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20 May 2020

Preliminary opinion on data protection and scientific research

Dear Sir or Madam,

The ADM Arbeitskreis Deutscher Markt- und Sozialforschungsinstitute e.V. welcomes the publication of the *Preliminary opinion on data protection and scientific research by the European Data Protection Supervisor (EDPS) of 6 January 2020* and is happy to take this opportunity of sharing its own views on these issues. Before we continue, please allow us to briefly introduce the ADM to you:

The ADM represents the private-sector market, opinion 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, 69 agencies are members of the ADM, together accounting for more than eighty percent of turnover in German market, opinion and social research (€ 2.3bn in 2019). According to its statutes, the aims and goals of the ADM include preserving and promoting the scientific nature of market, opinion and social research; ensuring the anonymity of individuals participating in scientific research projects; and developing codes of conduct based on professional ethics, as well as quality standards for research methodologies.

Since the above-mentioned publication by the EDPS of 6 January 2020 is a preliminary opinion on data protection and scientific research, we would like in the following to address and point out a number of general and, to our mind, central aspects, which are also covered in the opinion of the EDPS, without adhering too closely to the internal structure of that document. In keeping with the general objective of the preliminary opinion of the EDPS, the following comments and observations are intended as contributions by the ADM towards intensifying the broad discussion of the relationship between data protection and scientific research.

A. Criteria that qualify an activity as scientific research

The ADM welcomes, shares and upholds the view that scientific research is conducted both in an academic and university context, and by public-sector research facilities as well as – as is predominantly the case with market research – by private-sector research agencies. An institutional restriction of scientific research to the activities of academic and university or public-sector research facilities cannot be justified on objective grounds, and would exclude by definition entire fields of scientific research.

Nevertheless, the self-assertion that an activity is scientific is not sufficient for it to be characterised as scientific research. For an activity to be accepted as scientific research, it is essential that it should verifiably meet the generally recognised criteria for scientific research. The catalogue of scientific criteria comprises at least the following four criteria: objectivity, generalisability, validity and reliability of research results. With the help of these test criteria, it is necessary and possible to prevent the privileges accorded to scientific research under the (data protection) law from being unlawfully exercised.

In all methodological research approaches, it is essential that the four above-named scientific criteria should be met – including whatever modifications and concrete implementations are necessary in each case. Each specific approach and each individual activity must pass this test in order to rightfully claim to be scientific research.

Since the publication by the EDPS focuses on the relationship between data protection and scientific research, only those areas of scientific research are relevant for which the processing of personal data, or at least data permitting the identification of data subjects, is fundamental. This is primarily the case for the empirical social, economic and behavioural sciences. Beyond this, scientific research is only affected if and to the extent that personal data is processed, as for example in medical and health research. Together with the fact of the extensive processing of special categories of personal data, this may be the reason why this area of research is treated in such great detail in the EDPS publication – and to our mind in too much detail. We would have welcomed the focus of the preliminary opinion being placed instead on empirical scientific research as a whole.

The ADM also welcomes, shares and upholds the broad interpretation of the concept “scientific research purposes” as used in European data protection law.¹ According to this, the concept includes, among other things, fundamental research, applied research and privately funded research. This view is supported in Germany for instance by a ruling of the Federal Labour Court, which states

¹ Cf.: General Data Protection Regulation, Recital 159

that applied research too is covered by the overall scope of scientific freedom², but not the application of the research results. Another ruling of the Federal Labour Court finds that purpose-oriented research, contract research and departmental research are also covered, to the extent that scientific methods are used.³ The above-mentioned broad interpretation of the concept in Recital 159 of the General Data Protection Regulation corresponds to such a teleologically broad concept of research.

The institutional and teleological diversity of scientific research is necessarily accompanied by an epistemological and methodological pluralism of scientific research. According to the Federal Constitutional Court⁴, German constitutional law considers “the search for truth and the fundamental incompleteness of the process of gathering knowledge” to be fundamental to science. Research as a subset of science – alongside academic teaching – has the purpose of “gathering scientific knowledge”⁵. This fundamental openness of the concept of research leads to a prohibition of favouring or discriminating against individual epistemological approaches or directions. Whether the goal of an activity lies in the objective and precise description, the causal or functional explanation, or in a meaningful understanding of social phenomena and correlations, this must have no influence on the decision to characterise this activity as scientific research.

No similar ruling by the European Court of Justice exists concerning the scope of the research concept and the addressees of freedom of research, at least not that we are aware of. On the other hand, Jarass is very clear on the matter in his commentary on the Charter of Fundamental Rights of the European Union:⁶

“Applied research is also captured, but not the mere application of findings already gathered. It makes no difference whether the findings achieve scientific recognition, or whether the research takes place inside or outside universities.”

² Quoted from: Jarass, Hans D. / Pieroth, Bodo; Munich, 2018: Grundgesetz für die Bundesrepublik Deutschland. Kommentar

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Jarass, Hans D. / Pieroth, Bodo; Munich, 2016: Charta der Grundrechte der Europäischen Union. Kommentar, p 155

B. On the ethics and logic of scientific research

The ethical and epistemological aspects of scientific research cannot be discussed altogether independently of one another. However, the primary decision as to whether an activity is to be characterised as scientific research is taken on the basis of epistemological and methodological criteria. Were ethical criteria of research to play a role here too, the scientific nature of the famous social psychological experiments by Stanley Milgram⁷ on the willingness to obey a figure of authority, for example, would possibly or necessarily have to be called into question, on account of the misguidance and deception and the subsequent mental and to some extent even physical stresses and harm inflicted on the subjects.

However, ethical aspects must not be ignored when deciding whether to privilege scientific research under constitutional and secondary law; on the contrary, they play a decisive role. From the point of view of data protection, “appropriate safeguards for the rights and freedoms of the data subject(s)”⁸ are of central importance. In market, opinion and social research, these safeguards are, in particular, the requirement of anonymisation and the requirement of separation dictated by the rules of professional conduct. Both requirements of conduct are codified as industry-specific formulations of the data protection principles of storage limitation and purpose limitation⁹, and also as basic principles of professional conduct in market, opinion and social research in the self-regulatory system of the profession¹⁰.

The **requirement of anonymisation**¹¹ demands that personal data collected from study participants through interviews, observations, recordings, technical measurements or by other means, must only be communicated to the client commissioning the scientific research project and to third parties in a form that does not allow the participants in the study to be recognisable or identifiable. The **requirement of separation**¹² demands that scientific research projects in market, opinion and social research must be clearly separated from other activities in organisational and technical terms. They must not be combined with activities that do not constitute scientific research.

⁷ Cf.: Milgram, Stanley; New York, 1974: Obedience to Authority. An Experimental View

⁸ Cf.: General Data Protection Regulation, Article 89, Paragraph 1

⁹ Cf.: General Data Protection Regulation, Article 5, Paragraph 1(b) and (e)

¹⁰ Concerning the self-regulatory system of market, opinion and social research in Germany, cf. Section E of this document and the Declaration for the Territory of the Federal Republic of Germany regarding the ICC/ESOMAR International Code on Market, Opinion and Social Research and Data Analytics (“German Declaration”).

¹¹ Cf.: German Declaration, Section 3.

¹² Cf.: German Declaration, Section 4.

The ADM fundamentally welcomes, shares and upholds the view that in order for the privileges accorded to scientific research under data protection laws regarding derogations of the rights of data subjects¹³ to be lawfully applied, ethical criteria of research need to be taken into consideration in addition to the verifiable compliance with epistemological criteria. Rules of professional conduct – where they exist – play an important role here in the context of professional self-regulation. The ADM therefore regrets the practical difficulties and protracted procedures involved in approving codes of conduct for the proper application of the General Data Protection Regulation in accordance with Articles 40 and 41 GDPR and in certifying personal data processing operations in accordance with Articles 42 and 43 GDPR.

C. Scientific research and public interest

The ADM considers it problematical to combine the privileging of scientific research under the (data protection) laws with the criterion of public interest. For one thing, the term “public interest” is an undefined legal concept, which is primarily used in criminal law and in administrative law but which is nowhere defined in more detail in terms of a corresponding legal definition. For another thing, the concept of “public interest” is often used to legitimise particular political interests and, moreover, it is historically not unencumbered by misuse in criminal law, also with respect to scientific research, especially in the forms of the “common good” and “good of the people”.

As already explained above, the ADM welcomes, shares and upholds the view that privileging scientific research under the (data protection) laws should primarily depend on the observation of ethical criteria of research. Epistemological criteria only play a part here to the extent that compliance with them must be verifiable and no concrete epistemological positions or schools of thought must be favoured or discriminated against.

Based on the freedom of research guaranteed by European and national primary law¹⁴, the ethical boundaries of scientific research recognised by society follow first of all from the totality of the provisions of positive law. The objectives and procedures of scientific research must of course comply with the law.¹⁵ Beyond this, according legal privileges to scientific research must firstly be objectively necessary and secondly be associated with a special responsibility to society. This is taken into account

¹³ Cf.: General Data Protection Regulation, Article 89, Paragraph 2

¹⁴ Cf.: Article 13 GRCh and Article 5 GG

¹⁵ This does not rule out that a concrete research activity may, after an appropriate examination, be found to be unlawful, without this necessarily meaning that the recognition of its scientific nature is withdrawn.

by the legal provisions of Article 89 GDPR. The responsibility to society of a particular discipline in scientific research is manifested particularly in its professional self-regulation.¹⁶

D. The scientific nature of market, opinion and social research

The professional self-image of market, opinion and social researchers is that they conduct empirical scientific research – mostly in the form of applied research – and are therefore part of the scientific system of modern societies. This is manifested in the so-called requirement of scientific conduct¹⁷, which is codified in the self-regulation of our profession. The **requirement of scientificity** demands that scientific research projects in market, opinion and social research should on principle serve to gain generalisable knowledge and must be conducted using the appropriate methods and techniques of empirical social and economic research in line with the object of research and the epistemological interest.

The various definitions of market, opinion and social research developed by the national and international industry associations reflect the self-image of the profession as being a part of the scientific system of society. They do not differ substantially from one another. The following definition is taken from draft rules of conduct clarifying the application of the General Data Protection Regulation¹⁸, which the ADM submitted to the Berlin Representative for Data Protection and Freedom of Information as the competent supervisory authority for approval in accordance with Article 40 GDPR:

Market, opinion and social research is the systematic search using recognised scientific methods and techniques of empirical research for insights about objective or subjective facts in the various areas of society, politics and business, as well as about the individuals, groups and institutions acting within these areas.

As a scientific discipline, market, opinion and social research aims to describe and analyse economic, political and social facts and correlations by applying the scientific methods and techniques of empirical research. It is conducted both by private-sector research agencies and by public-sector research institutions, and is financed by both private- and public-sector clients. Market, opinion and social research can be fundamental or applied research. In the latter case, its results support the economic, political or social decisions of its private- or public-sector clients.

¹⁶ Cf.: Section E of this document.

¹⁷ Cf.: German Declaration, Section 2.

¹⁸ Cf.: ADM; Berlin, 16 August 2019: Rules of conduct for the proper application of the General Data Protection Regulation in market, opinion and social research

If the individual legal provisions and the corresponding Recitals of the General Data Protection Regulation, as a component and instrument of European Union law, were to contain specific rules or explicit permissions for individual areas of scientific research, this would be incompatible with the level of abstraction that is necessary in both. This is true of all areas of empirical scientific research, including market, opinion and social research. Nevertheless, the scientific nature of the latter is not questioned by prevailing legal opinion because – at least in the German-language commentaries on the General Data Protection Regulation – the view generally held is that market, opinion and social research are covered by the concept of scientific research as broadly defined in European data protection law. A prominent example of this is the commentary by Simitis, Hornung and Spiecker on the General Data Protection Regulation and on Germany’s Federal Data Protection Law.¹⁹

E. Digression: The self-regulation of market, opinion and social research in Germany

Over the years, the industry associations for market, opinion and social research in Germany²⁰ have developed a comprehensive system of professional self-regulation under the leadership of the ADM, which codifies both the professional ethical principles and the methodological requirements of the industry. One key component 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 jointly published by the German industry associations put the professional ethical principles of market, opinion and social research that are codified in the Code and the “German Declaration” in a more concrete form for individual areas or methods of research.

F. Conclusions

1. As the trade association representing the interests of private-sector market, opinion and social research agencies in Germany, the ADM welcomes the planned intensification of the dialogue between the data protection bodies and institutions and those of scientific research, and would be grateful to be allowed to take active part in this.

¹⁹ Cf.: Simitis, Spiros / Hornung, Gerrit / Spiecker genannt Döhmann, Indra (Ed.); Baden-Baden, 2019: Datenschutzrecht. DSGVO mit BDSG, p 536ff

²⁰ ADM Arbeitskreis Deutscher Markt- und Sozialforschungsinstitute e.V.; Arbeitsgemeinschaft Sozialwissenschaftlicher Institute e.V. (ASI); BVM Berufsverband Deutscher Markt- und Sozialforscher e.V.; Deutsche Gesellschaft für Online-Forschung – DGOF e.V.

2. The ADM welcomes a broad definition of research that does not assume an institutional limitation of scientific research and that recognises both academic and private-sector research facilities as being part of the scientific system, and which includes both fundamental research and applied research, irrespective of how these are funded.

3. The decision to characterise an activity as being scientific research must take into account epistemological and methodological criteria. In addition to this, ethical aspects of research are decisive in order to be able to lawfully claim legal privileges that are codified in the laws of the European Union and its member states.

4. Granting legal privileges to scientific research in connection with the criterion of public interest is problematical in view of the vagueness of that concept and its possible misuse. Instead, the privileging of scientific research should, beside its objective necessity, depend on the special responsibility to society of an area of research, as manifest especially in its professional self-regulation.

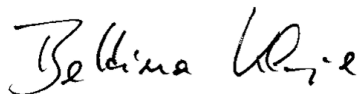
5. The requirement of scientificity codified in the professional self-regulation of market, opinion and social research demands that scientific research projects in those fields should on principle serve to gain generalisable knowledge and must be conducted using the appropriate methods of empirical research in line with the object of research and the epistemological interest.

Finally, we would like to once again express our gratitude for the opportunity provided by this publication to comment on the "Preliminary opinion on data protection and scientific research". If you have any questions or require further information, we will of course be happy to assist you. Furthermore, we would be very grateful if the ADM, as the trade association representing the interests of private-sector market, opinion and social research agencies in Germany, could be invited to join the intended dialogue between the data protection bodies and institutions and those of scientific research, and be actively included in the intensification of this dialogue.

Yours sincerely



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Chairman of the Board



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