

**Opinion on Article 6b of the Proposal for a
Regulation on Privacy and Electronic Commu-
nications in the version proposed by the
Presidency of the Council of the
European Union on 10 February 2021**

This opinion focuses on Article 6b(1)(e) in conjunction with Article 6b(2) 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 10 February 2021. These legal provisions are of considerable importance to scientific survey research – specifically when 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, 73 agencies are members of the ADM, together accounting more than 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 using electronic communications metadata

The legal provision of Article 6b(1)(e) 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 10 February 2021 allows electronic communications metadata to be processed:

in relation to metadata that constitute location data, it is necessary for scientific or historical research purposes or statistical purposes, provided that:

- i. such data is pseudonymised;
- ii. the processing could not be carried out by processing information that is made anonymous, and the location data is erased or made anonymous when it is no longer needed to fulfil the purpose; and
- iii. the location data is not used to determine the nature or characteristics of an end-user or to build a profile of an end-user.

This permissive rule cannot be applied in the case of market, opinion and social research, because when drawing representative samples for telephone surveys for scientific research purposes, using electronic communications metadata only makes sense in a personalised form, not in a pseudonymised form.

Using electronic communications metadata to draw representative samples for telephone surveys in market, opinion and social research is restricted to the broader location data of mobile devices, with the help of which it is possible to calculate the probability that the owner of a mobile phone number selected for a telephone

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.

survey belongs to the target group of the survey in geographical terms, i.e. he or she lives in the region targeted by the survey. The only information required for conducting the survey is whether or not a mobile device 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 use of electronic communications metadata for the scientific purpose of market, opinion and social research has no negative effect on the rights and interests of the data subjects. Appropriate technical and organisational measures for the protection and security of the research data, as required by Article 32 GDPR, 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.

Petition on Article 6b(1)(e)

In order to give the permissive rule of Art. 6a(1)(e) legal traction with regard to drawing representative samples for telephone surveys in market, opinion and social research, as well as for a number of other scientific research purposes, **the ADM recommends modifying Art. 6b(1)(e) as follows:**

in relation to metadata that constitute location data, it is necessary for scientific or historical research purposes or statistical purposes, provided that:

- i. such data is pseudonymised; the processing is carried out under specific measures appropriate to safeguard fundamental rights and the interest of the end-users;
- ii. the processing could not be carried out by processing information that is made anonymous, and the location data is erased or made anonymous when it is no longer needed to fulfil the purpose; and
- iii. the location data is not used to determine the nature or characteristics of an end-user or to build a profile of an end-user.

Restriction of the permissive rule for the use of location data by Article 6b(2)

The permissive rule for telecommunications service providers regarding the processing of electronic communications metadata in the form of location data, which is already restricted by the provisions in Art. 6b(1)(e), is further significantly restricted by the legal provisions of Art. 6b(2). This specifies that transmitting location data to third parties is only permissible if it has been made anonymous beforehand. In terms of the proposed modification of Art. 6b(1)(e), it follows that it cannot be implemented unless Art. 6b(2) is suitably modified or, alternatively, deleted without replacement, because the two paragraphs would otherwise contain contradictory legal provisions.

From the ADM's point of view, the following argument speaks in favour of the deletion rather than the modification of Art. 6b(2): If the European legislators intend the legal provisions of Art. 6b(1)(e) to allow location data from mobile devices to be processed for scientific or historical research purposes or for statistical purposes

while at the same time protecting the rights and interests of end users, then in many cases the legal provisions of Art. 6b(2) do not match the realities of scientific or statistical processing purposes:

Firstly, various scientific research purposes rely on the use of location data from mobile devices to be available in a personalised form so as to achieve the research objective; anonymised location data cannot contribute to this. One example of this is the possibility of using location data from mobile devices to draw samples for telephone surveys in market, opinion and social research, as discussed here.

Secondly, telecommunications service providers themselves only extremely rarely process location data for scientific research purposes. Empirical scientific research is conducted almost exclusively by public and private or private-sector research institutions. If and to the extent that the underlying research objectives require location data from mobile devices to be provided in a personalised form, the legal provisions of Art. 6b(1)(e) make it impossible to achieve them.

Thirdly, Art. 6b(2) applies without prejudice to Art. 6(3), i.e. their respective legal provisions are to be applied in parallel. The precedence of the legal provisions of Art. 6b(2) results from its nature as *lex specialis*. Nevertheless, the parallel applicability of the two different provisions leads to legal uncertainty for the users of the law, which can be avoided by deleting Art. 6b(2) without replacement.

Petition on Article 6b(2)

The ADM recommends deleting Art. 6b(2) without replacement, since the above petition regarding Art. 6b(1)(e) cannot be realised for formal legal reasons without deleting Art. 6b(2) or at least modifying it accordingly.

In the interest of scientific survey research, the ADM would welcome these two petitions being taken into account in the further course of the European legislative procedure. The ADM will be happy to respond to any queries or requests for further information, also by telephone or video conference.

Berlin, 31 May 2021

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 due 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 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. A prominent example of a European-wide survey affected by this is the “Flash Eurobarometer” commissioned 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.