

*Submission in response to the European Commission
consultation on the legal framework for the fundamental right
to protection of personal data*

17 December 2009

1. About EFAMRO and ESOMAR

This paper is submitted on behalf of EFAMRO, the European Federation of Associations of Market Research Organisations and ESOMAR, the World Association of Research Professionals.

EFAMRO represents the interests of market, social and opinion research in Europe. Its members are national trade associations for research businesses. Founded in 1992, the objectives of EFAMRO are:

- To represent the common interests of its members at European and international level with regard to their mutual contacts as well as to their external relations with national and international authorities and national and supranational organisations.
- To maintain and improve the reputation of market, opinion and social research to the public.
- To develop and establish international quality standards for market, opinion and social research.
- To develop, maintain and enforce international professional principles and rules which are mandatory for the members of the Federation.
- To combat unfair trading.
- To support its members and other national associations in the field of market, opinion and social research by providing corresponding information and services.

The EFAMRO website www.efamro.eu provides full details of its members and activities.

Founded in 1948, ESOMAR gathers together nearly 5000 individual members worldwide on both the provider and client side as well as in public bodies and academic institutions.

ESOMAR's mission is to promote the highest standards in market research for improving decision making in the public and private sectors.

The objectives of ESOMAR are internationally,

- to promote the development and use of marketing, social and opinion research, as an important basis for effective management decisions in both public and private sectors alike,
- to encourage the highest technical standards and levels of professional conduct among its Members,
- to establish a code or codes of ethical practice and professional standards and

- to provide the means, through meetings, publications and other activities by which members may extend their knowledge and advance their professional status.

The ESOMAR website www.esomar.org provides full details of membership and the organisation's activities.

2. Introduction

EFAMRO and ESOMAR welcome the opportunity offered by the European Commission to respond to its consultation on the legal framework for the fundamental right to protection of personal data.

We have consulted with key stakeholders in the market, social and opinion research sector in Europe in the preparation of this response (see Appendix 1). We confirm that the contents of this paper are not confidential and can be attributed to EFAMRO and ESOMAR.

We have noted the questions outlined in the invitation to the consultation and used the topics to guide our response.

3. Response to Consultation

General comments

3.1 Market, Social and Opinion Research in Europe

Market research, which includes social and opinion research, is the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social sciences to gain insight or support decision making.

Since the 1940s, market, social and opinion research has been robustly self-regulated by a family of codes of conduct and practice, supported by strong compliance and disciplinary frameworks. Amongst these, the ICC/ESOMAR International Code on Market and Social Research (last updated 2007) is used in 17 EU Member States and 44 associations in 37 countries internationally.

The research sector has also developed an international standard for market social and opinion research, ISO 20252.¹ The primary role of this standard is to ensure robust and adequate process quality. The standard is based on long established national standards, reflecting traditional concerns with research integrity and data security.

The fundamental principles of research, shared by the ICC/ESOMAR International Code and other codes used by national associations, are that

¹ ISO 20252:2006 Market, opinion and social research -- Vocabulary and service requirements

- Research must be conducted with the voluntary participation of respondents, based on the principle of informed consent.
- Respondents must not be harmed or disadvantaged as a result of participating in a research project; and
- Personal data collected for research purposes must not be used for other purposes.

These principles mirror the legislative requirements introduced by the Data Protection Directive.

Research in itself does not seek to change or influence opinions or behaviour. Unlike direct marketing, advertising or other commercial communications, it does not contain commercial messages nor does it seek to promote the aims or ideals of those who conduct or commission it. While research is used by marketers to test their product or messages, it is not a promotional communication.

Market, social and opinion research play a key role in helping businesses and other constituencies better understand consumers, customers and citizens in developing goods and services and is essential for economic efficiency, innovation and progress. Social and opinion research is widely used by public bodies to understand citizens' preferences and measure key performance indicators, for example the Eurobarometer surveys carried out by the European Commission, and government studies used for improving educational, healthcare and police services.

3.2 The Market Social and Opinion Research Sector

According to ESOMAR's *Global Market Research 2009* report the size of the market for social and market research in the EU was estimated to be 9,874 million Euro in 2008. The sector has shown sustained growth in the EU during recent years particularly in the new member states. The EU now accounts for 46% of the world-wide market compared to the USA at 30%. Within Europe, the single largest share of research turnover is accounted for by fast-moving consumer goods (30%) followed by healthcare and pharmaceuticals (11%), media (9%) and government (5%).

3.3 Research and Directive 95/46/EC

EFAMRO and ESOMAR support retention of current provisions on fair and lawful processing of personal data for historical and scientific research and statistics in Article 32 paragraph 3 of Directive 95/46/EC².

EFAMRO and ESOMAR also support the retention of the exemption to the right of subject access set out in Article 13 paragraph 2 when data are processed solely for purposes of scientific research or are

² Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data

kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics.

These provisions allow access to historic data to compile research and statistical records which in turn inform better and more accurate assessment of, and decision making on, important economic and social activities in Europe.

These arrangements have worked successfully since the introduction of Directive 95/46/EC and should be retained should the current review result in the redrafting of the Directive.

Comments on the consultation questions

3.4 Current challenges to the protection of personal data

3.4.1 Distributed computing

The use of distributed computing creates a fundamental challenge to the traditional model of data controller and data processor. In distributed computing, data are no longer held in a single easily defined system. They are distributed across multiple nodes, where the processing takes place as capacity becomes available. In this way computing can be seen as a utility like gas or electricity. The consumer is unconcerned as to where the service is sourced or generated, merely that it is delivered at the point of use.

While distributed computing is an efficient way of harnessing computing power, it challenges the traditional application of the concept of a data processor. Like the consumer of the utility, one cannot readily identify the source or sources of the processing or the location where it has taken place.

The challenge here is twofold: the ability of data controllers to effectively manage processing of data in distributed systems, particularly in regard to transfers of data outside of the EEA; and the rights of citizens to know who has access to their data within a given system of distributed computing.

Distributed systems offer a commercial benefit to data controllers, including research organisations, particularly in regard to capital expenditure on data processing systems. The ability to take advantage of such systems is however limited by a lack of clarity in the application of the Data Protection Directive to them. A preferred solution would be the introduction of a clarified definition of data controller which would place the responsibilities on those who decide how data are processed as opposed to those who control a particular computer or filing system. This would restate the responsibility of a single data controller to assess the need to process personal data and the security of such systems before electing to process personal data in them and would provide a single point of responsibility and accountability to citizens. Since the operator of a particular computer or filing system would be contractually bound or otherwise obliged to abide by their representations about system integrity to those who use their systems for processing data, there is no disruption to the continuity of data protection.

3.4.2 Online data collection

In the online environment, cookies and IP addresses, with information collected from browsers and operating systems form a unique combination which can identify a given machine whenever that machine contacts the server again.

While this passive processing (i.e. it is not obvious but is integral to the online experience) presents a challenge to the traditional implementation of the concept that a data subject should give their unambiguous consent to the processing of their personal data, the collection and processing of this information may be relevant and proportionate to the specified purposes of the data controller and the preferences of the data subject.

In a research context the use of this technique enables the unique identification of a particular machine and therefore protects the robustness of research results by ensuring that individuals or groups of individuals cannot bias research projects by submitting multiple or fraudulent responses. As more research moves to online environments, this kind of processing will become more necessary to guarantee the quality and robustness of European research and statistical data, vital to the development of the EU and the internal market.

The European institutions are increasingly turning to online communication to engage with citizens and invite wider participation in consultations. Online forums, networks and polls all rely on types of passive processing to ensure their integrity and reliability.

Current data protection legislation requires that such processing is undertaken transparently. By requiring that personal data be processed with the unambiguous consent of data subjects, the Directive is already sufficiently robust regarding these processing requirements. This is supported by the self-regulated research codes which more specifically detail how this can be achieved in a research context. EFAMRO and ESOMAR also support the application of the principle of privacy by design to these technologies (see section 3.6.3).

3.5 Adequacy of the current directive

3.5.1 The Data Protection Principles

EFAMRO and ESOMAR support the retention of the current data protection principles. They have proven their durability in the 30 years since they were first formulated by the OECD, as technology has progressed from the use of bulky mainframes to the use of mobile, distributed and ubiquitous computing.

However EFAMRO and ESOMAR support the clarification of the definitions of the terms used in the principles and the harmonisation of their application across the Member States. The process of harmonisation should however seek to understand current divergences in interpretation to ensure that no single national market or jurisdiction is disproportionately affected by a change in the

application of the Data Protection Directive.

3.6 Changes to improve the protection of personal data

3.6.1 Definition of Personal Data

One of the key concepts in market social, and opinion research is the anonymity of respondents to research projects and the confidentiality of their responses.

The corollary of anonymity is identifiability. In order to protect the anonymity of respondents, EFAMRO and ESOMAR support the wide ranging interpretation Of the definition of personal data as outlined by the Article 29 Working Party in *Opinion 4/2007 on the concept of personal data*³, particularly in regard to an “identified or identifiable” natural person. The Working Party notes how unique combinations of information may indirectly lead to the identification of individuals.

The application of research codes of conduct and practice has always placed great emphasis on the elimination of any risk of a breach of respondent confidentiality. This requirement is built into the ICC/ESOMAR Code and other self-regulated codes used by European research associations, and this was recently recognised by legislators in Germany as providing sufficient protection to individuals where their data is processed as part of a research project, including access to publicly available records for the generation of sample, and where their data is retained for quality control purposes. The Working Party’s interpretation is supportive of that position and any narrower interpretation would undermine the anonymity of respondents in research. EFAMRO and ESOMAR support adoption of this interpretation to increase harmonisation across the Member States.

3.6.2 Definition of Data Controller

EFAMRO and ESOMAR support a clarified definition of data controller which would focus on the decision to process data for specified purposes as opposed to control of a particular computer or filing system. This would go some way to addressing the issues connected to novel processing arrangements, such as distributed processing outlined above, and would restate the responsibility of data controllers to assess the security of such systems before electing to process personal data in them. Clarification of this definition would also serve to increase harmonisation across the Member States.

Clarification of the responsibility of a single data controller would ensure the application of identical standards of processing and security across multiple systems rather than relying on the co-ordination of standards of processing and security by multiple controllers.

In the research context, data may be processed by a telephone centre, a website and by research analysts as part of the same project. Each section or part may work within separate entities and hold

³ Document WP 136, Adopted 20 June 2007

data in separate systems. Process standards (such as ISO 20252⁴ and similar national standards) and ethical standards (codes of conduct and practice) ensure that each aspect is managed consistently and that respondents are protected. A single data controller assists the protection of individuals as there is a single point of responsibility and accountability. The phenomenon of multiple controllers decentralises this function and increases the risk of errors occurring.

3.6.3 Privacy by Design

EFAMRO and ESOMAR support enabling citizens to decide how and when their personal data should be collected and processed. This is reflected both in the fundamental principles of research and in the practical application of research codes of conduct and practice. Privacy and data protection should be a key design consideration in the development and application of new information technologies. Examples include:

- Default settings in social networking sites that protect privacy while allowing citizens to choose lower levels of privacy if they wish;
- Transparent, understandable and comprehensive privacy policies that provide citizens with information that they need to know before their personal data are collected and processed;

EFAMRO and ESOMAR support the principle of privacy by design forming part of the technical and organizational measures required to protect personal data against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access and against all other unlawful forms of processing. This is particularly important where the processing involves the transmission of personal data over a network.

The application of this principle should however allow for relevant and necessary use of information in relation to the risks of the technology used. The application of the principle should also be technology neutral. New technologies should not be subject to either a higher or lower standard of scrutiny than technologies in current use. This would inhibit the development of new technologies necessary for the development of the EU economy and of innovation in the research sector.

There is a need for greater understanding and appreciation of current privacy and data protection practice in the design and application of new technologies before specific new requirements are put in place. This is necessary to avoid discouraging technological development; the European data protection framework should strive to encourage innovation while protecting the rights of citizens.

Code holders, trade bodies and other organisations can encourage this protection by ensuring that privacy and data protection features are designed into new developments and form part of the compliance framework for that sector. In research, EFAMRO and ESOMAR already require this of

⁴ ISO 20252:2006 Market, opinion and social research -- Vocabulary and service requirements

their members and are willing to work with the European Commission to communicate this message more widely.



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Appendix 1

The following associations were consulted in the drafting this document:

<i>Austria</i>	VMÖ - Verband der Marktforscher Österreich
<i>Belgium</i>	FEBELMAR - Belgian Federation of Market Research Institutes
<i>Croatia</i>	CROMAR – Croatian Marketing Association
<i>Cyprus</i>	SEDEAK – Cyprus Opinion Poll and Market Research Association
<i>Czech Republic</i>	SIMAR - Association of Marketing Research Agencies
<i>Denmark</i>	FMD – the Association of Market Research Institutes in Denmark
<i>Finland</i>	SMTL - Finnish Association of Market Research Agencies
<i>France</i>	IREP - Institut de Recherches et d'Etudes Publicitaires SYNTEC Études Marketing et Opinion
<i>Germany</i>	ADM - Arbeitskreis Deutscher Markt und Sozialsforschungsinstitute BVM - Berufsverband Deutscher Markt-und Sozialforscher
<i>Greece</i>	SEDEA - Association of Greek Market and Opinion Research Companies
<i>Hungary</i>	PMSZ - Association of Hungarian Market Research Organizations
<i>Ireland</i>	AIMRO – Association of Irish Market Research Organisations
<i>Italy</i>	ASSIRM - Ricerche di Mercato, Sociali e di Opinione
<i>Netherlands</i>	MOA - MarktOnderzoekAssociatie
<i>Norway</i>	Norsk Markedsanalyse Forening
<i>Poland</i>	OFBOR - Polish Association of Public Opinion and Marketing Research Firms PTBRiO - Polish Association of Market and Opinion Researchers
<i>Portugal</i>	APODEMO - Portuguese Association of Market Research Companies
<i>Romania</i>	SORMA - Societatea Romana de Marketing si Cercetarea Opiniei Publice
<i>Slovakia</i>	SAVA - Slovak Association of Research Agencies

<i>Slovenia</i>	DMS - Slovenian Marketing Association
<i>Spain</i>	AEDEMO - Spanish Market Research Association
	ANEIMO - Asociación Nacional de Empresas de Investigación
<i>Sweden</i>	SMIF - Svenska Marknads-undersökningsföretag
	SÖK - Swedish Market Research Society
<i>Switzerland</i>	VSMS - Verband Schweizer Marketing -und Sozialforscher
<i>Turkey</i>	TÜAD - Turkish Researchers Association
<i>United Kingdom</i>	AQR - Association for Qualitative Research
	MRS – The Market Research Society