



**EFAMRO / ESOMAR  
Position Statement on the  
Proposal for an ePrivacy  
Regulation**

---

April 2017

00.

## Table of contents

<b>1. About EFAMRO and ESOMAR</b>	<b>P 3</b>
<b>2. Key recommendations</b>	<b>P 3</b>
<b>3. Overview</b>	<b>P 4</b>
<b>4. Audience measurement research</b>	<b>P 5</b>
<b>5. Telephone and online research</b>	<b>P 7</b>
<b>6. GDPR framework for research purposes</b>	<b>P10</b>
<b>7. List of proposed amendments</b>	<b>P11</b>
a. Recitals	P11
b. Articles	P13

01.

## About EFAMRO and ESOMAR

This position statement is submitted on behalf of EFAMRO, the European Research Federation, and ESOMAR, the World Association for Data, Research and Insights. In Europe, we represent the market, opinion and social research and data analytics sectors, accounting for an annual turnover of €15.51 billion<sup>1</sup>.

1

ESOMAR Global Market Research 2016

In particular our sector produces research outcomes that guide decisions of public authorities (e.g. the Eurobarometer), the non-profit sector including charities (e.g. political opinion polling), and business (e.g. satisfaction surveys, product improvement research). In a society increasingly driven by data, our profession ensures the application of appropriate methodologies, rigour and provenance controls thus safeguarding access to quality, relevant, reliable, and aggregated data sets. These data sets lead to better decision making, inform targeted and cost-effective public policy, and support economic development - leading to growth and jobs.

02.

## Key Recommendations

We support the proposal for an ePrivacy Regulation to replace the ePrivacy Directive as this will help to create a level playing field in a true European Digital Single Market whilst increasing the legal certainty for organisations operating in different EU member states. However in order to ensure greater consistency and certainty the following changes should be made to the proposal:

- ▶ Amendment of Article 8 and Recital 21 to enable research organisations that comply with Article 89 of the General Data Protection Regulation (GDPR) to continue conducting independent audience measurement research activities for the benefit of the digital (media) economy;
- ▶ Creation of an exemption for analytics cookies used for research purposes that pose no consequential threat to the privacy of users; and
- ▶ Reduction of opportunities for individual jurisdictions to create divergent national requirements such as those foreseen in Article 16.

03.

## Overview

The current proposal for the ePrivacy Regulation will have a significant impact on the ability of the research sector to conduct a wide variety of activities commissioned by our key stakeholders particularly for audience measurement research and social and opinion research conducted using electronic communication methods. These research activities range from online audience measurement to opinion and social research conducted by the telephone. It is important that the legislative process does not unintentionally hinder or damage the ability of the sector to conduct statistical and scientific research in Europe.

We support the decision to propose transitioning the ePrivacy Directive to a Regulation and encourage legislators to secure maximal alignment of requirements between the GDPR, and the ePrivacy Regulation. We further welcome efforts to establish a level playing field across the whole of the European Digital Single Market by preventing the multiplication of opportunities for jurisdictions to create divergent requirements through derogations and other legislative mechanisms.

Nonetheless, the proposals currently contained in the draft ePrivacy Regulation raise a number of concerns for our sector, particularly:

■ The distinction made between first-party and third-party audience measurement as defined in Article 8: and

■ New measures proposed to curtail unsolicited telephone contacts for marketing purposes as defined in Article 16 - which may be interpreted so broadly as to prevent legitimate telephone-based research activities conducted by our members.

04.

## Audience measurement research

Article 8 and Recital 21 of the proposed ePrivacy Regulation acknowledge the importance of measuring web traffic to websites, but do not enable the ecosystem required to deliver true independent online audience measurement.

### High value placed on insights from independent audience measurement

Website owners and content providers require precise and independently verified audience measurement in order to be able to both measure the relevance and effectiveness of a variety of content and improve the web experience of users.

In today's operating environment, audience measurement is conducted for website owners and content providers through both first-party and first-party cookies and other similar functioning technologies. Many website owners may lack the technical capacity and means to establish an effective first-party audience measurement and content providers only trust independently verified sources of measurement.

With a market, worth over EUR 115 billion in Europe alone<sup>2</sup>, accuracy is a key requirement in combating fraud and assigning a realistic valuation of web traffic and media investment. Independent audience measurement is a critical part in the functioning of the internet and is crucial to facilitating a successful Digital Single Market.

As the digital economy grows, so does the transition from traditional to digital media. One example of this is the move by national TV stations to start broadcasting or simulcasting on the internet. In many countries, audience measurement figures are a critical element in

helping to guide government decisions around the frequency and licensing levy or amount of subsidy to be provided to a national broadcaster.

Stakeholders, including governments, website owners, content providers and media platforms use audience measurement research in order to establish independent, verifiable measures and barometers to evaluate audience shares, traffic flows, and establish (globally) trustworthy currencies for the purchase and selling of online advertising space. The number of independent actors - separate from leading and known American brands - that are able to institute and establish these measurements has steadily decreased, as this information has increasingly been concentrated with brands who are able to leverage their first-party advantage.

The proposed ePrivacy Regulation could, if amended appropriately, be an important lever to diminish the risk of data and economic monopolies, foster trust and confidence in the market, and maintain the separation between audience measurement research providers and other operators collecting for non-research purposes.

<sup>2</sup>

Group M This Year Next Year 2016 Report

Our sector's leading research organisations have traditionally provided the independent role of measuring and providing objective, accurate media measurements for use by media owners and content providers. These measurements are used to set the value of content placement on platforms ensuring that each stakeholder is awarded a fair remuneration. Effective measurement for them often cannot be achieved exclusively using first-party audience measurement techniques and often need third-party input to achieve actionable precision. The ability to provide audience measurement would therefore be concentrated in the hands of the few leading and known American brands such as Google and Facebook who can offer first-party solutions in a way that an independent research organisation simply cannot hope to provide.

Similarly, the market, opinion, and social research sector increasingly needs to embrace the use of new digital technologies and innovation to boost its ability to collect and use data as an integral part of its service provision – and meet the evolving needs of research users who inhabit an increasingly digital world.

## Audience measurement has clear scientific and statistical research purposes

**It is important to underline that audience measurement research is not an activity which precedes online behavioural advertising, it is a research activity interested in understanding and segmenting traffic flows in order to provide insight into the audiences being attracted to particular content using a series of research techniques to establish these measurements.**

To achieve effective and independent media measurements, researchers combine two essential data sources: the first is the detailed behavioural personal data provided by data subjects who have consented to participate in research media measurement panels.

The second is aggregated traffic calibration sourced from general census data provided by cookies or other similar functioning technologies that is collected passively and subsequently aggregated so as to present little or no privacy risk to the individuals measured. Using both of these data sets together increases the precision of research as the panel data will provide richer research insights into the audience segments visiting the service providers, whilst the traffic calibration data will provide valuable insights into the representativeness of the panel data that is being used to provide the measurements to the service user.

## GDPR derogation for scientific and statistical research purposes should be reflected in the ePrivacy Regulation

**The GDPR, acknowledges, as set out in Recitals 156 and 157 and Article 89, that scientific and statistical research may, at times, need to benefit from specific derogations in order to ensure that Europe achieves its objective of establishing a European Research Area. However the proposed Article 8 and Recital 21 are likely to lead to major disruptions to a vital statistical research activity.**

We therefore urge legislators to amend Recital 21 to explicitly enable audience measurement and other research resulting in aggregated statistics, conducted by statistical and scientific organisations, as defined by the GDPR<sup>3</sup>, and to extend the derogation foreseen in Article 8(d) to include independent scientific and statistical research providers<sup>4</sup> in order to safeguard independent audience measurement for the European Digital Single Market (please see below).

Indeed, already witnessed in the application of the ePrivacy Directive, strict requirements have at times prevented effective service provision across the European Digital Single Market. A number of Member States have already realised this and have taken steps to remove barriers for these use-cases, which have little or no impact and present low risks to an individual's privacy (as shown in the Netherlands)<sup>5</sup>, but this has not been consistently applied across all EU member states, thus creating imbalances and hindering the development of a common single digital market.

<sup>3</sup>

Recital 21 could be amended to read: "... Cookies can also be a legitimate and useful tool, for example, in measuring web traffic to a website. Such cookies may be placed by providers for scientific and statistical research purposes subject to appropriate safeguards as defined by Regulation 2016/679"

<sup>4</sup>

Article 8(d) could be amended to read: "... It is necessary for web audience measuring, if such measurement is carried out by the provider of the information society service requested by the end-user, or a provider conducting such measurement for scientific and statistical research

<sup>5</sup>

Article 11.7a(3b) of the Dutch Telecommunications Law

05.

## Telephone and online research

Telephone and online survey research account for more than half of the global research spend for conducting market, opinion and social research<sup>6</sup>. In order to ensure this research is statistically robust and representative, researchers use statistical and analytical methods and techniques of the social sciences.

Representative sampling is essential to improve and validate the accuracy of the surveys, and to achieve this, researchers often initiate telephone calls inviting individuals to participate in research using information such as telephone directories.

<sup>6</sup>

Accounting for 56% of annual research spend in 2015, ESOMAR Global Market Research 2016

Telephone research represents one of the most efficient and cost-effective ways of ensuring representative samples and is widely used by the public sector, a sector which accounts for 8% of annual global research spend<sup>7</sup>.

Additionally, telephone research is one of the best methods for researching otherwise hard-to-reach populations because of their physical or social locations such as rural or older participants and who are often a key target of social research.

7

ESOMAR Global Market Research 2016

## Research activities are distinguishable from direct marketing activities

**Research can be clearly distinguished from direct marketing activities. A 'research purpose' is where information is systematically collected to assess opinions, attitudes and behaviours of the population under study.**

It does not include data collection intended directly to create sales or to influence the opinions of participants. Nor does it include data collection as a means of information gathering for use on future sales or marketing activities (direct), for example, to generate potential sales leads/contact details (and related details on consumer usage and consumption patterns). In research activities direct action should not be taken in relation to named individuals or organisations.

However increasingly, researchers face mounting difficulties in assembling representative samples using the telephone because of public perception that researchers are engaged in marketing activities when they are not, the increasing use of call-blocking software which does not discriminate between unsolicited marketing and telephone research, and a decreasing willingness of citizens to participate in these activities. Such difficulties impact negatively on the quality and reliability of the results obtained, despite the fact that the telephone remains one of the optimal methods for conducting social and opinion research (e.g. Flash Barometer).

**These research activities indeed are strictly governed by national codes and by the ICC/ESOMAR International Code on Market, Social and Opinion Research and Data Analytics which guarantees:**

- ▶ The rights of respondents to volunteer or refuse to participate, which obliges researchers to disclose the nature of the survey being undertaken;
- ▶ That any data that the participant consents to share, will be kept strictly confidential and not used to impact the individual participant; and
- ▶ The existence of an independent complaints handling process to investigate any suspected breach of these guarantees.

## Explicit exclusion of research activities from direct marketing will lead to greater consistency and legal certainty

**We are concerned that the scope of Article 16, which provides for the right to object to direct marketing communications, and allows Member States to determine it should be opt-in or opt-out regime is too wide.**

The availability of options by individual Member States creates a risk of divergent interpretations which could lead to legitimate telephone and online research activities being adversely impacted. The current position under the ePrivacy Directive had already created legal uncertainty and inconsistency across the EU which could be exacerbated by the proposed ePrivacy Regulation.

Accordingly, to secure legal certainty across the Digital Single Market, we recommend and invite legislators to amend Recital 32 to confirm that research for scientific and statistical purposes is not to be in scope of Article 16 and the relevant recitals, thereby safeguarding the ability in Europe to conduct important telephone and online social and opinion research.

06.

## GDPR framework for research purposes

**In light of the implementation of the comprehensive data protection reforms under the GDPR it is important that the ePrivacy Regulation only addresses those matters not covered under the GDPR and that there is alignment of requirements in these legislative instruments.**

We consider that the ePrivacy Regulation should aim to address only those specific issues which are not already covered by the GDPR. The GDPR resulted from years of particularly intensive scrutiny and negotiation by all stakeholders. It provides an excellent basis for the continuation of a rights-based approach to data protection, whilst boosting operators' accountability and flexibility to approach issues of privacy and data protection on a risk-based analysis.

In order to ensure that there are no inconsistencies between the GDPR and the ePrivacy Regulation, we would urge that the processing grounds and the re-use grounds for research outlined in GDPR be referred to by the ePrivacy Regulation so as to enable introduction of consistent and harmonised obligations across Europe for processors regardless of the technologies they use to achieve the legally permitted purpose for processing.

GDPR requires that scientific and statistical research be conducted subject to appropriate technical and organisational measures and ethical safeguards. As both a sector and as a community, market, opinion and social research and data analytics has continuously demonstrated an ability to assess and carefully manage privacy risks resulting from our data collection and processing activities. As enshrined in national, and global codes of conduct and practice such as the ICC/ESOMAR Code on Market, Social and Opinion Research and Data Analytics, our sector has proactively put in place a robust self-regulatory framework to investigate suspected breaches of our fundamental promises by our members.

Furthermore, with specific reference to audience measurement, our sector has established a unique, public-facing information and education resource: [researchchoices.org](http://researchchoices.org). It clearly sets out what audience measurement is, and how it is conducted. It also provides a clear opt-out mechanism for respondents who do not wish to participate.

Under the GDPR, the vital role played by statistical and scientific research was accepted and enabled through a series of derogations which we encourage legislators to align within the ePrivacy Regulation for the benefit of the European Digital Single Market and our ability to conduct research. Therefore we hope that legislators will support our recommendations to ensure that the ePrivacy Regulation is fit-for-purpose for scientific and statistical research actors keen to support research and innovation across Europe.

7a.

## List of Proposed Amendments – Recitals

### (21):

Exceptions to the obligation to obtain consent to make use of the processing and storage capabilities of terminal equipment or to access information stored in terminal equipment should be limited to situations that involve no, or only very limited, intrusion of privacy. For instance, consent should not be requested for authorizing the technical storage or access which is strictly necessary and proportionate for the legitimate purpose of enabling the use of a specific service explicitly requested by the end-user. This may include the storing of cookies for the duration of a single established session on a website to keep track of the end-user's input when filling in online forms over several pages. Cookies can also be a legitimate and useful tool, for example, in measuring web traffic to a website. Information society providers that engage in configuration checking to provide the service in compliance with the end-user's settings and the mere logging of the fact that the end-user's device is unable to receive content requested by the end-user should not constitute access to such a device or use of the device processing capabilities.

### (21)NEW:

Exceptions to the obligation to obtain consent to make use of the processing and storage capabilities of terminal equipment or to access information stored in terminal equipment should be limited to situations that involve no, or only very limited, intrusion of privacy. For instance, consent should not be requested for authorizing the technical storage or access which is strictly necessary and proportionate for the legitimate purpose of enabling the use of a specific service explicitly requested by the end-user. This may include the storing of cookies for the duration of a single established session on a website to keep track of the end-user's input when filling in online forms over several pages. Cookies can also be a legitimate and useful tool, for example, in measuring web traffic to a website **and audience measurement.**

**Such cookies may be placed by providers for scientific and statistical research purposes subject to appropriate safeguards as defined by Regulation 2016/679.** Information society providers that engage in configuration checking to provide the service in compliance with the end-user's settings and the mere logging of the fact that the end-user's device is unable to receive content requested by the end-user should not constitute access to such a device or use of the device processing capabilities.

**(32):**

In this Regulation, direct marketing refers to any form of advertising by which a natural or legal person sends direct marketing communications directly to one or more identified or identifiable end-users using electronic communications services. In addition to the offering of products and services for commercial purposes, this should also include messages sent by political parties that contact natural persons via electronic communications services in order to promote their parties. The same should apply to messages sent by other non-profit organisations to support the purposes of the organisation.

**(32)NEW:**

In this Regulation, direct marketing refers to any form of advertising by which a natural or legal person sends direct marketing communications directly to one or more identified or identifiable end-users using electronic communications services. In addition to the offering of products and services for commercial purposes, this should also include messages sent by political parties that contact natural persons via electronic communications services in order to promote their parties. The same should apply to messages sent by other non-profit organisations to support the purposes of the organisation. **It shall not apply to communications for statistical and scientific research purposes aiming to inquire about voluntary participation in research subject to appropriate safeguards as defined by Regulation 2016/679.**

7b.

## List of Proposed Amendments – Articles

### 8(1)d:

if it is necessary for web audience measuring, provided that such measurement is carried out by the provider of the information society service requested by the end-user.

### 8(1)d NEW:

It is necessary for **audience measurement**, provided that such measurement is carried out by the provider of the information society service requested by the end-user, **or conducted on behalf of that provider for scientific or statistical research purposes.**



Founded in 1948, ESOMAR gathers nearly 5000 professionals and over 300 companies worldwide providing or commissioning research, including public and academic bodies. For further information on ESOMAR and its activities, contact Kim Smouter, Head of Public Affairs and Professional Standards.

Atlas Arena, Azië building - 5th floor,  
Hoogoorddreef 5, 1101 BA Amsterdam,  
The Netherlands

**Telephone**

+31 20 664 2141

**Fax**

+31 20 664 2922

[info@esomar.org](mailto:info@esomar.org)

<https://www.esomar.org>



Founded in 1992, EFAMRO represents the interests of market, social and opinion research in Europe. Its members are national trade associations for research businesses. For further information on EFAMRO and its activities, contact Michelle Goddard, Director of Policy and Communication.

Bastion Tower, level 20  
Place du Champ de Mars 5  
1050 Brussels, Belgium

**Telephone**

+32 2 550 3548

**Fax**

+32 2 550 3584

[info@efamro.eu](mailto:info@efamro.eu)

<http://www.efamro.com>