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edpb

European Data Protection Board

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## Reply to public consultation - Guidelines 3/2019

Dear Sir or Madam,

We are very grateful for this opportunity to participate in the public consultation on the “Guidelines 3/2019 on processing of personal data through video devices”. Please allow us to briefly introduce the ADM to you:

The ADM Arbeitskreis Deutscher Markt- und Sozialforschungsinstitute e.V. represents the private-sector market and social research agencies in Germany. It was established in 1955 and is the only trade association of its kind. At the time of writing, 72 agencies are members of the ADM, together accounting for some 83 percent of turnover on the German market for market, opinion and social research (2.36 bn € in 2018). According to its statutes, the duties of the ADM include preserving and promoting the scientific nature of market and social research, ensuring the anonymity of individuals participating in scientific research studies, and developing codes of professional conduct and canons of professional ethics.

### A. Scope of the “Guidelines 3/2019 on processing of personal data through video devices”

The “Guidelines 3/2019 on processing of personal data through video devices” should primarily be read as an interpretation of the legislative provisions of Article 35(3)(c) and Article 37(1)(b) GDPR and the resulting requirements regarding the assessment of the impact on data protection and the designation of a data protection officer. These two legal provisions legally standardise the conditions under which the “systematic monitoring of publicly accessible areas on a large scale” and the “regular and systematic monitoring of data subjects on a large scale” is lawful. Both provisions standardise the aspect of “monitoring”, which the “Guidelines 3/2019” focus on with respect to the use of video devices.

In market, opinion and social research too, video devices are used and video recordings are made in the course of conducting scientific surveys. However, this is not done for the purpose of monitoring publicly accessible areas or data subjects, but is instead a specific component of the collection of research data, which is afterwards analysed in terms with the scientific knowledge of interest. Video recordings are relevant on the one hand when conducting group discussions and on the other hand when observing behaviour.

## **B. Recording group discussions**

Video recordings are in many cases an indispensable technical aid in the hermeneutic or interpretative analysis of the overall course of group discussions and the corresponding interactions between their participants, for which the direct observations that are often carried out in parallel are not a substitute. In terms of data protection laws, both the recording and the observation of group discussions have their legal basis in the consent of the persons taking part. The concrete application of the legal provisions for data protection has been codified in guidelines jointly issued by the German associations for market, opinion and social research (see Section C below for details of the self-regulation system used in market, opinion and social research).

The rules of professional conduct pertaining to data protection that deal with the video recording of group discussions are primarily guided by the principles governing the processing of personal data codified in Article 5 GDPR:

The legal basis for video recording group discussions is the corresponding consent (principle of “lawfulness”) given by the participants, which in this case encompasses not only the participation in the group discussion but also the fact of its being recorded. The research data collected from video recordings of group discussions is also, without exception, subject to the professional “requirement of anonymisation” and the “requirement of separation” in market, opinion and social research. In concrete terms, this means that in its original form, which in principle technically allows the data subjects to be identified, it may only be used for scientific research purposes (principle of “purpose limitation”). Third parties to whom the video recordings are transmitted must provide a legally binding declaration of commitment to this effect. Beyond this, the recipients of the video recordings must delete these at the latest after three months (principle of “storage limitation”).

The rule of professional conduct requiring that the participants of group discussions should not be addressed by their actual names by the moderator and that they should be encouraged not to do so among themselves either, also serves the purpose of data protection. Transmitting the video recordings of group discussions to a client or another third party is prohibited, if they are likely to know the participating individuals. The same is true of the observation of group discussions behind the famous “one-way mirror”.

### **C. Self-regulation in German market, opinion and social research**

Over the years, the industry associations for market, opinion and social research in Germany have developed a comprehensive system of professional self-regulation on a national and an international level, which codifies both the professional ethical principles and the research methods of the industry. The centrepiece of the professional ethical part of this system is the “ICC/ESOMAR International Code on Market, Opinion and Social Research and Data Analytics”, which is accepted by many national associations throughout the world. The industry associations for market, opinion and social research in Germany have adopted the “ICC/ESOMAR Code” prefaced by a “Declaration for the Territory of the Federal Republic of Germany”. The various guidelines published by the German industry associations put the professional ethical principles of market, opinion and social research that are standardised in the Code and the “German Declaration” in a more concrete form for individual research areas or research methods. At the moment, these eleven guidelines are being revised so as to adjust the details of the rules of professional conduct to the legal provisions of the General Data Protection Regulation.

### **D. Recording behavioural observations**

In addition to conducting group discussions and psychological in-depth interviews, video recordings are in many cases an indispensable technique for collecting research data in the context of the various methods of behavioural observation used in market, opinion and social research. This is true, for example, for concrete shopping behaviour at the so-called “point of sale” or for the way technologically improved or innovative products, as well as changes in packaging, are handled (“usability tests”).

The same rules of professional conduct in market, opinion and social research that apply to all research methodologies and techniques – including the research-related concrete rules for the application of data protection regulations – also apply to research data obtained from video recordings of behavioural observations. For this reason, the rules of professional conduct codified within the various guidelines issued by the German associations for market, opinion and social research are also applicable to the various techniques for observing behaviour – even when they do not explicitly refer to these. Furthermore, various industry guidelines already make reference in specific instances to the professional ethical requirements of carrying out behavioural observations.

Until now, however, the system for the self-regulation of the German industry associations for market, opinion and social research has lacked a guideline that explicitly standardises the mandatory rules of professional conduct to be observed when video recording behavioural observations as part

of the industry's self-regulation. The "Guidelines 3/2019 on processing of personal data through video devices" point out, on the one hand, the benefit of such a guideline as a part of a comprehensive system of self-regulation within the industry, while on the other hand identifying important aspects that need to be examined in terms of the relevant data protection laws. This is true despite the difference in the purpose of video recordings, i.e. monitoring public spaces and data subjects as the focus of the "Guidelines 3/2019", versus the collection of research data for market, opinion and social research.

## E. Conclusions

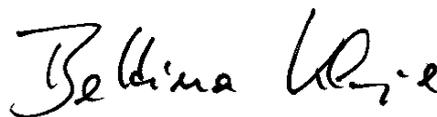
Even though the various EDPB Guidelines are not all to the same extent directly relevant to the industry-specific processing of personal data in market, opinion and social research – as for example the "Guidelines 1/2019 on Codes of Conduct and Monitoring Bodies under Regulation 2016/679" – they should nevertheless be seen by the industry associations and taken into account in the course of the ongoing updating and evolution of the industry-specific self-regulation regime. For this reason, the ADM will take into account the "Guidelines 3/2019 on processing of personal data through video devices" as far as possible in developing a guideline codifying the rules of professional conduct for video recording behavioural observations, despite the differences in their focus.

Finally, we would like to once again express our gratitude for being given this opportunity to comment on the "Guidelines 3/2019". If you have any questions or require further information, we will of course be happy to assist you.

Kind regards



Bernd Wachter  
Chairman



Bettina Klumpe  
Managing Director