

***Consultation on the Commission's Communication “A
comprehensive approach on personal data protection in the
European Union”***

A joint submission by:

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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.

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 its comprehensive approach on personal data protection in the European Union.

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.

3. General comments

EFAMRO and ESOMAR support the revision of the data protection framework. We believe that the principles set out in Directive 95/46/EC are still relevant but that greater cross-border consistency is required. Any changes should however be proportionate to the matters of concern, should take the public interest into account and should not hinder business growth.

Market, social and opinion research plays a key role in helping businesses and other constituencies including the public sector such as national governments and the EU institutions, better understand consumers, customers and citizens in developing goods and services and is essential for economic

efficiency, innovation and progress. The use of surveys for the EU, the ECB and EBRD is fundamental to policy formulation and evaluation, KPI's, and other applications such as epidemiology. It relies on the existence of data protection legislation that balances the needs of the individual with the needs of business and society.

In summary, we make the following points about the Communication on behalf of market, social and opinion research which provides feedback from citizens and consumers to improve goods and services:

- Particular measures for children should also protect their right to participate in society;
- The concept of “the right to be forgotten” should emphasise responsible data collection, data minimisation, and purpose limitation;
- EFAMRO and ESOMAR believe the current consent requirements are sufficient but should be clarified for consistency of application. Clarity should also be provided for all conditions for fair and lawful processing currently in Article 7;
- Conditions for processing sensitive personal data should be clarified and harmonised;
- Researchers’ traditional concern with the anonymity of respondents provides a unique insight into the boundaries of “personal data” which we would be pleased to share;
- The definition of “data controller” should be clarified and harmonised, with an emphasis on the decision to process data for specified purposes;
- Administrative burdens on data controllers should be reduced;
- The revised framework should not contain specific technological provisions, as this would impair its technology-neutral status. We remain concerned about references to “profiling”;
- The framework should encourage and support self-regulation through availability of advice and guidance;
- EFAMRO and ESOMAR support retention of current provisions on fair and lawful processing of personal data for historical and scientific research and statistics.
- Market, social and opinion research should not suffer from unintended consequences resulting from measures taken designed for other sectors, as illustrated in the section on profiling on page 9.

In our response, we have used the numbering and headings from the Communication document.

4. Comments on the Communication

2.1.2 : Increasing transparency for data subjects

Children

Although the Directive does not explicitly contain provisions for the protection of children, many sectors including market, social and opinion research 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. The protection of children and young people should not be over-simplified to a mandatory requirement for parental or guardian consent for contact with all individuals under 18 nor should children's data be classified as sensitive data in the revised legislation to reflect this consideration.

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. Children have the ability to take decisions that are appropriate to their competence, environment and corresponding to their age, whilst noting for example it would not be appropriate to expect a child to take transactional decisions usually taken by the head of the household.

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 or supervision of a responsible adult such as a parent or guardian with under 14s. It is our view that if we are to properly prepare children and young people for the transition from childhood to adulthood that the transition should start at 14 not 18. For those over the age of 14, it is generally accepted that they can provide personal information for a research survey as a young person can make an informed decision and take into account the consequences of providing that information which does not involve a personal obligation. This will depend on the sensitivity of the survey topic. Existing self-regulatory rules and guidelines require researchers to seek parental consent on more sensitive topics providing this does not conflict with the interests or rights of the young person.

2.1.3. Enhancing control over one's own data

EFAMRO and ESOMAR note the Commission’s emphasis on the “right to be forgotten” in particular for social networking, where data subjects are using a service that appears or claims to be directly under their control.

However, in other areas, EFAMRO and ESOMAR believe that the emphasis should be on responsible data collection and data minimisation retaining data only where it is necessary for the purpose for which it is collected.

In research, the International Standard for market, social and opinion research, ISO20252¹, the development of which was strongly supported by EFAMRO and ESOMAR, sets down retention periods for data collected or generated in the course of research projects and this is also reflected in the sector’s self-regulatory codes. The purpose of these retention periods is to allow for necessary processes such as quality control and verification of results. These are essential activities to ensure research is robust and representative, and undertaken whilst balancing this with not keeping data longer than is necessary once the process has been fulfilled. The Commission should support and encourage the development of such policies and practices by data controllers.

Another important issue in this context is that of “purpose limitation”, that is to say that personal data is used in ways that have been described to the data subject, at the time their informed consent is obtained. This is currently embodied in Article 6.1(a) of Directive 95/46/EC:

Member States shall provide that personal data must be...collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.

More coherent implementation in the different Member States of this principle will also have the effect of giving greater control to the data subject over their personal data.

In the research context, the codes of conduct require the purpose of research projects to be clearly communicated to the data subject. This in turn limits all processing of the data, and the extent to which it may be further processed and accessed.

2.1.5. Ensuring informed and free consent

EFAMRO and ESOMAR believe the current consent requirements are sufficient but should be clarified for consistency of application. Unambiguous consent requires data subjects to clearly be informed about the data that is being collected about them, 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, having been informed of the identity of the

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

researcher, the purpose of the interview, and of their right to withdraw at any time. There is no specific question to obtain permission for the processing of data, but the consent of the data subject is unambiguous 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 specific question. The interpretation of explicit consent has varied from jurisdiction to jurisdiction and should not be interpreted as written consent as this would introduce a disproportionate administrative burden and hamper the collection of responses for market, social and opinion surveys. For example, in Europe, telephone research is an essential tool in discovering and understanding the views of hard-to-reach groups, such as geographically isolated communities, individuals with disabilities, or the elderly. A requirement for written consent, not possible in telephone communications, would deprive these respondents of their right to be heard, and deprive research users' access to important research findings.

Insisting on explicit consent via a question for every data collection and not just sensitive data collection events 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 burden 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.

Consent is however only the first of the six conditions set out in Directive 95/46/EC for fair and lawful processing in Article 7. One of the reasons for lack of harmonisation in consent (for example that transparency or implied consent is permitted in some Member States but not in others) is because of a lack of clarity about the other five grounds for fair and lawful processing currently in Article 7. An over-emphasis on consent has led to a distortion of the concept as it is used in a one-size-fits-all approach.

EFAMRO and ESOMAR would welcome clarification and harmonization of all the conditions for fair and lawful processing. These conditions have been provided for by law, and data controllers should be able to rely on them where it is appropriate to do so. In particular, we would welcome harmonization in the scope of the sixth condition, *processing is necessary for the purposes of the legitimate interests pursued by the controller*, noting that processing data for market, social and opinion research does not directly affect the rights or freedoms of the data subject. We believe that this condition can be appropriately applied, for example, to the use of publicly available information to form robust and reliable sample frames for research. This is embodied in Article 6, paragraph 1.b) 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. Further processing of data for historical, statistical or scientific purposes shall not be considered incompatible provided that Member States provide appropriate safeguards.

2.1.6. Protecting sensitive data

EFAMRO and ESOMAR encourage the Commission to clarify and harmonise the conditions allowing the processing of categories of sensitive personal data.

We are aware that in some Member States, data protection supervisory authorities are required to give their prior consent before sensitive personal data can be obtained from data subjects. This is a clear departure from the provisions of the current directive, which provides that explicit consent of data subjects is sufficient. The differences in the way that 'explicit consent' has been translated hampers the conduct of market, social and opinion research and goes beyond the legislation without adding to the protection of individuals.

EFAMRO and ESOMAR believe that obtaining the free and explicit consent of the data subject for the processing of this information offers sufficient protection and control to the data subject. Further requirements of third-party authorisation of the data collection would place an unwarranted burden on research and its ability to produce robust and valid data for the benefit of European businesses, governments and citizens.

2.2.1. Increasing legal certainty and providing a level playing field for data controllers

Definition of Personal Data

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

The application of research codes of conduct and practice, together with quality standards such as the research standard ISO 20252² have 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.

Identifiability is a key concept in the definition of personal data. Researchers have developed a wealth of experience in this area. EFAMRO and ESOMAR would be pleased to share with the Commission their experience in setting the boundaries of personal data.

² ISO 20252:2006 Market, opinion and social research - Vocabulary and service requirements

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, 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 market, social and opinion 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 data in separate systems. Process standards (such as ISO 20252³ 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.

2.2.2. Reducing the administrative burden

EFAMRO and ESOMAR also support standardisation and harmonisation of notification and data transfer requirements in Member States. We would note that current notification procedures vary widely, place a burden on businesses and data protection supervisory authorities alike and do not enhance or protect the rights of data subjects.

We would welcome standardisation of the notification system e.g. one that would allow multiple notifications to take place using a standard form and also harmonisation of the grounds for which notification is required.

2.2.4. Enhancing data controllers' responsibility

EFAMRO and ESOMAR note the Communication's emphasis on accountability and privacy by design. We believe that these issues are implicit in the current provisions of the directive, contained in Recital 46, Article 17 as well as the security provisions in the 2002 and 2009 e-privacy Directives.

While EFAMRO and ESOMAR would support provisions that relate to specific organisational measures, we do not believe that the framework should contain specific technological provisions, as

³ ISO 20252:2006 Market, opinion and social research - Vocabulary and service requirements

this would impair its technology neutral status. We also remain concerned about references to “profiling” in the Communication.

Profiling

EFAMRO and ESOMAR are concerned that new rules on profiling would have unintended consequences for the market research sector’s entirely legitimate activities. 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].

Profiling is not defined by the Commission or in any current legislation. This view was expressed by the stakeholders at the meeting with the Commission on 1 July, 2010. The absence of a clear definition of profiling makes engaging with this issue, in a meaningful way, very difficult.

A very broad definition is used by the Council of Europe in its *Recommendation on the Protection of Individuals with Regard to Automatic Processing of Personal Data in the Context of Profiling*, adopted by the Committee of Ministers on 23 November 2010:

“Profiling” means an automatic data processing technique that consists of applying a “profile” to an individual, particularly 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 this 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 social surveys such as Eurobarometer use statistical techniques 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.

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 promotional purposes. Market research, 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, it does not seek to promote the aims or ideals of those who conduct or commission it. While research is used by marketers in the public and private sectors to test their product or messages, it is not a promotional communication.

We would urge the Commission to not restrict profiling for purposes such as market, social and opinion research, which do not produce legal effects on individual data subjects or significantly affect data subjects. If the Commission decides to introduce profiling restrictions, the definition of profiling used should make clear that potentially harmful profiling activities are being restricted not other legitimate profiling activities such as research.

2.2.5. Encouraging self-regulatory initiatives and exploring EU certification schemes

Self regulation by the means of codes of practice and conduct provide 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.

Further, self-regulation is flexible and is generally 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 Guideline on Internet Research has, for example, been revised three times since the introduction of Directive 95/46/EC. The latest revision, to be published in 2011, 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 56 associations in 46 countries internationally. The remaining EU countries have adopted similar national codes which have been adapted to suit local market conditions.

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 cooperation 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 1995 Data Protection Directive and the data subject's/research respondent's interests are placed at the heart of research self-regulation. We

would encourage the Commission to recognise such existing regimes within their own communications, and 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.

The current provisions in the Directive for the recognition of codes of conduct have not been widely adopted. The process outlined in Article 29 Working Party document WP13⁴ in practice involved a complex procedure that was administratively burdensome and lengthy to complete (five years in one case) which resulted in low levels of interest.

EFAMRO and ESOMAR would welcome an environment which supports self-regulation by providing advice and guidance when requested to assist code holders in ensuring that codes of conduct are robust and fit for purpose. The provision of advice and guidance also provides an opportunity for regulators to keep abreast of legal and technological developments across sectors.

The role of the Article 29 Working Party and other regulators should not, in the main, be *ex-ante* but rather *ex-post*. It should be for individual sectors to provide for effective self-regulation and regulators to intervene only if that system is not working.

Other comments

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 6, paragraphs 1b and 1e, Article 11, paragraph 2 and 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 kept in personal form for a period which does not exceed the period necessary for the sole purpose of creating statistics. The data are not used for taking measures or decisions regarding any particular individual and there is no risk of breaching the privacy of the data subject.

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.

⁴ Future work on codes of conduct: Working Document on the procedure for the consideration by the Working Party of Community codes of conduct



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