

Opinion

on Article 8 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 Article 8 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 Article 8 have a direct impact on the possibilities for using the Internet as an object of research and a method of research in scientific market, opinion and social research – in particular on the possibility of conducting representative surveys online.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.

Permissibility of the use of the processing and storage capabilities of terminal equipment other than by end-users themselves

The legal provisions of Article 8(1) on the legal standards pertaining to the use of the processing and storage capabilities of terminal equipment other than by end-users themselves and any collection of information from end-users' terminal equipment stipulate that it shall as a rule be prohibited. It is permissible only under the following conditions:

- a) it is necessary for the sole purpose of carrying out the transmission of an electronic communication over an electronic communications network; or
- b) the end-user has given consent; or
- c) it is strictly necessary for providing a service specifically requested by the end-user; or
- d) it is necessary for audience measuring, provided that such measurement is carried out by the provider of the service requested by the end-user or by a third party on behalf of or

¹ Further details on the professional ethical and research methodological principles, as well as the Internet as an object of research and a research instrument in market, opinion and social research 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.

jointly with one or more providers of the service requested provided that the conditions laid down in Article 28, or where applicable Article 26, of Regulation (EU) 2016/679 are met; or [...]

Use of the processing and storage capabilities of terminal equipment in market, opinion and social research

In the context of scientific surveys carried out online in market, opinion and social research, the consent of the end-users selected to participate in the survey (i.e., subsection b) is, in principle, the legal basis for the use of the processing and storage capabilities of terminal equipment other than by themselves. This means that survey participants have the option of rejecting the use and not participating in the survey if they wish. Subsection (a) can only serve as the legal basis for the use of the processing and storage capabilities of study participants' terminal equipment if such use is solely for methodological purposes, i.e. if it controls the timing of the invitation to take part in the survey or serves to avoid repeated invitations.

In contrast to surveys that are conducted online, it is not possible in most non-reactive methods (cf. Appendix) of Internet-based market, opinion and social research to obtain the consent of the survey participants for the use of the processing and storage capabilities other than by themselves. This form of use is a methodological necessity, however, in order to be able to conduct scientific investigations on this basis which have the appropriate and at the same time necessary research quality with regard to the reliability and the generalisability of their results. The proposal of the Portuguese Presidency of the Council of the European Union for a Regulation on Privacy and Electronic Communications of 5 January 2021 does not contain a corresponding explicit permissive rule to serve as the legal basis for the use of the processing and storage capabilities of terminal equipment for scientific research purposes other than by end-users themselves. The legal provision of subsection (d) falls short of the mark in this respect.

Subsection (d) establishes the use of the processing and storage capabilities of end-users' terminal equipment by people other than themselves as being permissible when such use is necessary for measuring the web audience of the provider of a service. However, measuring the web audience of an Internet site is only one part of Internet-based market, opinion and social research. Moreover, it is done not only for scientific research purposes, but also for other purposes.

The permissive rule for measuring the web audience includes both the provider of the service and a third party contracted by the provider. Compliance with the provisions of Article 28 or Article 26 GDPR is required of the third party contracted. When Article 28 is applied, it is assumed that the commissioned measuring of the web audience constitutes processing by a commissioned contractor under data protection law. However, in view of the research character of this activity, this cannot be assumed to be the case. When Article 26 is applied, the provider of the service and the contracted

third party are assumed to be joint controllers under data protection law. This is factually possible. However, since measuring the web audience is a research activity, it is also factually possible that the commissioned third party is the sole party responsible for measuring the web audience under data protection law. Article 8(1)(d) should therefore be modified as follows:

it is necessary for audience measuring, provided that such measurement is carried out by the provider of the service requested by the end-user or by a third party on behalf of or jointly with one or more providers of the service requested provided that the conditions laid down in ~~Article 28~~ Article 24, or where applicable Article 26, of Regulation (EU) 2016/679 are met; or [...]

Permissive rule on the use of the processing and storage capabilities of terminal equipment for scientific research purposes

An independent permissive rule for the use of the processing and storage capabilities of terminal equipment other than by the end-users themselves and any collection of information from end-users' terminal equipment for scientific research purposes would not only increase legal certainty when conducting scientific research in Internet-based market, opinion and social research, it would also protect the privacy of participants in scientific research by giving suitable consideration to and balancing the rights and freedoms of end-users. An appropriate additional subsection should therefore be added to Article 8(1):

ca) it is necessary for scientific research purposes, provided that the controller has implemented appropriate technical and organizational measures to safeguard the rights and freedoms of the end-user and the processed personal data will be anonymized as soon as possible according to the research purposes; or [...]

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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Appendix:

Professional ethical and research methodological principles of market, opinion and social research

Market, opinion and social research are solely interested in making generalisable, valid and reliable statements about the attitudes and behaviour of individual groups within the population, as distinguished by various sociodemographic and socioeconomic characteristics, using scientific methods and techniques (**requirement of scientific conduct**).

Making statements about specific individuals is not the subject of market, opinion and social research. Nor does it seek to influence people's attitudes and behaviour. For this reason, market, opinion and social research are conducted separately from other activities – in particular advertising and sales promotion (**requirement of separation**).

Maintaining the anonymity of the persons included in a scientific study is also one of the basic principles of professional conduct in market, opinion and social research. The research data is only ever analysed in an anonymised form, using mathematical procedures and statistical analyses, and is only communicated to third parties (in most cases the client commissioning the study) in an anonymised form (**requirement of anonymisation**).

The Internet as an object of research and a research tool

Since the turn of the millennium, the Internet has gained considerably in importance and diversity for market, opinion and social research, both as an object of research and as a research tool, and it will continue to do so in the coming years. One indicator of the way in which online research has become established as a relevant area of scientific market, opinion, and social research in terms of its content and methodology is the publication of an independent quality standard in the form of the international standard ISO 19731³, in 2017.

Reactive and non-reactive research methods

With regard to the European Commission's proposal for a Regulation on Privacy and Electronic Communications of 10 January 2017, the fundamental distinction between the various scientific approaches used in Internet-based market, opinion and social research is that between reactive and non-reactive research methods. In the reactive methods of market, opinion and social research, the

³ ISO 19731:2017 Digital analytics and web analyses for purposes of market, opinion and social research – Vocabulary and service requirements

selected research participants are actively involved in the collection of the research data. For the main part, these are (online) surveys conducted for scientific purposes. The non-reactive methods of market, opinion and social research, by contrast, do not involve any active participation of the study participants in the data collection process. As a rule, they encompass the various procedures for observing and measuring the behaviour of individuals on the Internet, whereby – due to the research method – the individuals concerned are not or do not need to be aware of this fact.