

Opinion

on Articles 6b and 6c 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 5 January 2021

The opinion on hand focuses on Articles 6b and 6c of the Proposal for a Regulation on Privacy and Electronic Communications in the version proposed by the Portuguese Presidency of the Council of the European Union on 5 January 2021. The provisions of Articles 6b and 6c 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 on hand, which has the support of the other industry associations² in Germany:

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 German trade association of its kind. At the time of writing, 68 agencies are members of the ADM, together accounting for some 80 percent of turnover in German market, opinion and social research (€ 2.3bn in 2019). According to its statutes, the objectives and duties of the ADM include preserving and promoting the scientific nature of market and social research, ensuring the anonymity of individuals participating in scientific 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 Presidency of the Council of the European Union on 5 January 2021 allows electronic communications metadata to be processed if:

it is necessary for statistical purposes other than based on electronic communications metadata that constitute location data or for scientific research purposes, provided such processing is based on Union or Member State law which shall be proportionate to the aim pursued and provide for specific 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 would be that electronic communications metadata could in fact only be used for scientific purposes to draw samples for telephone surveys once the necessary legal basis has been created within the national law of the member states after the Regulation on Privacy and Electronic Communications comes into force. Furthermore, the passage concerning suitable safeguards to protect the fundamental rights

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.

² Arbeitsgemeinschaft Sozialwissenschaftlicher Institute e.V. (ASI); BVM Berufsverband Deutscher Markt- und Sozialforscher e.V.; Deutsche Gesellschaft für Online-Forschung – DGOF e.V.

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.

Lawfulness of further processing electronic communications metadata

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 contains a permissive rule in Article 6c(1), in convergence with the legal provisions of the GDPR, whose legal provisions can be drawn on in a suitably modified form, while maintaining the high level of protection for the rights and interests of the data subjects, as an additional legal basis for the further processing of electronic communications metadata for the purpose of scientific research:

Where the processing for a purpose other than that for which the electronic communications metadata have been collected under paragraphs 1 and 2 of Articles 6 and 6b is not based on the end-user's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 11, the provider of electronic communications networks and services shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the electronic communications metadata are initially collected, take into account, inter alia: [...]

The legal provisions of Article 5(1)(b) of the 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 codifying the latter in a way that is reconcilable with the initial purposes:

- b) 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 picked up by 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 purposes could also 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 compatibility of the further processing of electronic communications metadata for scientific research purposes with the initial purposes for which this data was collected, as required by Article 6c(1), applies in the case of market, opinion and social research:

The further processing of electronic communications metadata for the purpose of market, opinion and social research is restricted to the broader location data of mobile phones, with the help of which it is possible to calculate the probability that the owner of a mobile phone number selected for a phone survey belongs to the target group of the survey in geographical terms. The only information required for conducting the survey is whether or not a mobile phone is located inside or outside the target region at a defined point in time.

Special categories of personal data as defined in Article 9 GDPR and personal data relating to criminal convictions and offences as described in Article 10 GDPR are not processed. In view of the required anonymisation of the research data collected, as dictated by the rules of professional conduct, the further processing of electronic communications metadata for the scientific purpose of market, opinion and social research has no effect on the rights and interests of the data subjects. Appropriate technical and organisational measures for the protection and security of the research data are in place in all market, opinion and social research agencies in order to implement the principles for processing personal data codified in Article 5 GDPR.

Restrictions on compatible further processing

The legal provisions of Article 6c(2) of the current proposal by the Presidency of the Council of the European Union for a Regulation on Privacy and Electronic Communications permit the further processing of electronic communications metadata for purposes that are compatible with the initial purposes only subject to the following restrictions:

Such processing, if considered compatible, may only take place, provided that:

- a) the processing could not be carried out by processing information that is made anonymous, and electronic communications metadata is erased or made anonymous as soon as it is no longer needed to fulfil the purpose, and
- b) the processing is limited to electronic communications metadata that is pseudonymized, and
- c) the electronic communications metadata is not used to determine the nature or characteristics of an end-user or to build a profile of an end-user, which produces legal effects concerning him or her similarly significantly affects him or her.

Proviso a) focuses on the legal principle of storage limitation, whereas proviso b) focuses on technical and organisational data security, and proviso c) focuses on the principle of purpose limitation. The necessary level of protection of the rights and interests of the data subjects concerning the further processing of the electronic communications metadata relating to them arises from the interaction of the legal provisions codified within these three provisos.

In its current form, Article 6c(2)(b) means that the permissive rule for the compatible further processing of electronic communications metadata that is codified in Article 6c(1) has no legal traction in a range of cases of legitimate processing, because such further processing only makes sense, in view of its nature and objectives, when the electronic communication metadata is in a personalised form but not when it is pseudonymised. This also holds for processing such data when drawing samples for telephone surveys in the context of market, opinion and social research. Therefore, Article 6c(2)(b) should be modified as follows:

- b) the processing is carried out under specific measures, including encryption and pseudonymization, appropriate to safeguard fundamental rights and the interests of the end-users;*

Restrictions on further processing through responsibilities of providers

The legal provisions of Article 6c(3) of the current proposal by the Presidency of the Council of the European Union for a Regulation on Privacy and Electronic Communications require providers of electronic communications networks and services to adhere to the following restrictive measures:

For the purposes of paragraph 1 this Article, the providers of electronic communications networks and services shall:

- a) exclude electronic communications metadata that constitute location data that reveal special categories of personal data pursuant to Article 9 of Regulation (EU) 2016/679 from processing;
- b) not share such data with third parties, unless it is made anonymous;
- c) prior to the processing carry out an assessment of the impact of the envisaged processing operations on the protection of electronic communications data in accordance with Article 35 of Regulation (EU) 2016/679, which may result in the prior consultation of the supervisory authority in accordance with Article 36 (1) to (3) of Regulation (EU) 2016/679. Points (2) and (3) of Article 36(2) and (3) of Regulation (EU) 2016/679 shall apply to the consultation of the supervisory authority; and

- d) inform the end-user of specific processing on the basis of paragraph 1 of this Article and of the right to object to such processing free of charge, at any time, and in an easy and effective manner. If the end-user objects, the electronic communications metadata shall no longer be processed for such purposes.

In many cases, the further processing of electronic communications metadata, which is in principle permissible, involves the transmission of personal data from a provider of electronic communications networks and services, where the processing takes place for the initial purpose, to a recipient, who processes the electronic communications metadata further for a purpose that is compatible with its initial purpose. This is also true of the further processing of electronic communications metadata for the purpose of drawing a sample for telephone surveys in market, opinion and social research. The duties imposed on the providers of electronic communications networks and services by the legal provisions of Article 6c(3) should therefore – where applicable – also hold for the legitimate recipients of electronic communications metadata.

The general prohibition of sharing electronic communications metadata in a personalised form expressed by section b) contradicts the permissive rule codified in Article 6c(1) for the further processing of electronic communications metadata, if the purpose of further processing is compatible with the initial purposes, as is the case with scientific research purposes according to Recital 17b. The legal definition of the term “processing” in Article 4 (2) GDPR includes “disclosure by transmission”. Article 6c(3)(b) should therefore be modified accordingly, as suggested below.

The requirement of section (c) to carry out an assessment of the impact on data protection in accordance with Article 35 GDPR is to be welcomed. Irrespective of the corresponding obligation of the providers of electronic communication networks and services, “Codes of Conduct for the Proper Application of the General Data Protection Regulation to Market, Opinion and Social Research”, as described in Article 40 GDPR, should therefore require research agencies to conduct a data protection impact assessment if they use electronic communications metadata to draw samples for telephone surveys.

The duty to inform end-users stipulated in section (d), including pointing out their right to object to the further processing of electronic communications metadata pertaining to them, applies to the legitimate further processing of this data, which relies neither on the consent of the end-user nor on European or national legislation for its legal basis and which in many cases also involves data transmission. The lawfulness of such further processing of electronic communications metadata follows from checking the compatibility of the purposes of further processing in terms of the initial purposes of the processing in accordance with Article 6c(1)(a) to (e).

The criteria codified in section (d) for the duty to inform the end-user, including pointing out their right to object to the further processing of communications metadata pertaining to them, should be

amended by a provision stating that this information should always be provided at the earliest possible time. The latter depends on the type of further processing of the electronic communications metadata and can therefore not be standardised in concrete terms. When electronic communications metadata is further processed for scientific purposes within market, opinion and social research, the earliest possible time is the first successful contact with the person selected for the telephone survey, at which they are asked to take part in the survey and at which time they are given the necessary information in accordance with Article 13 GDPR.

Based on the above arguments, the legal provisions of Article 6c(3) of the current proposal of the Presidency of the Council of the European Union for a Regulation on Privacy and Electronic Communications, should be modified and amended as follows:

3. For the purposes of this Article, the providers of electronic communications networks and services shall:

- a) exclude electronic communications metadata that constitute location data that reveal special categories of personal data pursuant to Article 9 of Regulation (EU) 2016/679 from processing;
- b) *only share such data with third parties, if further processing for another purpose is compatible with the purpose for which the electronic communications metadata are initially collected;***
- c) prior to the processing carry out an assessment of the impact of the envisaged processing operations on the protection of electronic communications data in accordance with Article 35 of Regulation (EU) 2016/679, which may result in the prior consultation of the supervisory authority in accordance with Article 36 (1) to (3) of Regulation (EU) 2016/679. Points (2) and (3) of Article 36(2) and (3) of Regulation (EU) 2016/679 shall apply to the consultation of the supervisory authority; and
- d) *inform the end-user of specific processing on the basis of this Article **at the earliest possible time** and of the right to object to such processing free of charge, at any time, and in an easy and effective manner. If the end-user objects, the electronic communications metadata shall no longer be processed for such purposes.*

The provisions of lit. c) and d) also apply to the recipients as third parties to which electronic communications metadata for the purposes of paragraph 1 are disclosed.

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.

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ADM Arbeitskreis Deutscher Markt- und Sozialforschungsinstitute e.V.

Bettina Klumpe

Phone: 0049 (0)30 2061638-21

E-Mail: bettina.klumpe@adm-ev.de

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 (e.g. the population of the Federal Republic of Germany) is subdivided into various geographically separate subgroups (e.g. the population living in the various federal states) and random samples of the people to be interviewed are selected that are proportional to the size of each subgroup.