

## Response from The Market Research Society (MRS)

### Ministry of Justice's Call for Evidence on European Commission's data protection proposals

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#### Preamble

- With members in more than 60 countries, MRS is the world's largest association serving all those with professional equity in provision or use of market, social and opinion research, and in business intelligence, market analysis, customer insight and consultancy.
- MRS has a diverse membership of individuals at all levels of experience and seniority within agencies, consultancies, support services, client-side organisations, the public sector and the academic community.
- It also serves MRS Company Partners – agencies, suppliers of support services, buyers and end-users – of all types and scale who are committed throughout their organisations to supporting the core MRS values of professionalism, research excellence and business effectiveness.
- In consultation with its individual members and Company Partners, MRS supports best practice by setting and enforcing industry standards. The commitment to uphold the MRS *Code of Conduct* is supported by the Codeline service and a wide range of specialist guidelines.
- MRS contributes significantly to the enhancement of skills and knowledge by offering various qualifications and membership grades, as well as training and professional development resources.
- MRS enables its members and Company Partners to be very well-informed through the provision of a wide range of publications, information services and conferences.

- MRS offers many opportunities for meeting, communicating and networking across sectors and disciplines, as well as within specialisms.
- As 'the voice of market research', MRS defends and promotes research in its advocacy and representational efforts.
- Through its media relations and public affairs activities, MRS aims to create the widest possible understanding of the process and value of market, social and opinion research, and to achieve the most favourable climate of opinion and legislative environment for research.

## **Introduction**

MRS welcomes the possibility offered by the Ministry of Justice to respond to its call for evidence on the European Commission's data protection proposals. MRS confirms that the contents of this paper can be attributed to MRS.

## **Response to Call for Evidence**

### **Market, Social and Opinion Research**

Research in itself does not seek to change or influence opinions or behaviour. Unlike direct marketing, advertising or other commercial communications, it does not seek to promote the aims or ideals of those who conduct or commission it. While **research** is used by marketers to test their products or messages, it **is not a commercial communication**.

Market, social and opinion research plays a key role in helping businesses and other constituencies better understand consumers, customers and citizens in developing goods and services, and is essential for economic efficiency, innovation and progress. Social and opinion research is widely used by public bodies to understand citizens' preferences, measure key performance indicators and used for improving educational, healthcare and police services via government studies.

The fundamental principles of research, embodied in the MRS Code of Conduct are:

- Research must be conducted with the voluntary participation of respondents, based on the principle of informed consent.
- Respondents must not be harmed or disadvantaged as a result of participating in a research project; and
- Personal data collected for research purposes must not be used for other purposes.

These principles mirror the legislative requirements introduced by the Data Protection Directive.

### **Regulating the business of research**

The latest MRS annual survey <sup>1</sup>of the UK market research industry showed that total market research industry revenue during the 12 months to December 2010 reached an estimated total of £2.025bn, during which an estimated 15 million research interviews were undertaken. After the US, the UK is the second largest market research sector in the world<sup>2</sup>.

Research in the UK has been regulated by MRS since 1954, when the first MRS Code of Conduct was published for MRS members. Today the MRS Code, last revised and reissued in April 2010, is binding on over 6,000 individual MRS members and over 400 MRS Company Partners.

The MRS Code of Conduct is supported by disciplinary regulations for MRS members and a complaints procedure for MRS Company Partners. Typically MRS receives between 60 and 100 complaints each year.

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<sup>1</sup> The Market Research Society , Survey of the UK Market Research Industry 2010

<sup>2</sup> ESOMAR Global Market Research Report 2011

Of these, about 15 to 25 complaints require some form of investigation which may result in disciplinary action.

MRS also responds to over 500 queries a year via the MRS Codeline advisory service. Codeline is a free and confidential query service on the MRS *Code of Conduct*, associated guidelines and related legislation. Typically 25% of queries directly relate to the Data Protection Act 1998.

MRS has worked extensively with the Information Commissioner's Office since the introduction of the Data Protection Act 1998, to provide relevant guidance on the implications of the Act on research activities.

All the resulting documents were given a supportive foreword (originally from Elizabeth France and then from Richard Thomas -we have not updated the guidance since Christopher Graham took office). The following links show the breadth of guidance which we have agreed with ICO over the years:

<http://www.mrs.org.uk/standards/downloads/revised/legal/The%20Data%20Protection%20Act%201998%20and%20Market%20Research.pdf>

<http://www.mrs.org.uk/standards/downloads/revised/legal/processes2002.pdf>

[http://www.mrs.org.uk/standards/downloads/revised/legal/data\\_protection\\_social.pdf](http://www.mrs.org.uk/standards/downloads/revised/legal/data_protection_social.pdf)

Other MRS data protection guidelines can be found here:

<http://www.mrs.org.uk/standards/dp.htm>

In this context MRS has been able to provide a large degree of legal certainty for the research sector about the application of the Act to their business. Whilst MRS recognises the need for some updating of the Act to reflect modern technology, the certainty of the current framework should not be overlooked.

MRS has made a significant investment in time and resources since the introduction of the Act to ensure an understanding and appreciation by the research sector of the impact of data protection. In addition to providing detailed guidance on the Act, MRS also provides training courses, standards and legal briefings, and members' evenings. This year MRS is conducting a number of regional events on the theme of data protection and data security. The low level of complaints about research in terms of those received by MRS but also those received by the Information Commissioner's Office (which has never had to take action against research) reflects the high level of understanding and adherence to the Act by the research sector.

Having a clear understanding of the data protection act allows businesses to make decisions about data collection and processing with confidence in their legal responsibilities. This decision also may require investing resources in data processing capacity and technology. Significant changes to the Directive, and hence the Act, would inevitably lead to a long period of uncertainty and transition for the research sector and others involved in the marketing communications sector. This could have a negative impact on investment in research technology, which is essential to ensuring that the UK research sector continues to be strong and would be detrimental to the overall knowledge economy which is an essential and growing part of the UK economy in the 21<sup>st</sup> Century.

### **Key areas of concern in the current proposals**

#### ***Consent***

The first principle of the MRS Code of Conduct is:

- Researchers shall ensure that participation in their activities is based on voluntary informed consent.

Therefore researchers rely heavily on consent as the basis for fair and lawful processing. Much of that consent is very clear- where a researcher invites a data

subject to participate and they agree to do so or where a direct question is asked and an answer is spontaneously and voluntarily given.

In some cases researchers may rely on the second data principle to process data to invite data subjects to participate in a research project. For example, in the case of customer satisfaction research, an individual whose data has been collected in order to obtain a product or service may be invited to give their views on the quality of service they have received. It has been accepted by the Information Commissioner's office that processing data in this way (i.e. inviting them to participate in research) is not incompatible with the purposes for which the data was collected (provision of a product or service).

A number of major social research projects also rely on the ability to contact individuals whose data may have originally been collected for non-research purposes. Examples of this include:

- Victims of Crime surveys, conducted for the Home Office or for local police forces; and
- The GP-Patient Survey for the Department of Health, which interviews patients who have visited their GP in the preceding six months.

The current proposal defines the data subject's consent as:

*any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed;*

MRS believes that this represents an evolution of the definition rather than a radical change. We would note however the particular importance of the phrase "by a statement or by a clear affirmative action". In the past, in regulators in member states Member States such as Germany have defined explicit consent as written consent. This would seriously undermine the use of current and future technologies for data collection, which are widely used for research purposes.

In research a respondent to a research project provides the answers to the questions they are asked, having been informed of the identity of the researcher, the purpose of the interview, and of their right to withdraw at any time. There is not always a specific question to obtain permission for the processing of data, but the freely given, specific, and informed consent of the data subject is explicit nonetheless from the data subject's willingness to answer questions posed by the researcher. We believe it is essential that any requirement for explicit consent retain the possibility of it being signified by statement or action by the data subject.

### ***Protection of personal data of children***

Although neither the 1995 Directive nor the 1998 Act explicitly contain provisions for the protection of children, MRS has always recognised that children and young people are vulnerable members of society and the MRS Code of Conduct contains a number of specific rules to offer children additional protection. For example, the consent of a parent or a responsible adult acting in the place of a parent is required before a research interview can be conducted with a person under the age of 16. Separate MRS children's guidelines also prohibit research with minors on products that are illegal for the age group, and set out additional criteria which should be followed to provide maximum protection for respondents that are under 16.

It should also be noted that there are circumstances where the asking of parental consent may harm or adversely affect children, for example, research with users of helpline services such as ChildLine. The MRS Code of Conduct makes provisions for this by the waiving of parental consent requirements in limited circumstance subject to ethical review and approval of the MRS Market Research Standards Board.

MRS Guidelines for Research with Children and Young People are available here:

<http://www.mrs.org.uk/standards/children.htm>

MRS, by having specific rules governing research with children, recognises that children and young people are valuable members of society and have the right to participate in society, including participating research projects relevant to them.

The current proposal defines a child as person under the age of 18, in line with the UN Convention on the Rights of the Child, but the only substantive provision relating the children is in Article 8:

*For the purposes of this Regulation, in relation to the offering of information society services directly to a child, the processing of personal data of a child below the age of 13 years shall only be lawful if and to the extent that consent is given or authorised by the child's parent or custodian. The controller shall make reasonable efforts to obtain verifiable consent, taking into consideration available technology.*

Persons under 18 may leave school, marry, join the Armed Forces or attend university and are autonomous persons. The UN Convention on the Rights of the Child also guarantees right to express views to participate in society:

*Article 12: States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*

*Article 13: The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.*

MRS recommends that if additional restrictions were to be introduced that these mirror the self-regulatory rules already in place in Europe, the majority of which require consent of a parent or responsible adult acting in the place of a parent with **under 14s**. Consideration should also be given to situations where parents or guardians are not engaged in the children's lives and where obtaining consent may cause harm or detriment to the interests of the child. As explained above



the MRS Code of Conduct requires such consent before interviewing persons under the age of 16.

It is the view of MRS that if society is to properly prepare children and young people for the transition from childhood to adulthood that the transition should start at 16 at the latest, not 18.

### **Profiling**

The proposed regulation in Article 20 defines profiling as:

*a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.*

MRS welcomes that this definition is limited to measure which produce “legal effects”. A broader definition (such as that used by the Council of Europe in its Recommendation 2010(13))<sup>3</sup> would encompass many statistical processes (such as sampling) used by research. This could have a huge and detrimental impact on the quality and representativeness of research samples and research results. For research to be robust for evidence based policy making, an important facet of European policy development, plus for broader commercial uses such as business development within Europe, it is essential that researchers are able to classify potential respondents to ensure that representative samples can be drawn . The introduction of a very broad definition could have unforeseen impacts on significant research projects such as Eurobarometer and the Labour Force survey, which are widely used within for policy development within Europe.

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<sup>3</sup> [Recommendation CM/Rec\(2010\)13](#) of the Committee of Ministers to member states on the protection of individuals with regard to automatic processing of personal data in the context of profiling

### ***Business burdens created by the proposals***

MRS notes that the Commission estimates that businesses in the EU will save up to €2.3 billion by their proposals. However, these benefits would appear to be outweighed by a number of additional obligations and requirements being proposed including the appointment of data protection officers (DPO).

Given the detailed responsibilities of the DPO set out in Article 38 of the proposed regulation<sup>4</sup>, it would not be possible to pool the responsibility of a group of companies under a single officer, meaning that multiple appointments would have to be made. Further the proposal contains additional requirements to conduct privacy impact assessments for all material data processing events and products. While it is difficult to estimate the exact costs of these requirements, for a large research organisation they could easily add over £5 million annually to the cost of doing business. The additional process steps and delays that would take a toll on business performance are not included in this figure.

While the independent DPO model is one method of ensuring accountability, as an alternative consideration should also be given the concept of a Chief Privacy Officer who is an integral part of the management of a business and would have overarching responsibility for all data protection and privacy matters in an organisation or group of organisations.

### **Historical, Scientific and Statistical Research**

The Commission's proposals contain a number of provisions relating to historical statistical and scientific research. These build on existing provisions in the 1995 Directive and the 1998 Act and we support their retention in any final text. These include:

- Personal data may be stored for longer periods insofar as the data will be processed solely for historical, statistical or scientific research purposes (Article 5e)

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<sup>4</sup> [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf)

- Processing of personal data which is necessary for the purposes of historical, statistical or scientific research shall be lawful (Article 6.2)
- The prohibition on the processing of special categories of personal data shall not apply where processing is necessary for historical, statistical or scientific research purposes (Article 9.2i)
- Data held for historical, statistical or scientific research purposes is exempt from the right to be forgotten (Article 17.3c)

### **Conclusion**

As noted earlier, data protection is a key facet of the business of market, social and opinion research. MRS supports the development of a coherent, harmonised and proportionate framework for this area. We wish to remain closely involved in the process and would welcome further opportunities to comment on the proposed legislation, during its passage through the Parliament and Council of Ministers.

For further information or clarification on this submission please contact Barry Ryan ([barry.ryan@mrs.org.uk](mailto:barry.ryan@mrs.org.uk)) at The Market Research Society (MRS)

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