

## *Targeted stakeholder consultation on the legal framework for the fundamental right to protection of personal data*

15 July 2010

### **1. About EFAMRO and ESOMAR**

This paper is submitted on behalf of EFAMRO<sup>1</sup>, the European Federation of Associations of Market Research Organisations and ESOMAR<sup>2</sup>, the World Association of Research Professionals.

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

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.

### **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. We confirm that the contents of this paper are not confidential and can be attributed to EFAMRO and ESOMAR.

We have noted the questionnaire circulated in the background paper for the 1 July 2010 stakeholders meeting and due to the relatively tight deadline to respond to these issues we have concentrated on the topics which appear, at this stage, to be of the most particular concern to the research sector. It should be noted that we are interested in the whole of the data protection consultation and would wish to be involved in any of the broader discussions not just the topics which are covered in this response.

EFAMRO and ESOMAR would like to state that in their opinion, several questions raised by the Commission are already dealt with because Directive 95/46 is a Directive of principles that are independent from media and techniques. EFAMRO and ESOMAR recommend that more effort be

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<sup>1</sup>Register ID Number : 90847842431-88

<sup>2</sup>Register ID Number : 29952722795-07

paid to the understanding and application of the principles and that any regulation should be looked at in the light of the free flow of services and goods in the European market and the need for innovation and competitiveness.

### **3. Market, Social and Opinion Research**

Research in itself does not seek to change or influence opinions or behaviour. Unlike direct marketing, advertising or other commercial communications, it does not seek to promote the aims or ideals of those who conduct or commission it. While research is used by marketers to test their products or messages, it is not a commercial communication.

Market, social and opinion research plays 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.

### **4. Comments on the consultation questions**

*Q2: Should the current provision on automated individual decisions be made more explicit, namely by clarifying that "profiling" is prohibited?*

Article 15 of Directive 95/46/EC provides that Member States shall grant the right to every person not to be subject to a decision which **produces legal effects concerning him** or **significantly affects him** and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc. [*emphasis added*] As outlined in section 3 above, processing of personal data for research is not designed to produce legal effects concerning, or significant effects on, a data subject.

Profiling is not defined in the question raised by the Commission or in any current legislation. As was expressed by the stakeholders at the meeting with the Commission on 1 July, 2010, the absence of a clear definition of profiling makes responding to this question in a meaningful way very difficult.

Some contributors to the discussions on July 1 referred to the current very broad definition used by the Council of Europe in its *Draft Recommendation on the Protection of Individuals with Regard to Automatic Processing of Personal Data in the Context of Profiling*, published on 3 June 2010:

*"Profiling" means an automatic data processing technique that consists of applying a "profile" to an individual, namely in order to take decisions concerning him or her; or for analysing or predicting personal preferences, behaviours and attitudes.*

*"Profile" refers to a set of data characterising a category of individuals that is intended to be applied to an individual.*

The unintended consequence of the broad definition is that many research activities would be included within the definition of “profiling”. There are many examples of profiling used in research, including some particularly important European research projects. Large public sector social surveys use statistical techniques for stratification to improve the quality of the sample which could be described as profiling depending on the definition. If the Commission were to decide to adopt the Council of Europe definition and introduce the restrictions being proposed by the Council of Europe this could have a huge and detrimental impact on the quality and representativeness of research results, key characteristics for research to be robust for evidence based policy making, an important facet of European policy development not least by the Commission. This could have unforeseen impacts on significant research projects such as Eurobarometer and the Labour Force survey.

From recent discussions between ESOMAR and the Council of Europe in May and June 2010, it would appear that the intention is to address concerns regarding the use of profiling for commercial purposes. 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. Research in itself does not seek to change or influence opinions or behaviour. Unlike direct marketing, advertising or other commercial communications, market research is not a commercial communication and does not 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. It is therefore recommended that any clarification in the Directive specifically acknowledges the purpose of market, social and opinion research.

We would urge the Commission to not restrict profiling for purposes such as market, social and opinion research, which do not produce legal effects concerning data subjects or significantly affect data subjects. If the Commission decides to introduce profiling restrictions, the definition of profiling used should make clear that commercial profiling activities are being restricted not other legitimate profiling activities such as research. Simply banning a single form of automated decision making such as profiling (as is suggested in the question 2 in the stakeholder questionnaire), without reference to the effects of that technique on data subjects, is not proportionate to the balance of risks and benefits brought by the use of that technique.

*Q4: Should the personal data of minors be better protected? If yes, how? In that case, should there be a harmonized age limit of 18 years in line with Article 1 of the UN Convention on the Rights of the Child?*

Although the Directive does not explicitly contain provisions for the protection of minors, many sectors have actively introduced additional rules to ensure the adequate protection of children and young people who are not yet adult. This includes all the relevant European self-regulatory research Codes noting that their personal data will not be used for commercial purposes and researchers must take all reasonable precautions to ensure respondents are not harmed or adversely affected as a result

of participating in a research project. The protection of children and young people should not be oversimplified to a mandatory requirement for parental consent for contact with all individuals under 18.

Persons under 18 may leave school, or attend university and are autonomous persons. The UN Convention on the Rights of the Child also guarantees right to express views to participate in society:

*Article 12: States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*Article 13: The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*

If additional measures were to be introduced, the need to address concerns for the protection of children and young people must be balanced with their rights of expression. We recommend that if additional restrictions were to be introduced that these mirror the self-regulatory rules already in place, the majority of which require consent of a parent or responsible adult acting in the place of a parent with under 14s. It is our view that if society is to properly prepare children and young people for the transition from childhood to adulthood that the transition should start at 14 not 18 as currently being proposed.

*Q5: Should there be specific conditions for collecting personal data if they are not directly collected from the data subject?*

There should be no specific conditions for collecting personal data if not directly collected from the data subject. This is already controlled by the second principle in Article 6 of the Directive which provides that personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes, and is supported by the current provisions of Article 11.

This is a robust principle which has worked well and is entirely sufficient for addressing concerns about data being used appropriately. In instances where a data controller lawfully assembles a data base from other sources, it takes on all the responsibilities that go with collecting the data. These responsibilities include the obligation to ensure that the data are processed fairly and lawfully, are adequate, relevant and not excessive, are accurate and, where necessary, kept up to date and are protected against accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access.

In research there are frequent situations where collecting personal data from others is essential for research purposes. It is important that the exemptions in Paragraph 2 of Article 11 be maintained for the processing for statistical purposes or for the purposes of historical or scientific research. 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 international Code and other self regulatory codes used by European research associations, and has been recognised by regulators and legislators in a number of Member States 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 general sample, and where their data is retained for quality control purposes.

*Q9: Should the current requirement for “unambiguous consent” of the data subject be changed to always require “explicit consent”? If so, how could a requirement for “explicit consent” be implemented and exercised in practice, particularly in the on-line environment?*

The consent requirements should not be changed. Unambiguous consent requires data subjects to clearly understand the data that is being collected about them, who is responsible (ie data controller), who will have access to it and what it will be used for. We consider this level of consent to be sufficient to ensure that data is adequately protected. In many cases, unambiguous consent is obvious – in research a respondent to a research project provides the answers to the questions they are asked, in a commercial context a purchaser of a book from an online store for example is asked to give the address where it will be delivered. These two examples do not require the asking of a particular question to obtain permission for the processing of data, but the consent of the data subject is clear nonetheless from the circumstances of the data collection.

Only in cases where data processing is not obvious or where further processing is intended at a later date would additional information need to be provided and consent obtained by the asking of a detailed question.

Insisting on explicit consent for every data collection event will embed an “always click yes” mentality in data subjects. By treating all consent in a formulaic way the value of consent overall is diminished and may in fact mean that data subjects are less protected. Further, requiring explicit consent in all cases would place disproportionate burdens on both the data subject and the data controller. Such a burden is restrictive and not enabling – it impedes the flow of data without a commensurate increase in the protection of the rights of the data subject. For research, requiring explicit consent for every data collection event would reduce response rates and levels of unbiased results and thus the possibility to achieve accurate sampling on which quantitative research is based.

*Q19: Is there a need to clarify the interpretation of “statistical data” and “data for scientific purposes”?*

There is no need to clarify the interpretation of statistical data or data for scientific purposes. The essential element of statistical data and data for scientific purposes is that the processing of the data does not have a direct effect on the data subject. The data may inform wider decisions about social policy or provide data on the outcome of policies or practices but they do not inform decisions about a specific individual. The requirements set out in the current Directive have been well understood by the

research community and have been complemented by the robust self-regulatory research Codes which have all the principles of data protection firmly embedded within them.

The self regulatory codes also provide a clear and comprehensive definition of research. As mentioned in our discussion of question 2 above, 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.

*Q26: Should self-regulation in the context of strengthening the data subject's rights be encouraged?*

Self-regulation by the means of codes of practice and conduct provides sector specific guidance and interpretation on the application of data protection legislation. Self-regulation provides a level of detail and granularity that is impossible to achieve in national or supra-national legislation and encourages sector specific authoritative guidance and regulation. In addition, codes can be supported by ISO standards; for instance, the global market research standards define robust processes for research quality, integrity and data security.

Further, self-regulation is more responsive to emerging issues than legislation. Self-regulatory codes, and supporting guidelines which provide national interpretation of clear principles and best practice advice, can be regularly revised and adapted quickly to reflect social or technological developments. The ESOMAR Guidelines on Internet Research have, for example, been revised three times since the introduction of Directive 95/46/EC. The latest revision, to be published in 2010, includes a clear statement in a list of all forms of technology not considered to constitute acceptable ways for a researcher to obtain information indirectly on the Internet about a data subject.

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

- 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 and the interests of data subjects/research respondents are placed at the heart of research self-regulation. We would

encourage the Commission to recognise such existing regimes within their own communications and indeed to make adherence to the recognised research Codes and participation in the associated regulatory regimes as a condition in the procurement of research within the Commission and associated bodies.



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