

Opinion
on Article 6b(f) of the Proposal for a
Regulation on Privacy and Electronic
Communications in the version proposed by the
Presidency of the Council of the European Union
on 17 October 2019

The opinion in hand focuses on Article 6b of the Proposal for a Regulation on Privacy and Electronic Communications in the version proposed by the Finnish Presidency of the Council of the European Union on 17 October 2019. The provisions of Article 6b are of considerable importance to scientific survey research – especially when it comes to conducting representative telephone surveys.¹ We begin by briefly introducing the ADM as the author of the opinion in hand:

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, 73 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.

Permissive rule for processing electronic communications metadata

The legal provision of Article 6b(f) of the proposal for a Regulation on Privacy and Electronic Communications in the version proposed by the Finnish Presidency of the Council of the European Union on 17 October 2019 allows electronic communications metadata to be processed if:

it is necessary for statistical purposes or for scientific research purposes, provided it is in accordance with Union or Member State law and subject to appropriate safeguards, including encryption and pseudonymization, to protect fundamental rights and the interest of the end-users. Processing of electronic communications metadata under this point shall be done in accordance with paragraph 6 of Article 21 and paragraphs 1, 2 and 4 of Article 89 of Regulation (EU) 2016/679.

For market, opinion and social research, the consequence of this legal provision is that electronic communications metadata can in fact only be used for scientific purposes to draw samples for telephone surveys in the member states of the European Union if the necessary legal basis exists or is created within the respective national law after the Regulation on Privacy and Electronic Communications comes into force. Furthermore, the passage concerning appropriate safeguards to protect the fundamental rights and interests of end-users must be interpreted as a general indication of the need for such measures, which can but do not necessarily have to include encryption and pseudonymisation.

¹ Further details on the scientific methodological aspects of this issue and in particular the basic principles that apply when drawing samples for telephone surveys may be found in the appendix to this opinion.

Lawfulness of further processing electronic communications metadata

The legal provisions of Article 5(1)(b) GDPR contain a legal permissive rule for the further processing of personal data initially collected for other purposes, among other things for scientific research purposes, by legally normalizing the latter as being reconcilable with the initial purposes:

collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes;

This provision within the GDPR is addressed in Recital 17b of the current version of the proposal for a Regulation on Privacy and Electronic Communications presented by the Presidency of the Council of the European Union:

Processing of electronic communication metadata for scientific research or statistical counting purposes should be considered to be permitted processing. This type of processing should be subject to safeguards to ensure privacy of the end-users by employing appropriate security measures such as encryption and pseudonymization. In addition, end-users who are natural persons should be given the right to object.

The modification of Article 6b(f) proposed by the ADM in the form of a petition will contribute to the desired coherence of the legal provisions of the General Data Protection Regulation and those of the proposed Regulation on Privacy and Electronic Communication.

Creation of a European research area

The fundamental permissive rule for the (further) processing of electronic communications metadata for scientific research purposes in Article 6b(f) of the Proposal by the Presidency of the Council of the European Union is to be welcomed. By contrast, its concrete elaboration must be criticised with respect to the goal of creating a European research area, as codified in Article 179 of the Treaty on the Functioning of the European Union, because it does not agree with the spirit or the letter of this goal.

If the lawfulness of the (further) processing of electronic communications metadata for scientific research purposes is left to the national legislation of the member states of the European Union as a facultative margin of manoeuvre, this will in all likelihood result in this margin of manoeuvre being used and elaborated in different ways by the individual member states and being omitted altogether in some member states. Such legal foundations will not lead to a “level playing field” for carrying out telephone surveys for scientific purposes in market, opinion and social research, corresponding to the goal of creating a European research area; instead, on the contrary, it will produce a variety of different situations, possibilities and limitations with regard to carrying out telephone surveys.

All transnational telephone surveys in market, opinion and social research would be impacted, including the various European-wide surveys that are commissioned by the political institutions of the European Union.² The negative consequences of a national margin of manoeuvre in the processing of electronic communications metadata for scientific research purposes do not primarily affect the actual execution of telephone surveys, but rather the necessary quality of the research carried out and hence the accuracy, reliability and transnational comparability of the survey results. These problems could be avoided if the fundamental permissive rule of Article 6b(f) for the processing of electronic communications metadata is not left to national margins of manoeuvre but has immediate legal force in the member states of the European Union.

Appropriate safeguards for protecting the rights and interests of end-users

Carrying out scientific surveys for the purpose of market, opinion and social research relies on the voluntary participation of as large a proportion as possible of those people selected for a survey. This can only be achieved if the persons to be interviewed can trust that the assurance will be honoured that the personal data collected will only be processed in an anonymised form and exclusively for scientific research purposes. Appropriate safeguards for the rights and freedoms of the survey participants are therefore both a principle of professional ethical conduct and a research-methodological requirement.

Suitable technical and organisational measures for the protection and security of personal data are an important part of the safeguards protecting the rights and freedoms of survey participants and are therefore in place in the information technology systems of the research agencies. Encryption and pseudonymisation are undoubtedly important measures for preventing personal data breaches. However, they are just two of a whole range of technical and organisational measures that are suitable for providing data protection, and they cannot be applied in every situation.

When processing electronic communications metadata while drawing samples for telephone surveys, encrypting or pseudonymising these would mean that the fundamental permissive rule of Article 6b(f) would in fact have no legal traction, because in such cases the temporary processing of unencrypted personal data is necessary. According to the principle of storage limitation codified in Article 5(1)(e) GDPR, the electronic communications data used for drawing samples are only stored in a form which permits identification of data subjects for as long as is necessary for the purposes for which the personal data are processed.

For this reason, the fundamental permissive rule that allows the processing of electronic communications metadata for scientific research purposes in Article 6b(f), with regard to the necessary safeguards for the rights and freedoms of end-users, should not be combined with concrete individual measures. Instead, the lawfulness of further processing electronic communications metadata for scientific research purposes should be generally tied to conducting a data protection impact assessment pursuant to Article 35 GDPR. As a means of practical concordance in weighing up legally

² See the appendix to this opinion.

protected rights, this would do justice to both the protection of personal data and the rights and freedoms of the data subjects, and to the right to the freedom of science.

Petition on the legislative provisions of Article 6b(f)

Based on the above arguments, the ADM recommends that Article 6b(f) in the version proposed by the Finnish Presidency of the Council of the European Union on 17 October 2019 be amended as follows:

it is necessary for statistical purposes or for scientific research purposes, provided it is ~~in accordance with Union or Member State law and~~ subject to appropriate safeguards, including ~~encryption and pseudonymization~~ **a data protection impact assessment in accordance with Article 35 of Regulation (EU) 2016/679**, to protect fundamental rights and the interest of the end-users. Processing of electronic communications metadata under this point shall be done in accordance with paragraph 6 of Article 21 and paragraphs 1, 2 and 4 of Article 89 of Regulation (EU) 2016/679.

The authors of the above opinion will be happy to respond to any queries or requests for further information, and also to present their arguments in person.

Berlin, 4 November 2019

Appendix:

Basic methodological principles when drawing samples for telephone surveys

A methodological statistical condition for surveys to be representative of a given population is that every member of the population should have a mathematically calculable, non-zero probability of being selected as a member of the sample. In the case of telephone surveys, this means that publicly accessible directories of phone numbers – whether in printed form (“phone books”) or in electronic form – can no longer serve as a suitable sampling frame for drawing representative samples because they do not contain ex-directory numbers. Instead, the sampling frame used must be based on reference data published (on the Internet) describing the number ranges made available to phone providers.

Up until a few years ago, representative telephone surveys based solely on landline phone numbers were still methodologically justifiable. However, the increasing popularity of mobile phone communications means that the sampling frame for telephone surveys can no longer be restricted to landline phone numbers, but must also include mobile phone numbers, since an increasing percentage of the population can only be reached by mobile phone. The inclusion of mobile phone numbers leads to a practical and ethical problem for the researcher in determining the geographical location, which does not arise with landline numbers thanks to their regional area codes; with mobile phone numbers, the dialling code depends on the provider and not on the location.

This means that when conducting regionally restricted surveys, it is not possible to verify without previous testing whether a selected mobile phone number belongs to the defined overall population in geographical terms. Since the necessary additional information is not available, due to the absence of the necessary legal basis within the telecommunications legislation for passing on location-based data for the purpose of scientific research, this scientific methodological problem could only be solved by carrying out so-called screening calls beforehand. This approach is not practicable, however, both for reasons of research ethics, in view of the additional strain it puts on the owners of the selected mobile phone numbers, and for practical reasons, in view of the additional time and cost involved.

Furthermore, it should be noted that the lack of any means of broadly localising mobile phone numbers is a scientific methodological problem not only for regionally restricted telephone surveys, but also for representative surveys of the entire population based on individual or several member states of the European Union. Examples of European-wide surveys affected by this include the “Flash Eurobarometer” conducted by the European Commission. The lack of means of localising mobile phones prevents a regional stratification of the sample, a mathematical statistical procedure aimed at improving the scientific quality of the selected samples³ both in methodological respects – by reducing the so-called statistical sample error – and with respect to content – by expanding the possibility of carrying out mathematical statistical analyses of subgroups within the overall population.

³ In the regional stratification of a sample, the intended overall population of the survey is subdivided into various geographically separate subgroups and random samples of the people to be interviewed are selected that are proportional to the size of each subgroup.