

# European Data Protection Legislation and how it affects market research: a plain guide

*Since its foundation in 1948 ESOMAR has promoted the protection and confidentiality of personal data through its Codes and guidelines. EFAMRO has also from its inception in 1992 always fully supported this principle. All ESOMAR members undersign to observe the letter and the spirit of the rules laid out in the ICC/ESOMAR code, which also has been adopted by EFAMRO and its member Associations. This Code safe-guards the anonymity and confidentiality of respondents and states that the information collected may be used only for research purposes and not for sales or promotional activities directed at individual respondents.*

The EU Directive on Data Protection passed in 1995 required that member states would have incorporated this into national legislation during 1998. At the time of writing eight countries have still not done this including France and Germany although draft proposals for these countries are just now available.

However in spite of this piecemeal response the situation for market researchers is potentially detrimentally affected by this legislation and the industry bodies – ESOMAR and EFAMRO have for a number of years been working together, first to understand how the industry could be affected and secondly to make representation at the European level as to how the legislation should be interpreted with regard to market research.

All these representations are made on the basis that there is a clear distinction between social and market research and commercial activities such as direct marketing which will be much more severely affected by data protection legislation.

What follows is intended to be a summary of the current understanding and progress.

## **Scope of the Directive**

The Directive is intended to replace all previous law on this issue. It is intended to protect the citizen and provide a common law for Europe. It is more far reaching than previous legislation in that it covers all data records including manual and electronic. It further covers recording of speech and images, e.g. tapes and videos of group discussions.

Much of what the Directive is attempting to do is sensible and in the interests of all, however there are a number of problems that have to be faced.

The first of these is that each country that is passing a national law to implement the Directive can add to the Directive or change the detailed meaning of some parts. This can result in the way in which research is carried out varying from country to country. This causes confusion, adds to cost and undermines the EU concept of improved competition and the free flow of goods and services.

We are trying to overcome this problem by dealing directly with the EU staff and the members of the '29' Group – a working party of National Data Protection Registrars and Civil Servants who are charged by the EU with the responsibility for common interpretation and implementation. They progress steadily but slowly and we are one of many bodies which need their attention and agreement. We have established contact with them and are working towards a discussion with them in the future.

A second problem is in the wording of much of the Directive in that it is not always clear and sometimes introduces concepts which have as yet no defined and agreed legal meaning; an example of this is the term 'explicit consent' when describing what is required for the collection of some types of personal data. This is a problem for every party affected by the Directive and one which is discussed in more detail below.

A third problem is that whilst the Directive does not apply to anonymised data it does cover the collection of data if at the time of collection or for any time after that a person or organisation can relate the collected data to a particular person. This is true, even if the data are later made anonymous; indeed even if in the case of CATI or CAPI they were made anonymous immediately via the use of coded files. We are arguing that market research data as covered by the ICC/ESOMAR Code are always made

anonymous and that the data that are collected and held personally are only used for quality control, for example back checking and are not passed to third parties. We believe after discussions last year in Brussels that this argument has been accepted and we are looking in detail at such issues as how quickly the personal details should be made anonymous or separated, and the security with which they are held in the interim.

It follows from this that we are here only describing how the law affects data collected for anonymous analysis. Anybody carrying out named customer satisfaction research amongst members of the public for transfer to clients should regard such activity as equivalent to Direct Marketing list building as far as the law is concerned. We cannot provide guidance on that at this time.

### **Clear distinction between marketing research and direct marketing**

As mentioned before, a strict distinction between marketing research and direct marketing activities must be maintained. The ICC/ESOMAR International Code requires that respondents' anonymity must be strictly preserved. Personal information can only be passed on in a form which allows it to be identified, if the respondent has given his/her informed consent. Even then, the researcher must ensure that the information will not be used for any non-research purpose and that the recipient of the information has agreed to abide by the ICC/ESOMAR Code. At no time should an interview lead to an attempt to sell something to the respondent as a result of having taken part in the interview.

### **Coverage of the Directive**

Similarly it also follows that tapes and videos must be regarded as personal data and you must follow the revised ESOMAR Guideline on this subject relating to respondent permissions.

Care must also be taken that even where the data are anonymous there is no element of identifiability. By that it is meant that there is a low probability of an individual being recognised, for example in the way a lottery winner can be identified as being a blue eyed one legged Englishman with five cats living in Salerno.

Clients will often not be aware of the Law and how it affects market research. Care must be taken to give the proper advice. Ignorance or action for a third party is not a defence.

The Law covers the actions of all companies in the EU and any transfer of data to other countries outside of the EU. Transferring completely anonymous data is OK, but personal data, even a sampling frame, must have the same rules observed by end users as if they were in the EU. The best way to ensure this is through the terms and conditions of your contracts.

## **Consent**

For the collection of most data ahead of it being made anonymous the agreement to participate in an interview is, as we understand, an adequate consent. However, the Directive introduces a new category of data which is 'sensitive' data. This covers such things as ethnicity, religion, trade union membership, medical records, sexual orientation, criminal records and political opinions. For this category of data 'explicit' consent is required, but not defined. We are advised that this probably is agreement to participate at the time of interview, but that is a view not shared, it would seem by all countries. The need to get prior written advance as has been suggested in some places would totally undermine the conduct of legitimate opinion polling, both in terms of accuracy, cost and speed. However mindful of the current conflict we need to demonstrate that we are aware of the sensitivities of these areas and that any self-regulation is effective and universal within our own area of control.

## **Application in different countries**

The current position after some early difficulties in individual member states, particularly The Netherlands, is beginning to look more positive. The Directive allows for special exceptions of the rules concerning the use of personal data for 'scientific and statistical purposes'. The legal opinion that we have been given is that personal data, collected and processed for marketing research and complying with strict codes of practice, should benefit from the same exceptions as scientific and statistical research. Precisely how far these exceptions might extend is still to be determined by the legislators in each of the Member States. The opinion went on also to say that in theory it could be argued under general EU law that citizens had a right to express their opinions through surveys and that to restrict this was to restrict fundamental freedoms.

The first of these opinions has been successfully used by researchers in the Netherlands to achieve a revision of the hostile approach first taken by the Dutch Data Protection Registrar. This opinion has now achieved acceptance by Parliament, the Department of Justice, and the Department of Science and Education. In particular the distinction between direct marketing and market research has been made clearer to the political and government bodies.

Remember: Follow the ICC/ESOMAR International Code. Ensure your staff and clients are familiar with this Code and all the ESOMAR guidelines that are relevant for your business.

ESOMAR and EFAMRO will continue to align forces each time their interests are congruent, to jointly promote the research industry and to defend the legitimate interests of their members.

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