in the credit agencies' own presentation, as shown above, the determination of the score by the presumably used mathematical-statistical methods is propagated as an objective calculation process, and thus it should be ensured that the same data lead to the same score results, the actual reality appears quite different:

In a remarkable, clearly formulated decision, the Frankfurt Higher Regional Court (OLG)[13] summarizes the criticism of credit agencies, in this case in an appeal of a case heard by the Darmstadt Regional Court in the first instance, as follows: "The extremely negative assessment of the plaintiff's creditworthiness submitted by the defendant is without any factual basis. The defendant's entire approach in issuing its various assessments is characterized by an irresponsible superficiality that seriously violates the plaintiff's absolute right not to suffer any unlawful interference with its established and practiced business operations. The regional court still correctly recognizes this starting point in § 823 paragraph 1 BGB, but wrongly denies its factual, unlawful and culpable violation. "

In the further course of the reasons for the judgment, which will be discussed in more detail (below), the 24th Civil Senate describes what it means by "without any factual basis", namely that absolute arbitrariness prevailed in the assignment of school grades. Civil Senate describes what it means by the assessment "without any factual basis", namely that absolute arbitrariness prevailed in the allocation of the school grades, which in turn represent the risk basis; changes to the risk class could be made without any reason whatsoever and even the additional qualitative assessments "The default risk is classified as high" and "Collateral recommended" provided to inquirers alongside the creditworthiness index were purely fantasy products of the credit agency.

In another recent case, a medium-sized company with annual sales of around 3.5 million euros and around 30 employees had not yet been able to prepare its 2019 financial statements, as this company had been particularly affected by the impact of the Covid-19 pandemic. The information provided by Creditreform was mediocre, citing, among other things, the lack of economic indicators. Before the end of the year-end closing work, the company received several collection reminders from the collection department of the locally responsible Creditreform. As it turned out, the collection cases were all based on pandemic-related issues or on issues that could only be processed with delays due to the pandemic. In two cases, the company settled the reminders in full, including all the demanded reminder and collection fees (which often cannot be claimed in court in Germany). In one case, the company refused to pay first, as there were doubts about the amount of the claim and the correctness of the underlying receivables, and in the last case, the managing director of the contractual partner of the company concerned and the latter were still in negotiations when Creditreform already started the collection process, apparently in a case where the contractual partner had used factoring of the claim, i.e. the sale of receivables to Creditreform, via its factoring subsidiary. In the last two cases, too, all claims raised were paid in full, including unquestioned default damages, and this at the level of the still acute Covid-19 pandemic. As a result of the collection cases, the Creditreform Solvency Index (*Bonitätsindex*) of the company concerned had changed to "500" - and the individual cases in question were not taken into account in any way. More seriously, the 2019 annual financial statements were subsequently submitted to Creditreform, and these represented the best year in the history of the company concerned, showing an extraordinarily solid profit, and all other key figures, including those for equity, free funds and accounts payable outstanding, were objectively assessed as "good" to "very good" in every respect. This submission did not change anything at all in this case, and it is questionable which factual connection may be present in which mathematical-statistical procedure, or whether the assessment of the Frankfurt Higher Regional Court, as stated, is also equally applicable here. In the present case, in any case, the "500" Solvency Index (*Bonitätsindex*) already led to far-reaching consequences, including the failure to deliver materials, the threat of termination of a loan that had been serviced continuously and without complaint, the failure to apply for KfW funding and the exclusion from the direct pool of service providers at a leading large group that is a key customer of the company concerned.

THE JUDGMENT OF THE FEDERAL COURT OF JUSTICE (BGH) OF FEBRUARY 22, 2011 - VI ZR 120/10 - IN THE CREDITREFORM CASE

In the case before the Frankfurt Higher Regional Court just outlined, the Creditreform in dispute[14] also referred to a ruling of the Federal Court of Justice from 2011[15] , and a free pass interpreted therein for any statement in its credit reports on the basis of the constitutional protection of the expression of opinion. In fact, the VI Senate of the Federal Court of Justice ruled that credit ratings, insofar as they are expressions of opinion, do not generally give rise to claims under Section 824 of the German Civil Code. It also ruled that claims under Section 823 (I) of the German Civil Code (Bürgerliches Gesetzbuch - BGB) based on interference with established and practiced business operations are generally excluded if the credit rating, which qualifies as an expression of opinion, is based on an accurate factual basis.

Pursuant to Section 824 (I) of the German Civil Code (BGB), a person who, contrary to the truth, asserts or disseminates a fact that is likely to jeopardize the credit of an-

[13] OLG Frankfurt am Main, judgment of 07.04.2015 - 24 U 82/14, paragraph 21; BeckRS 2015, 6846; NJOZ 2015, 1913.

[14] OLG Frankfurt am Main, judgment of 07.04.2015 - 24 U 82/14, paragraph 30

[15] BGH, judgment of 22.02.11 - VI ZR 120/10 (preceded by: OLG Jena judgment of 31.03.10 - 7 U 812/09, BeckRS 2011, 15251), NJW 2011, 2204.

other person or cause other disadvantages to that person's acquisition or advancement must compensate the other person for the resulting damage even if he does not know the untruth but must know it[16] . § Section 824 (II) of the German Civil Code stipulates that a communication the untruthfulness of which is unknown to the communicating party does not oblige the latter to pay damages if he or the recipient of the communication has a legitimate interest in it. Accordingly, the provision requires that untrue facts are communicated, not merely value judgments. On the other hand, Section 824 (I) of the German Civil Code does not provide any protection against derogatory statements of opinion and value judgments[17] . The distinction between facts and value judgments must be made when applying Section 824 of the German Civil Code in the same way as in other contexts[18] .

It is essential for the classification as a statement of fact whether the statement can be verified for its correctness by means of evidence[19] .

The credit rating of a company represented by a number generally represents an assessment based on facts. These are weighted according to predefined evaluation criteria and thus flow into the value judgment ultimately issued, which, however, does not thereby itself become a statement of fact. This is only the case if, from the perspective of the recipient, the elements of opinion, opinion or opinion take a back seat to the underlying facts in the statement[20] .

This corresponds to the case law of the discerning senate, according to which in collisions between the right of freedom of expression and the general right of personality, where factual assertions and evaluations interact, the text in its entirety is in principle covered by the protective effect of Article 5 (I) German Basic Law (*Grundgesetz*, GG, the German Constitution including the fundamental rights), because in the case of a close link between the communication of facts and their evaluation, the fundamental rights protection of the freedom of expression may not be shortened by taking a factual element out of context and considering it in isolation[21] . The restriction of legal protection against untrue statements of fact imposed by the wording of Section 824 of the German Civil Code does not exclude other bases for claims[22] .

If the credit rating as an expression of opinion is based on incorrect initial facts, the person concerned may have a claim under Section 823 (I) of the German Civil Code (BGB)[23] , from the point of view of interference with the established and practiced business. The right to conduct a trade or business is an open fact, the content and limits of which can only be determined by weighing up the interests and interests of the parties involved, which must above all take into account the positions protected by fundamental rights, with the sphere of interests of others that specifically collide in the individual case[24] . In this respect, it must be borne in mind for the area of business information that the right of the party making such assessments to freedom of expression from Article 5 (I) GG[25] can come into conflict with the right of the assessed company from Article 12 (I) of the German Basic Law[26] . However, this fundamental right does not protect against the dissemination of accurate and factual information on the market, which may be of significance for the competitive behavior of market participants, even if the content has a detrimental effect on individual competitive positions; the basis for the functioning of competition is the highest possible level of information of market participants on factors relevant to the market[27] . In particular, the fundamental right does not guarantee any claim to success in competition or to securing future earning opportunities[28] .

The provision of accurate creditworthiness information is of considerable importance for the functioning of the economy. The German Supreme Court has already ruled that information provided by a credit agency that is suitable for prompting possible lenders to carry out a careful creditworthiness check is necessary for the credit industry and must generally be accepted by the person concerned[29] . Nothing else applies if such information is provided to other (potential) business partners on request. In such cases, the conflicting fundamental rights will usually be weighed in favor of the permissibility of the credit check.

Due to the individual situation in the case, this was the case in the legal dispute in question: The plaintiff at that time had to accept the information provided by the defendant Creditreform Solvency Index (*Bonitätsindex*) “500". Because this was based on a correct factual basis. It had been established without procedural error that the facts on which the Creditreform Solvency Index (*Bonitätsindex*) of "500" was based corresponded to the truth. The appeal argued unsuccessfully that the Court of Appeal had proceeded on the basis of an incorrect assessment principle because the four receivables not initially settled (in the collection process) were relatively small amounts; the reference to "massive payment delays" and the description of the payment method as "slow and sluggish" gave the impression that the company was only

[16] BGH, judgment of 22.02.11 - VI ZR 120/10, paragraph 9.
[17] Compare BGHZ 166, 84 = NJW 2006, 830 = VersR 2006, 1219 margin no. 62 - Kirch.
[18] Wagner, in: MünchKomm-BGB, 5th edition, § 824 marginal no. 14.
[19] Compare BGHZ 132, page 13 [volume 21] = NJW 1996, 1131 = VersR 1996, page 597; BGH, NJW 2008, 2110 = VersR 2008, 793 paragraphs 14, 24; NJW 2010, 760 = VersR 2010, 220 paragraph 15.
[20] BGH, judgment of 22.02.11 - VI ZR 120/10, paragraph 11.
[21] Compare BGHZ 132, 13 [vol. 21] = NJW 1996, 1131 = VersR 1996, 597; BGH, NJW 2005, 279 = VersR 2005, 277; NJW 2009, 1872 = VersR 2009, 555 margin no. 11; NJW 2010, 760.
[22] Compare BGH, NJW 2006, 830 = NZG 2006, 227.
[23] BGH, judgment of 22.02.11 - VI ZR 120/10, paragraph 13.
[24] BGH, BGHZ 138, 311 = NJW 1998, NJW Year 1998 page 2141; GHZ 45, 296 = NJW 1966, 1617 = LM Article 5 GrundG No. 24; BGHZ 59, 30 = NJW 1972, 1366 = LM § 823 [Ai] BGB No. 42; BGHZ 65, 325 = NJW 1976, 620 = LM § 824 BGB [L] No. 20; BGHZ 74, 9 = NJW 1979, 1351 = LM § 823 [Ai] BGB No. 54.
[25] "Everyone shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by radio and film are guaranteed. There shall be no censorship. "
[26] "All Germans have the right to freely choose their occupation, place of work and place of training. The exercise of the profession may be regulated by law or on the basis of a law. "
[27] BVerfGE 105, 252, 265 f. = NJW 2002, 2621 - Glykol; BVerfG, NJW-RR 2004, 1710, 1711 - gerlach-report.
[28] BVerfGE 106, 275, 298 f. = NJW 2003, 1232 - Arzneimittelfestbeträge; BVerfG, NJW-RR 2004, 1710, 1711 - gerlach-report.
[29] BGH, NJW 2003, 2904.

fulfilling its payment obligations slowly and sluggishly to a considerable extent. However, the Court of Appeal had found that it was precisely the delays in payment of relatively small amounts that had created the impression in business dealings that the company was not even in a position to settle smaller receivables. At any rate, this did not meet with any far-reaching reservations against the background of the factual submissions on the other data negative for the assessment of the plaintiff's liquidity, which the plaintiff did not specifically counter. For it had to be taken into account that the result of the analysis of the balance sheets submitted by the plaintiff for two financial years had been alarming. Significant natural and legal persons who could have been expected to support the company in a crisis had themselves been insolvent in some cases, which was particularly significant in the case of a limited liability company. Under these circumstances, it was justified to describe the current creditworthiness situation of the plaintiff as deficient and to rate it with the index number "500". This is because the creditworthiness index includes an assessment of the current situation of the company and a forecast with regard to its future solvency; in this respect, the previous payment behavior is merely an indication[30] .

CRITICAL EXAMINATION OF THE BOUNDARY RELATIONSHIP OF AFFECTED FUNDAMENTAL RIGHTS CREATED BY THE BGH

It is questionable whether, in the decision just discussed, the 6th Senate of the Federal Court of Justice, in weighing up the fundamental rights of freedom of expression and the right to conduct a business, has made a fundamental decision that will in future cover arbitrary credit reports (even better) or, in its decision and on the basis of the particularities of the individual case, has made a judgment that is faithful to the previous line. According to the available information, it seems comprehensible that the company in dispute had indeed "earned" a credit rating index "500", if only to provide adequate warning to other companies and possible contractual partners of the company, because the credit reporting agency must also take into account for each credit report that it can be successfully taken into recourse by the company obtaining the information for lack of warnings about obvious credit dangers and risk factors when providing information about a specific company[31] . According to this, a credit agency violates its contractual obligations if it does not use information apparent from publicly accessible registers to assess the probability of insolvency and cannot exclude the resulting liability for this by means of general terms and conditions. In the proceedings before the Federal Court of Justice, however, the Court of Appeal also found, in addition to what had already been stated, that in the relevant period the managing director and managing partner of a parallel company had been entered in the debtors' register due to two arrest orders for the submission of an affidavit in lieu of an oath and that the company's authorized signatory had submitted the affidavit in lieu of an oath. The financial situation of the natural persons behind a limited liability company is without question of considerable importance for assessing the creditworthiness of a company.

Having said this, it is worthwhile to take a look at the definition of the protected good "established business enterprise". Article 12 (I) 1 GG protects the right to freely choose and freely exercise one's profession. "Profession" is any activity that is calculated to be permanent and serves to create and maintain livelihood[32] . According to Article 19 (III) of the Basic Law[33] , the fundamental right is also applicable to legal persons under private law insofar as they engage in an activity for gain which, by its nature and type, is open in the same way to a legal person as to a natural person[34] . In the existing economic order, the right to freedom under Article 12 (I) of the Basic Law includes the professional conduct of companies on the market in accordance with the principles of competition. In this respect, Article 12 (I) GG secures the participation in competition for profit. Competitors, however, have no fundamental right to demand that the conditions of competition remain the same for them. In particular, the fundamental right does not guarantee a claim to successful market participation or to securing future earning opportunities. Rather, the competitive position and thus also the achievable earnings are subject to the risk of ongoing change depending on the conditions on the market and thus on its operating conditions[35] . The scope of protection of Article 12 (I) GG can be affected not only if a professional activity is prevented, but also if market success is impeded. Although incorrect or unobjective information does not fundamentally prevent the competitor from practicing his profession, it can influence the success of the professional practice. However, to the extent that the information available on the market is accurate in terms of content and factual, the fundamental right of freedom of occupation does not grant protection against it even if the competitive position of a company is adversely affected by it. A market economy presupposes that market participants have the highest possible degree of information about market-relevant factors. Information that improves market transparency and enables market participants to make decisions about the conditions of market participation based on their own interests does not affect the scope of protection of the freedom to choose an occupation even if it has a detrimental effect on the competitive position of an individual company[36] . In contrast, Article 12 (I) of the German Basic Law protects companies in their professional activities from information that is inaccurate in terms of content or from evaluations that are based on irrelevant considerations or are formulated in a disparaging manner[37] , if the functioning of competition is disturbed by them and they

[30] BGH, judgment of 22.02.11 - VI ZR 120/10, paragraph 16 et seq.

[31] OLG Frankfurt am Main, Judgment of 26.06.08 - 22 U 104/06, NJW-RR 2009, 166

[32] Compare BVerfGE 7, 377 = NJW 1958, 1035; BVerfGE 54, 301 = NJW 1981, 33; BVerfGE 68, 272 = NJW 1985, 964; BVerfGE 97, 228 = NJW 1998, 1627.

[33] "Fundamental rights shall also apply to domestic legal persons to the extent that they are applicable to them by their nature. "

[34] BVerfGE 106, 275 = NJW 2003, 1232 = constant case law of the Federal Constitutional Court (BVerfG).

[35] Compare BVerfGE 105, 252 = NJW 2002, 2621; BVerfGE 106, 275 = NJW 2003, 1232; BVerfG, NVwZ 2004, 846.

[36] Compare BVerfGE 105, 252 = NJW 2002, 2621.

[37] Compare BVerfGE 105, 252 = NJW 2002, 2621.

subsequently impair the affected competitor in the freedom of his professional activity.

In contrast, any natural person can invoke Article 5 (I) of the German Basic Law, as can any legal entity under private law[38] . The statements in the form of the creditworthiness index, which are worthy of attack due to their content, together with additional allegations, could fall within the scope of protection of freedom of opinion under Article 5 (I) 1 of the German Basic Law. According to the BGH ruling discussed, they are not factual assertions, but are to be classified as value judgments, since they are characterized by the element of evaluative statements[39] . The demarcation between value judgments and factual assertions can be difficult in individual cases, especially because the two forms of expression are not infrequently combined with each other and only together make up the meaning of an expression. In such cases, the concept of opinion must be understood broadly in the interest of effective protection of fundamental rights: Insofar as an utterance in which facts and opinions are combined is characterized by the elements of opinion, opinion or opinion, it is protected as an opinion by the fundamental right. This applies in particular if a separation of the evaluative and the factual content would nullify or distort the meaning of the statement. If the factual element were to be regarded as decisive in such a case, the fundamental right protection of freedom of opinion could be substantially reduced[40] .

However, the fundamental right of freedom of opinion is not guaranteed without limitation. According to Article 5 (II) of the Basic Law, it is limited by the provisions of general law, the statutory provisions for the protection of minors and the right to personal honor. However, provisions of ordinary law that restrict fundamental rights must in turn be interpreted in the light of the restricted fundamental right, so that its value-setting significance for ordinary law also comes into play at the level of application of the law[41] . Within the framework of the interpretable elements of the provisions of ordinary law, this regularly leads to a case-specific weighing of the significance of freedom of expression and the status of the legal interest affected by the expression of opinion, which ordinary law seeks to protect.

The result of this consideration cannot be anticipated in general and abstract terms because of its relevance to the case. However, the BVerfG assumes that sharp and exaggerated formulations do not in themselves render a damaging statement inadmissible. Rather, it is precisely when contributions to the intellectual battle of opinions on an issue that substantially affects the public are involved that the presumption in favor of the admissibility of free speech speaks for itself[42] . This is a consequence of the fundamental importance that freedom of expression has for the human person and the democratic order[43] . Only when a statement no longer focuses on the dispute in the matter, but on the disparagement of the person, does such a statement as vituperation regularly have to take a back seat to the personal rights of the person concerned[44] .

For factual assertions, on the other hand, the proposition that the presumption is in favor of free speech applies only to a limited extent. Insofar as factual assertions do not remain outside the protection of Article 5 (I) 1 GG from the outset, they are more easily amenable to restrictions in the interest of other legal interests than expressions of opinion[45] . This also applies if evaluative and factual elements in a statement are mixed in such a way that they are to be regarded as a value judgment as a whole. The correctness of the factual elements can then play a role in the context of the weighing. If the statement of opinion contains demonstrably false or deliberately untrue factual assertions, the fundamental right of freedom of opinion will regularly take a back seat to the legal interest protected by the law restricting the fundamental right. In this case, too, it must of course be noted that, in the interest of freedom of expression, no requirements may be placed on the duty of truthfulness that could reduce the willingness to use the fundamental right and thus have a restrictive effect on freedom of expression as a whole[46] .

In the case of a credit report and a creditworthiness index expressed therein, the standards for weighing must be adapted to the significance of credit reports for the factual decisions of third parties based on them on the one hand, and to the factual accuracy and completeness of the underlying factual information on the other. The Federal Court of Justice consequently takes this up in its previously introduced ruling on credit reports by stating that claims under Section 823 (I) of the German Civil Code (BGB) can be considered for those affected if the credit rating is based on incorrect initial facts. There must be a factual core, which the credit agency can prove, which forms the basis for the respective expression of opinion. However, this means that the factual core must also be comprehensible and comparable for the respective school grades (1 - 6) of the credit agencies as the basis for the creditworthiness index, which is then developed even further, i.e. one and the same set of facts must lead to the same result for two rated companies.

THE JUDGMENT OF THE HIGHER REGIONAL COURT (OLG) FRANKFURT OF 07.04.2015 - 24 U 82/14

The above-mentioned ruling of the Frankfurt Higher Regional Court also sums up this conclusion, which is based on a correct weighing of fundamental rights interests and follows the ruling of the Federal Court of Justice: A credit agency must provide a statement of opinion based on an accurate factual basis if it wishes to make use of its freedom of expression[47] . The correct factual basis is of course subject to full judicial review.

[38] Compare BVerfGE 21, 271 = NJW 1967, 976; BVerfGE 80, 124 = NJW 1989, 297: on the protection of legal persons by Article 5 (I) GG.
[39] Compare BVerfGE 90, page 241 = NJW 1994, 1779; BVerfGE 93, 266 = NJW 1995, 3303.
[40] Compare BVerfGE 61, 1 = NJW 1983, 1415 - NPD of Europe.
[41] Compare BVerfGE7, 198 = NJW 1958, 257 - Lüth; constant case law of the BVerfG.
[42] Compare BVerfGE 7, 198 = NJW 1958, 257 - Lüth.
[43] op. cit.
[44] Compare BVerfGE 82, 272 = NJW 1991, 95 - Zwangsdemokrat Strauß.
[45] Compare BVerfGE 61, 1 = NJW 1983, 1415 - NPD of Europe.
[46] Compare BVerfGE 54, 208 = NJW 1980, 2072 - Böll/Walden; BVerfGE 61, 1 = NJW 1983, 1415 - NPD of Europe.
[47] OLG Frankfurt am Main, judgment of 07.04.2015 - 24 U 82/14, paragraph 30; BeckRS 2015, 6846; NJOZ 2015, 1913.

The benchmark for the conduct permitted to credit agencies is Section 31 of the German Federal Data Protection Act (BDSG) ("Scoring")[48] . According to this, a "probability value for a certain future behavior may be collected or used if the data used to calculate the probability value is demonstrably significant for calculating the probability of the certain behavior on the basis of a scientifically recognized mathematical-statistical method. There are different views on how detailed the scoring company has to provide with regard to the criterion "demonstrably significant": According to the scoring ruling of the Federal Court of Justice[49] , the "score formula" itself and the basic data (i.e., the empirical probabilities for the risk factors) are protected trade secrets. On the other hand, in comparable proceedings, defendant scoring agencies (in the cited case of the Federal Court of Justice: "Schufa") do indeed talk about details of the calculation[50] .

In the case heard by the Frankfurt Higher Regional Court, despite the difficulty that the defendant could not be forced to disclose its calculation formulas and show which values were incorporated and how, the factual basis for the "scoring" could be refuted by the defendant in several key respects. In view of the refusal of the b-to-b market leader Creditreform to disclose the scoring formula, such a procedure seems to be the only possible way at least until the legislator either makes regulatory changes or is forced to do so by Brussels.

CURRENT REGULATORY DEVELOPMENTS AFFECTING SCORING

This could soon be the case, as under reference C-634/21: Reference for a preliminary ruling from the Verwaltungsgericht Wiesbaden (Germany), lodged on 15 October 2021 - OQ v Land Hessen, with Schufa Holding AG (SCHUFA) as an intervening party, the European Court of Justice is hearing two questions:

1. Is Art. 22 para. 1 of Regulation (EU) 2016/679 (1) to be interpreted as meaning that the automated generation of a probability value about a data subject's ability to service a loan in the future already constitutes a decision based solely on automated processing - including profiling - which produces legal effects vis-à-vis the data subject or similarly significantly affects him, if that value, determined by means of personal data of the data subject, is communicated by the controller to a third party controller and that third party relies on that value as the decisive basis for its decision on the establishment, performance or termination of a contractual relationship with the data subject?
2. If the answer to the first question referred is in the negative, are Articles 6(1) and 22 of Regulation No 2016/679 to be interpreted as precluding national legislation under which the use of a probability value - in this case relating to the solvency and willingness to pay of a natural person where information on claims is included - concerning certain future conduct of a natural person is permitted for the purpose of deciding on the establishment, performance or termination of a contractual relationship with that person (scoring) only if certain further conditions, which are set out in more detail in the grounds for reference, are satisfied?

In the underlying legal dispute[51] , the plaintiff and data subject requested information and deletion of her data processed by SCHUFA, which she believed to be incorrect. SCHUFA complied with the request for information. It also provided a rough explanation of how scoring works. However, it remained silent about the individual pieces of information processed and their weightings, referring to its company and business secrecy. In addition, she pointed out that it was ultimately up to the contracting party to decide whether or not to conclude a contract. After the plaintiff unsuccessfully approached the competent supervisory authority with the request that SCHUFA delete the inaccurate data concerning her and provide information about the logic involved, scope and effects of the processing, she brought an action against the supervisory authority. The Hessian Commissioner for Data Protection and Freedom of Information pointed out that SCHUFA had to comply with the requirements of Section 31 BDSG. This was the case. Beyond that, however, it was not obliged to disclose how the score worked.

The creation of score values falls under profiling (Recital 71 page 1, page 2 DS-GVO). The concept of profiling is legally defined in Article 4(4) of the GDPR[52] . It must be an automated form of processing which concerns personal data and the aim of which is the evaluation of personal aspects, such as the economic situation, reliability or behavior of a natural person[53]. The notion of evaluation is central to this. The evaluation is carried out in order to make predictions or draw conclusions. Through the use of statistical methods, predictions are made about people by using data from various sources and drawing conclusions about a person based on characteristics of other statistically similar people.

The ECJ must now clarify whether the creation of the score value is already an automated decision in an individual case that is subject to Article 22 of the GDPR. This would be the case if the algorithm decides whether to grant the credit and the decision is automatically communicated to the person concerned without any meaningful assessment by a person having taken place beforehand[54] .

The VG Wiesbaden is of the opinion that the activities of credit agencies, such as SCHUFA, which create score values,

[48] Or § 28 b BDSG old version

[49] BGH ruling dated January 14, 14 - VI ZR 156/13, MMR 2014, 489

[50] See also paragraphs 63 - 71 of the judgment of the Munich Higher Regional Court in Case No. 15 U 2395/13 of March 12, 2014 (juris).

[51] VG Wiesbaden, decision of 1.10.2021 - 6 K 788/20, ZD 2022, 121.

[52] "'profiling' means any automated processing of personal data which consists in using such personal data to evaluate certain personal aspects relating to a natural person, in particular to analyze or predict aspects relating to that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or change of location".

[53] Art. 29-Data Protection Group, WP 251, rev.01_en, page 7, accessed 6/18/22 at https://datenschutz.hessen.de/sites/datenschutz.hessen.de/files/wp251rev01_de.pdf.

[54] WP 251, rev.01_en, page 9

fall within the scope of Article 22(1) of the GDPR. Third parties decide whether to enter into a contract with the data subject or not, taking this score into account[55] . The VG classifies the creation of the score values as a case of profiling pursuant to Article 4(4) of the GDPR[56] . It further states that Article 22 GDPR is not a right of the data subject, but a prohibition in principle, which does not have to be invoked individually by each data subject[57] . It follows from the fundamental prohibition under Article 22(1) of the GDPR that automated decision-making is only permissible if there is an exception under Article 22(2) of the GDPR, whereby in the present case only Article 22(2)(b) of the GDPR in conjunction with Section 31 of the German Federal Data Protection Act (BDSG) comes into question. According to the clear wording of Article 22 of the GDPR, it is sufficient that the decision is supported by the automated processing[58] .

The linchpin of the ECJ referral is whether the constituent element of a decision based exclusively on automated processing, as required by Article 22(1) of the GDPR, is fulfilled in the case of credit agencies. The court considers the creation of a score value not merely as a profiling action that ultimately prepares the decision of the third party controller, but precisely as an independent "decision" within the meaning of Article 22(1) of the GDPR[59] . It justifies this by stating that Article 22 of the GDPR must be interpreted broadly for three reasons: Firstly, third party controllers regularly rely on the score value created by credit agencies. In practice, contractual partners would therefore always be guided by the score value, even if another decision was actually possible. No contract would regularly be concluded against the recommendation of the score value. Therefore, the score value takes a "predominant position in the decision-making process" of the third party responsible[60] . As a further argument, the Administrative Court stated that the purposes pursued by Article 22(1) of the GDPR required this interpretation. The legislator of the regulation had seen the conflict and had therefore required a decision-making competence in the third controller[61] . Finally, the VG stated that also for reasons of the legal protection guaranteed in Article 87 et seq. DS-GVO the broad interpretation is necessary[62] . If the determination of the score value fell under Article 22(1) DS-GVO, the data subject would have a right of access under Article 15(1)(h) DS-GVO, according to which he or she would have to be informed about the existence of automated decision-making, including profiling, and be provided with meaningful information about the logic involved and the scope and intended effects of such processing[63] . Since it was previously only assumed that the third party controller ultimately made the decision, he was in principle obliged to provide information. However, since the latter regularly had no information about the logic involved, a gap in legal protection arose to the detriment of the data subject. In contrast, the credit agency is not obliged to provide information and regularly has no interest in disclosing the logic involved, which it tries to protect as its trade and business secret[64] . This legal protection gap would only be closed if the activity of the credit agency fell under Art. Article 22 GDPR and is thereby covered by regulation, in particular by the Member States adopting national regulations on the opening clauses[65] .

Proposals for the Future Regulation of Credit Reports with Scoring

The last thought of the VG Wiesbaden should be taken up again here as an introduction to the next thoughts: What should regulatory control of credit reporting agencies look like and is it appropriate? Based on the findings to date, it certainly appears necessary. Given the legal loopholes, it also seems appropriate, because it would seem to be an acceptable burden to list the parameters on which a credit report or score formula is based in a standardized and comprehensible manner, and to specify at least the upward and downward revaluations for each category - in this case, there would also be sufficient room for the respective business secrets of the credit reporting agencies concerned.

In concrete terms, the standardized assessment of corporate creditworthiness by credit agencies could follow a legally standardized matrix that finally lists the dimensions / categories that can be assessed and provides guidelines for the classification according to the principle of school grades from 1 - 6 per category. In addition, certain findings (e.g. a detention order for the submission of a statement of assets and liabilities against a managing director of a limited liability company, possibly different for sole or joint managing directors) could lead to a downgrading to a certain school grade. In any case, the parties concerned would have a comprehensive right to information for such circumstances, without the respective credit agency having to disclose the details of the underlying mathematical-statistical model.

However, a government agency should regulate the industry and, for example, create a neutral point of contact for affected parties vis-à-vis credit agencies via the function of an industry ombudsman, who in turn would have to be granted full access, i.e. would also be allowed to view all details of the score formula in general and its application in specific individual cases. Since this is an ombudsman function, the business secrets of the companies concerned are not disproportionately affected. Other, much more sensitive industries, such as banks and insurance companies, have been operating on this principle for many decades. Depending on the development of the ombudsman-centric initial regulation, it may or may not be necessary to deposit the score formula with an independent regulatory body. If the ombudsman finds grounds for rejecting the score result in individual cases based on discrimination or a breach of data protection, the relevant credit agency would have to be subject to severe penalties, because on the one hand the credit agencies use the score to shape economic policy, and this should not be allowed to be arbitrary; on the other hand, a large number of

[55] VG Wiesbaden, decision of 1.10.2021 - 6 K 788/20, paragraph 16.
[56] op. cit., paragraph 19.
[57] op. cit., paragraph 17.
[58] op. cit., paragraph 18.
[59] op. cit., paragraph 21.
[60] op. cit., paragraph 26.
[61] op. cit., paragraph 27.
[62] op. cit., paragraph 24.
[63] op. cit., paragraph 29.
[64] op. cit., paragraph 30 f.
[65] op. cit., paragraph 32.

affected parties on both sides rely on the objectivity of the score result.

In any case, conflicts of interest should be prevented and, for example, the influence of the debt collection departments on the respective scores should be limited, because this creates a reciprocal incentive for a credit agency with an associated debt collection service (which is the case with virtually all of the b-to-b credit agencies presented) to maximize fees and earnings. Unpaid collection costs or alleged interest on arrears should not be allowed to flow into a score at all before a final, judicial determination. Reminded claims that are objected to by the other party would also have to be disregarded until a final, judicial determination, because the question of whether a claim is justified must be reserved exclusively for the ordinary courts - however, due to the often great pressure on those affected to "keep the score good," a parallel world has developed here in which payment is often made solely because the collection service provider is a credit agency that compiles a score. This, however, must be prohibited.

The proposed instruments will also mean that third parties requesting information, be they banks, suppliers or other business partners, will be able to rely much more on the informative value of the score in the future, because the objectivity and comparability of the score will be improved by the inclusion of the suggestions.

CONCLUSION

In an age characterized more than ever by uncertainty, an independent, comprehensible and trustworthy assessment of corporate creditworthiness is becoming even more important for civil legal transactions. In contrast to the rating agencies of large corporations, banks and public finances, the rating agencies in the area of small and medium-sized enterprises have so far been completely unregulated. This has led to inconsistencies, inaccuracies and arbitrariness, which must be countered, since otherwise a few rating companies would gain (or already have) economic policy power that the legislature and the state did not intend them to have and which, with their influence, could thwart and thus ultimately devalue state rescue and aid programs - for example, those to deal with the Covid 19 pandemic. This, however, would mean wasting taxpayers' money, because the effectiveness of taxpayer-funded government aid measures for companies would be limited or even prevented. Legislation is needed here in the short term, and the current inquiry to the ECJ regarding the secrecy surrounding the respective score formula could be taken as an opportunity to provide for basic regulation of the industry, for which the article presented initial ideas.

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