

EFAMRO and ESOMAR Position Paper

A Response to the European Data Protection Board's Guidelines 2/2023 on Technical Scope of Art. 5(3) of ePrivacy Directive

(Adopted on 14 November 2023)

This paper is submitted on behalf of:

EFAMRO the European Federation of Associations of Market Research Organisations. Founded in 1992, EFAMRO represents the interests of market, opinion and social research in Europe. Its members are national trade associations for research businesses in across Europe.¹

ESOMAR the global voice of the data, research, and insights community since 1947, gathers more than 8,000 individual and corporate members in over 130 countries. ESOMAR promotes professional and ethical standards and the value of market, opinion and social research in decision making.²

EFAMRO and ESOMAR represent the research and insights sector, accounting for a reported annual turnover of €20.87 billion in Europe.³

1. About Market, Opinion and Social Research

- 1.1. Market research is comprised of all forms of market, opinion, and social research (“Market Research”).
- 1.2. Market Research is the systematic gathering and interpretation of information about individuals or organisations using the statistical and analytical methods and techniques of the applied social, behavioural and data sciences to gain insight or support decision making.
- 1.3. Market Research stands at the heart of well-informed commercial, social and political decisions. Its purpose is to deliver information and insights about people’s behaviour, needs and attitudes to inform decision making by providers of goods and services, governments, individuals, and society at large. Insight into what makes a product, business initiative, consumer or government policy strategy is often the hidden – yet defining – factor between success and failure. It is our sector that provides the deeper intelligence needed for our world today by representing citizens’ authentic voices, from all levels of society, in an unbiased and representative way by applying the tenets of statistical and scientific methods.
- 1.4. Market Research associations apply a comprehensive framework for self-regulation to ensure that researchers meet their ethical, professional, and legal responsibilities to the individuals whose data they use in research and to the clients and organisations which

¹ EFAMRO, <https://efamro.eu/>

² ESOMAR <https://esomar.org/>

³ ESOMAR Global Market Research Report, which includes contributions from national associations including EFAMRO members: <https://esomar.org/global-market-research-report>

commission research. Members subscribe to self-regulation schemes that protect respondents' and participants' rights.

2. Purpose of our Response

- 2.1. Our associations are responding to the European Data Protection Board's (EDPB's) proposed Guidelines – 02/2023 on Technical Scope of Art.5(3) of ePrivacy Directive.
- 2.2. Our associations take note of the guidance. We do however have some concerns about the application of the recommendations to commercial activities; particularly omitting the application on Article 5(3) to certain market research activities (which qualify as statistical or scientific). The aim of this paper is to highlight the occasions where Article 89 of the GDPR, concerning scientific and statistical research takes precedence over Article 5(3) of the ePrivacy Directive.

3. Article 89 applies to all scientific & statistical research

- 3.1. Article 89 of the GDPR recognizes that *where personal data are processed for scientific or historical research purposes or statistical purposes, Union or Member State law may provide for derogations, which thus include Market Research.*
- 3.2. To determine the applicability of Article 89 of the GDPR, projects must meet all the following criteria to be defined as a scientific research or statistical purpose, namely:
 - The objective of the processing activity is to derive new knowledge and insights that enable decision-making, or increase knowledge for the general public;
 - The objective of the processing activity itself is not designed to directly influence or impact individual data subjects;
 - The methodologies and techniques used for the processing activity are scientifically sound and appropriate to the research problem;
 - The results of the processing activity itself, whilst they may be used to design and analyze segmentations, are not to be used for individual targeting or profiling;
 - The reporting level of the processing activity is intended to be sufficiently aggregated to provide suitable safeguards and reasonably prevent the identification of an individual data subject or where this is not possible measures are taken to minimize the risks to the data subject;
 - The results of the processing activity may only be published and shared in an aggregated or anonymized form, except in circumstances where the individual consents to the release of personal data in the context of illustrating research results, quality control purposes, or for the data subjects' own interests.

- 3.3. In summary, Market Research encompasses the systematic pursuit of knowledge. It involves the recognition and formulation of a problem, the methodological collection of data through observation and experiment and the formulation and testing of hypothesis, through observational and statistical methodologies.
- 3.4. Market Research is concerned with statistical/social science analysis and the delivery of insights. **Market Research is not interested in the identifiable individual** since its objective is to support decision-making without directly influencing or impacting data subjects participating in research or whose data is being used for research purposes. Researchers have no interest in the identity of individual data subjects except as representatives of a larger group. The identities of those whose personal data are collected and processed are confidential and are rigorously protected.

4. The applicability of Article 5(3) ePD

- 4.1. The objective of Article 5(3) ePD is to protect the private sphere of the users, as described in Recital 24: 'Terminal equipment of users of electronic communications networks and any information stored on such equipment are part of the private sphere of the user's requiring protection under the European Convention for the Protection of Human and Fundamental Freedoms'.
- 4.2. The guidelines clarify what is covered by the phrase 'to store information or to gain access to information stored in the terminal equipment of a subscriber or user', in an effort to make clear the ambiguities embedded in the scope and application of Article 5(3) ePD.
- 4.3. At large, the Market Research profession is already compliant and has adopted the guidelines established in Article 5(3) ePD. However, where market research is conducting scientific or statistical analysis or meeting the criteria of scientific and statistical research methods and practices, Article 89 of the GDPR, Recital 159, and Recital 162 take precedence above the requirements established in Article 5(3)ePD. This is because the exemptions established in Article 89 and the relevant Recitals reduce burdens for conducting effective research and fulfilling the EU mandate to create a single digital market.
- 4.4. The protections of data subjects' fundamental rights are upheld within the requirements of Article 89 of the GDPR. Article 89 sets out the safeguards that controllers must implement in order to further process personal data for research. Controllers that process personal data for research purposes must implement "appropriate safeguards" (Article 89(1)). Additionally, controllers must put in place "technical and organizational measures" to ensure that they process only the personal data necessary for the research purposes, in accordance with the principle of data minimization outlined in Article 5(c). When processing personal data for research purposes, Recital 33 states that controllers should act "in keeping with recognized ethical standards for scientific research."
- 4.5. In line with Recital 162, which requires the appropriate measures to safeguard the rights and freedoms of data subjects and to ensure statistical confidentiality, scientific research activities must ensure that the reporting level is sufficiently aggregated to reasonably prevent the identification of an individual or where this is not possible, that measures are taken to minimize the risks to the data subject to ensure that there is no direct impact on the individual. This provision applies exclusively to Market Research operating within statistical

or scientific research. These measures significantly reduce and mitigate privacy breaches and risks to the data subject, and are prescribed under the GDPR and embedded in Sector Codes.

- 4.6. The ethical standards of research are supplemented by a number of international process standards with *ISO 20252:2019 Market, opinion and social research, including insights and data analytics — Vocabulary and service requirements* being the primary standard⁴.
- 4.7. The ICC/ESOMAR Code and national Codes establishes and safeguards an explicit separation between activities conducted for research purposes from those conducted from marketing as an essential component of safeguarding public trust and confidence in research activities.
- 4.8. The Codes of Conduct further benefit from enforcement mechanisms enabling any member of the public to submit a complaint against any Code subscriber that contravenes the principles and requirements of the ICC/ESOMAR Code or of national codes. This mechanism is accessible on websites like those of EFAMRO and ESOMAR and is free of charge to any member of the public that wishes to avail themselves of it.

5. Recommendations

- 5.1 We recommend updating the adopted guidelines to include the relevant exemptions established in Article 89 of the GDPR. This will help businesses and entities alike clarify specifically where the provisions established in Article 89 of the GDPR for the purposes of scientific or statical research take precedence, without undermining or significantly deviating from the requirements of Article 5(3) ePD.

6. Next Steps

- 6.1 EFAMRO and ESOMAR would welcome the opportunity to discuss further the definition of Market Research and why it should be included within the scope of Scientific Research.

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⁴ <https://www.iso.org/standard/73671.html>