



## **MRS Policy Unit**

### **Response to DCMS Call for Views on National Derogations in the General Data Protection Regulation**

**10 May 2017**

1. This paper sets out the views of the Market Research Society (MRS) on the derogations (exemptions) within the General Data Protection Regulation (GDPR) and the areas that the UK should exercise its discretion over the application of certain provisions.

#### **About MRS and the research sector**

2. MRS is the world's largest research association and the regulator for the UK market. MRS supports best practice by setting and enforcing industry standards. All individual practitioners and organisations accredited by the MRS must adhere to the Code of Conduct of which data protection and privacy requirements are the bedrock.
3. The UK is the second largest research market in the world (second to the US) and the UK research sector is recognised as leading the way in the development of creative and innovative research approaches. In 2015, MRS with PWC undertook an updated assessment of the size and impact of the UK research and evidence market, *The Business of Evidence 2016*. One of the main findings from this report is the size of the UK 'business of evidence' market. The UK is the world's largest research market per capita supporting some 73,000 jobs and generating £4.8 billion in annual gross value added (GVA). There has been a 350% growth in data analytics since 2012 and a simultaneous increase in qualitative research to interrogate the findings. Continued success of the sector is dependent on the trust the public has in our ability to collect, use and analyse the most sensitive personal data with care and respect.

## **Overview**

4. MRS considers that it is critical that the research exemption set out in Article 89 of the GDPR is implemented in order to facilitate a workable legal framework for all type of research. This derogation will be vital in ensuring that the UK research sector can compete on a level playing field and will:
  - facilitate a workable approach for all types of publically and privately funded research;
  - ensure that British businesses and public sector organisations can continue to research customers and citizens to ensure that the UK understands the needs of its market and develops products, services and policies which ensure the UK remains competitive;
  - ensure that the UK remains as the second largest research market in the world (second only to the US) and continues to lead the way in the development of creative and innovative research approaches; and
  - allow for data sharing across research platforms such as in the Government's digital agenda and the continued use of digital research methodologies.

## **Theme 5 – Archiving and Research**

### **Importance of implementing the Article 89 research exemption**

5. Implementation by the UK of the national derogation/exemption for personal data processed for research purposes is critical. This will allow continuation of robust research whilst protecting the rights of research participants and maintaining public confidence in research.
6. In a society increasingly driven by data, the research sector ensures access to quality, relevant, reliable and aggregated data sets, leading to better decision-making, targeted and cost-effective public policy and economic development by informing and supporting more effective evidence-based decision making in public and private organisations leading to growth and jobs. Commercial research providers are essential to the collection of data for public functions, as only these businesses have the necessary capacity to undertake robust large scale data collection such as the Eurobarometer. Research also has a role to play in the context of the new digital economy driving the introduction of innovative and quality services that enable clients and agencies alike to make the most of market, social, and opinion research.



7. Timely introduction of national legislation to introduce the Article 89 research exemption will facilitate a workable approach for all types of publically and privately funded research and ensure legal certainty for the sector. It will facilitate the wider use of administrative data and data sharing including improved use of administrative data sources, increased data sharing and wider access to research data which promotes efficiency and effectiveness of use and supports the government's wider Open Data objectives. The research specific data protection regime will also benefit the census and data sharing programme which aims to remove barriers to sharing or linking different datasets in order to help Government to design and implement evidence based policy, for example to tackle social mobility, assist economic growth and prevent crime.
8. In line with the ethical standards set out in national and international codes of conduct such as the MRS Code of Conduct, the majority of market, opinion and social research in the UK and other EU Member States is currently conducted based on the informed consent of the research participant. Whilst it is expected that this will continue there are certain limited circumstances where this will not be feasible in conducting otherwise difficult research such as where working with large data sets and consents cannot be easily obtained. Additionally under the GDPR researchers carrying out public sector research will not be able to rely on legitimate interests as a ground for processing data. In these cases researchers may need to undertake processing using the special research regime in line with technical and security measures and ethical safeguards.
9. It is anticipated that implementation of the research derogation will be applied consistently across the EU especially with regards to the general conditions and safeguards that are put in place for processing. MRS supports this position which is currently being sought via representations being made within Europe by associations representing the EU wide research sector namely EFAMRO (European Research Federations) and ESOMAR. In this light it is important to note that a harmonised and consistent framework for research across EU will also be valuable in enabling the UK to demonstrate adequacy after formal withdrawal of the UK from the EU.

## GDPR research framework

10. The Article 89 GDPR research regime operates at both an EU and a national level. It applies to processing for archiving in the public interest, scientific, historical and statistical research purposes. These comments focus on the specific provisions for scientific and statistical research purposes:

- *Scientific research purposes* – the GDPR recitals explicitly note that this is to be interpreted in a broad manner to “include” privately funded research.<sup>1</sup> The definition is not exhaustive but indicative of types of research using terms “such as” and “in particular” which do not preclude the inclusion of commercial research. In light of this an ordinary meaning of research purposes i.e. where information is systematically collected to assess opinions, attitudes and behaviours of the population under study is a useful reference point.
- *Statistical research purposes* - mean “any operation of collection and processing of personal data necessary for statistical surveys or for the production of statistical results.” This will cover research that results in aggregate data that is not used to support measures or decisions regarding an individual. The outputs of statistical research can also be further used for other purposes including scientific research.<sup>2</sup>

### *EU-wide research regime*

11. Across the EU the Article 89 research provision expressly allows:

- broad consents for scientific research where consent cannot be secured for all specific purposes at the outset of data collection;<sup>3</sup>
- further use of personal data for scientific or statistical research as a secondary compatible purpose;<sup>4</sup>

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<sup>1</sup> Recital 159

<sup>2</sup> Recital 162

<sup>3</sup> Recital 33

<sup>4</sup> Article 5 91)(b); Recital 50 sets out the compatibility test.

- the right to data subjects to object to processing of personal data for research purposes (unless necessary in public interest);<sup>5</sup>
- restriction of the right of a data subject to exercise their “right to erasure” if it is if it is likely to significant impair processing for scientific research purposes;<sup>6</sup>
- relaxation of the storage limitation principle granting the data controller the ability to store personal data for longer periods;<sup>7</sup>
- isolated transfers of personal data to third countries taking into account legitimate expectations of society for an increase in knowledge.<sup>8</sup>

12. Additionally fulfilling all the information obligations will not apply to processing for scientific research purposes if this would involve a disproportionate effort. Consideration of this takes into account the number of data subjects and the age of the data and appropriate safeguards must be adopted.<sup>9</sup>

13. Use of the Article 89 research regime is subject to certain conditions:

- Appropriate safeguards to protect the right and freedoms of the data subject;
- Adequate technical and security measures entrenching the principle of data minimisation and using pseudonymised data as default;<sup>10</sup>
- Compliance with recognised ethical safeguards.

14. Expected safeguards required for the research derogation are largely in place. Commercial research already has a strong ethical framework that is responsive to key external changes and can keep pace with technological developments whilst placing research participant rights at the core of research. The MRS Code of Conduct and self-regulatory scheme has been in existence for over 60 years evolving to ensure that the standards are fit for purpose in maintaining professional

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<sup>5</sup> Article 21(6)

<sup>6</sup> Article 17(3); Recital 65

<sup>7</sup> Article 5(1) (e)

<sup>8</sup> Recital 113

<sup>9</sup> Article 14(5)9b); Recital 62

<sup>10</sup> Pseudonymisation is a security measure/technique for using personal data with safeguards.



standards, enshrine the rights and well-being of research participants and encourage best practices that go further than legal compliance.

#### *National derogations for research*

15. The research regime also allows Member States to make specific provisions on:

- *ability to process sensitive categories of data* - National legislation can confirm that scientific research is a legal processing grounds for use of this type of personal data (Article 9). Additionally provision can be made to allow the use of criminal convictions data in research (Art. 10) as processing of criminal convictions data is allowed if authorised by Member State law which provides safeguards.
- *restrictions on five individual rights* – Rights to access data; to rectify inaccurate data; to restrict processing; to object to processing; and the right of a child to be forgotten can be restricted for research purposes (if necessary for the processing). Each Member State can choose which individual rights will be limited in their national law. States can independently decide to limit all, none or some of these rights.
- *processing data for statistical purposes* - Member State and/or union law will determine statistical content, control of access, specifications for processing and measures to safeguard individual rights and freedoms and to ensure statistical confidentiality.<sup>11</sup>

#### *Recommendations for UK derogations*

16. Against this background MRS considers that the UK Government should exercise its flexibility in this area by setting out clear requirements for Article 89 that make specific provision on processing sensitive data, establish restrictions on the five named individual rights and detail the specific content on processing data for statistical purposes. This will provide important benefits for researchers with key safeguards for individuals.

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<sup>11</sup> Recital 162



17. Additionally the implementing legislation must also:-

- *Provide clarity that commercial research is within the research regime* - The GDPR recitals provide guidance and indicate a broad interpretation that should bring commercial research within the regime. The GDPR definition is not exhaustive but indicative of types of research using terms “such as” and “in particular” which does not preclude inclusion of market, opinion and social research.
- *Explicitly include industry codes of conduct within GDPR acceptable and recognised ethical safeguards* - Researchers currently abide by national and/or international research codes such as the MRS Code of Conduct. Ethical safeguards under the GDPR must extend to established self-regulatory codes of conduct with in-built disciplinary mechanisms and academic ethics reviews.

### **Theme 7 Sensitive Personal Data and Exceptions**

18. Provision should be made for scientific research to form a basis for processing sensitive personal data as set out in Articles 9 and 10 of the GDPR. This will allow the research exemption to be used for both standard personal data and sensitive personal data.

### **Theme 10 - Processing of Children’s Personal Data by Online Services**

19. Article 8 sets out the conditions applicable to child's consent in relation to information society services for online services.

20. If the opportunity is taken to implement the derogation regarding the age limit for children it is important that a definition of “information society services” is included so that other sector such as research (which currently sets the age of a child at under 16) are not inadvertently impacted.

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