Present and future data flow legislation

This is an adaption of the paper presented by Dr. Robert Schweizer at the meeting of Presidents and Chairmen of National Market Research Associations during the E.S.O.M.A.R. Congress held in Wiesbaden in September 1985.

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In this paper I will be reporting on new developments in the field of data flow legislation.

Last year's meeting on 4 September 1984 in Rome marked the conclusion of two years' stocktaking for the E.S.O.M.A.R. Committee on Data Protection. Consequently it was possible in Rome to give complete information regarding the state of data protection legislation in all the countries concerned. A written survey of all the relevant legal provisions covering all the countries (cf. 'Working paper for the discussion of the present international situation in the field of data legislation') was provided. In addition, all the sources of dangers in the field of data protection legislation were already described in writing. These working papers which were submitted to you in Rome were intended to provide complete coverage.

Today these presentations only need to be updated.

1. Survey of the state of legislation

(As yet this is without special consideration of market and social research.) First of all you will be interested in the following survey:

Laws in force:
Austria
Canada
Denmark
France
Federal Republic of Germany
Iceland
Israel
Luxembourg
New Zealand
Norway
Sweden
United Kingdom
United States of America

Laws expected to enter into force in 1985/86/87:
Australia
Belgium
Finland
Greece
Italy
The Netherlands
Portugal
Spain

Countries where work on data protection legislation is being pursued, but is expected to be enacted later than 1987:
Brazil
Ireland
Japan
Switzerland
Turkey

However, this survey is nothing more than a statement concerning the entry into force. One ought to be very cautious about drawing any conclusions from it. For instance, it would be wrong if the fact that Italy appears in the second group and Switzerland only in the third, led one to the conclusion that data protection legislation were pursued more intensively in Italy than in Switzerland.

2. Unbalanced laws

(Extreme difference from one country to another concerning the attitude towards unbalanced laws and thus extreme differences even concerning the dangers emanating from identically worded laws.) Italy was just picked out as an example, and that for more than one reason. In fact, there are refreshingly honest comments on the Italian legislation, which highlight and unmask the international situation. At present the Italian legislation largely has just an alibi function. In December 1984, *Losano* (Professor at the University of Milan), at a seminar organized by the Statistical Office of the European Communities, in a paper entitled 'The Italian Bills concerning the protection of personal data', stated:

'The laws abroad almost invariably contain a provision prohibiting the transfer of personal data to those states which do not provide legal guarantees corresponding to those in

force in the states supplying the data. Consequently Italy must adopt a law concerning privacy in order to avoid being cut off from the transnational flow of personal data. Moreover, this law must not deviate too much from the models already existing abroad, because in this case, too, the provision would be applied prohibiting the transfer of personal data.'

At the end of his paper, *Losano* kindly added a comment on what the result of a stringent law would be in Italy:

'The only consequence will be that it will not be applied at all.'

Losano's arguments are so important for the understanding of data protection legislation on an international scale that they merit being quoted here. *Losano* stressed, verbatim:

'I should like to conclude my reflections by referring to the risk of non-application of the future Italian data protection law. The Martinazzoli Bill provides for extremely severe sanctions; some points of the law will be difficult to apply; an implementing regulation of the Prime Minister will be necessary for the law itself. The result of this and of other factors might be that the law on the protection of personal data will not be applied.'

For the sake of comparison one ought to imagine, for example, a German expert on data protection law being asked about the (more stringent) German provisions:

'What, in your opinion, will be the consequence of the (stringent) legal provisions concerning data protection which are in force in the Federal Republic of Germany?'

Unbalanced laws? (Photo: C. Davey / Camera Press)

The interviewee would think of all sorts of things but would certainly not consider the possibility that the law might not be enforced.

Of course, these different attitudes have far-reaching consequences: cf. the following comments concerning individual aspects.

3. Last year's new developments

3.1. United Kingdom

The Data Protection Act 1984 has gradually been entering into force since 12 September 1984.

Nothing final can as yet be said about the Data Protection Act 1984. It is generally known that the Anglo-Saxon legal system acts are but a wide framework. Contrary to practice in continental Europe, the law is arrived at largely by court rulings. Besides, the U.K. Data Protection Act will in any case not be fully in force before Summer 1987.

The position of market and social research is favourable in the U.K. but it has not yet been permanently secured. The following provisions suffice to show that it is imperative to be on one's guard.

As far as the notion of 'personal data' is concerned, the Act stipulates right at the outset in Part I, No. 1 para. 3:

'"Personal data" means data consisting of information which relates to a living individual who can be identified from that information (or from that and other information in the possession of the data user), including any expression of opinion about the individual but not any indication of the intentions of the data user in respect of that individual.'

According to this wording, it cannot be ruled out that the courts will arrive at this result:

The replies given by the interviewees are personal data within the meaning of the Act provided the interviewee can be identified 'somehow', e.g., by means of a number and an address list.

The Data Protection Act 1984 contains provisions which document also for the U.K. how important it may become whether the activity of market and social research is in principle recognised as research or scientific activity in a country. Part I, No. 33 para. 6 stipulates (stresses supplied by the author):

'Personal data held only for

(a) preparing *statistics*; or
(b) carrying out *research*,

are exempt from the subject access provisions; but it shall be a condition of that exemption that the data are not used or disclosed for any other purpose and that the resulting *statistics* or the results of the *research* are not made available in a form which identifies the data subjects or any of them.'

Part II, No. 7 of Schedule 1 stipulates:

'Where personal data are held for historical, *statistical or research purposes* and not used in such a way that damage or distress is, or is likely to be, caused to any data subject,

(a) the information contained in the data shall not be regarded for the purposes of the first principle as obtained unfairly by reason only that its use for any such purpose was not disclosed when it was obtained, and
(b) the data may, notwithstanding the sixth principle, be kept indefinitely.'

As far as the British legislation is concerned, we may stop here. It is, after all, the sense and purpose of this paper just to give, from the E.S.O.M.A.R. perspective, an international survey and an insight; a survey and an insight which are intended to help you in achieving fair results in your work in your country. The market and social researchers from the United Kingdom, for instance, will presumably sit up and take notice when they hear later on, that similar criteria apply in Denmark in a sense which is favourable and appropriate to market and social research.

At present the next thing for the British companies to do is to be registered. A seminar concerning this topic was held on 11 November 1985.

3.2. The Swiss Data Protection Bill

Apart from legislation in the United Kingdom, legislation in Switzerland was also prominent in 1984. Care was taken, particularly by *President Strickler, President Dr. Domeyer* and *Dr. Weill*, to see to it that the requisite opinions concerning the Draft Federal Bill regarding the protection of personal data were submitted. At this juncture, the following facts are of general interest.

In Switzerland, as in most other countries, it was not possible to keep empirical market and social research completely out of the Data Protection Bill. The present Bill is drafted in such a way, and you know the problem, that solely on account of the possibility of identification, e.g., via an address list, it is assumed that survey results constitute personal data and should therefore be judged according to the Data Protection Bill. In fact, the Swiss Bill, like for example the Germany Federal Data Protection Act, is geared to 'identifiability'. Article 2 of the Bill stipulates:

'Personal data are all data concerning a natural or juridical person provided the data subject can be identified by means of the data.'

You will also note the similarity to the above-quoted provision of the U.K. Data Protection Act 1984 Part I, No. 1 para. 3.

In addition, the Swiss law introduces the notion of 'personal data particularly worth protecting', linking it to special impediments. This notion of 'personal data particularly worth protecting' is worded in such a way that it does after all affect market and social research considerably. The Swiss Bill stipulated:

'Personal data particularly worth protecting are data concerning:

(a) the religious, philosophical, political or trade-union related views or activities;
(b) the emotional, mental or physical condition, personal privacy, or the fact of belonging to a specific race; . . .'

It is true, the Swiss Bill in Article 15 contains a special provision relating to data processing 'for a non-personal purpose'. The upshot of this special provision is a provision which is acceptable to good for market and social research.

Art. 15, No 1 reads:

'If personal data are processed exclusively for a non-personal purpose, particularly for research, statistics or planning, predominant interest is presumed if

(a) these data, as soon as the purpose of processing them permits, are destroyed or rendered anonymous or at least used without direct designation of persons, and
(b) the results of processing are made known in such a way that the data subjects cannot be identified.'

Nevertheless, the provision for

market and social research contained in the Swiss Bill is unfortunate. The Swiss provision is unfortunate because it classifies market and social research in the wrong way. These are the classifications made:

- In the first place, it presumes that, as a matter of principle, market and social research 'infringes the personal sphere of the data subject'.
- A tolerable result is only achieved by, as quoted before, 'presuming a predominant interest', under certain conditions, which, as a result, permits data processing.

Most probably this is 'only' a bad legal construction. Presumably the Swiss legislator does not have such a bad opinion of market and social research. But you, too, have had some experience of the law by now: once it is possible to read something bad into the law, many 'data protectors' are bound to do precisely that. Consequently it is to be feared that market and social researchers will time and again be taken to task for infringing as a matter of principle 'the personal sphere of the data subject'. This may well have negative consequences in the course of time.

3.3. Denmark

At present the market and social researchers' Mecca as far as data protection legislation is concerned. The most important and most gratifying 'new development' is neither a new legislative act nor a court decision. Rather, *Mr. Kasper Vilstrup* was able to answer E.S.O.M.A.R.'s enquiries regarding the interpretation of the Danish acts in a way that meets the wishes of all market and social researchers. It may be recalled (see also above):

By the time of the Rome Congress (1984) the E.S.O.M.A.R. Committee on Data Privacy had ascertained, described and, as far as possible, analysed the legislation in all states concerned. Following this work on legislation, the E.S.O.M.A.R. Committee on Data Privacy, referring to the legal provisions in question, had asked the various National Delegates how these provisions were applied. The reply which E.S.O.M.A.R. was grateful to receive from *Mr. Vilstrup* on behalf of Denmark implies that Denmark is at present a model in the field of data protection legislation. It will be useful for you to have the decisive aspects reproduced here.

Art. 2 para. 2 of the Danish Act regarding Private Registers etc. No. 2983 stipulated:

'Furthermore, the Act does not cover any registrations carried out solely for scientific or statistical purposes or for the use of personal history studies or publications of general reference works.'

Mr. Vilstrup furnished E.S.O.M.A.R. with two references from the report of the preparing committee, which may be most valuable for all of you. These references show clearly that, and also why, market and social research is regularly not covered by the Danish Data Protection Act. In particular, the Danish legislator did not consider it necessary to bother about something like the possibility of the loss of anonymity via an address list. You know that this theoretical possibility of the loss of anonymity via an address list is at the source of most problems of market and social research regarding data protection legislation. This report from 1973 emphasises, on page 39:

'Opinion studies like, e.g., the Gallup surveys, in which only anonymous excerpts are made in statistically processed form, should be freely performed. ... Further, it is obvious that not every registration of information on private persons does interfere with areas worthy of protection in such a way that special precautions are required.'

Later in the report this view is repeated in a more detailed comment to Art. 2.2 (pp. 61–62):

'According to Art. 2.2 an exception is also made of the collection and registration of information for *scientific purposes.* This is motivated by a consideration of freedom of scientific research. It should be added that information of the types referred to in Section 1, collected for scientific purposes, is generally published in a statistically processed form only. Consequently the committee sees no reason to make regulations for this type of registration. Further, it is felt that all other registration for *statistical purposes* ought to be able to be made without being subject to any closer control, regardless whether the statistical excerpts can be said to serve scientific purposes or not.'

3.4. Federal Republic of Germany

It would be surprising if the Federal Republic of Germany could go unmentioned in this section concerning new developments. In the Federal Republic of Germany the amendment procedure is still pending, which involves efforts most of which are aimed at worsening the position of market and social research even further. However, the following is of even greater concern here: as is generally known, the German associations (*ADM, BVM, ASI*) were able in 1979 to agree with the German supervisory authorities on a procedure which is just bearable. The most important aspect

of this procedure is that the interviewee does not have to consent in writing to the processing of data and that the objective of the individual study need not be explained to the interviewee. However, in some instances public agencies have been trying to get round this procedure. Some registration offices in fact are only willing to continue supplying group information on the condition that the interviewee is informed about the objective and gives his written consent to data processing. Neither condition, of course, can be reconciled with the methods and techniques of market and social research: cf. also below.

Moreover, even the following has already happened: public clients had agreed that, according to the arrangement made with the supervisory authorities, the indication of the objective and the written consent of the interviewee could be dispensed with. Nevertheless, the public clients wanted to make the placing of the order dependent on the research company's pledge to obtain written consent and to explain the objective. There have already been fundamental disputes.

3.5. Transborder data flows

Finally, it is of interest at this juncture that the tendency has increased on an international scale to apply mutatis mutandis the following norm as far as transborder data flow is concerned:

'The transfer of data to a foreign country is not legally permissible unless data protection in that state is handled at least as intensively.'

3.6. The other countries

On the basis of E.S.O.M.A.R.'s enquiries, mentioned repeatedly above, information was also received in other ways concerning additional new developments in other countries.

4. Appraisal of these new developments by means of surveys

Several surveys conducted in the Federal Republic of Germany have consistently shown that in reply to an open-ended question concerning the 'Things and subjects in our society which are of major concern to you', data protection is not mentioned. Rather, the following are mentioned in this sequence: the general economic situation, including unemployment, the increase in violence, disease and health, various topics relating to the protection of the environment, problems involving foreigners, dangers to pensions and provision for old age.

However, when a multiple choice system was used, data protection was mentioned as high as fifth place, even ahead of inflation, problems involving foreigners and pensions/old-age provision. It is regularly stated in the analyses:

'It may be concluded from these parallel surveys that data protection is not, as a matter of principle, a topic of emotional concern to the interviewees, and it causes worries and anxieties only when it is presented as a "subject of concern and anxieties".'

Supplementing this it is stated:

'Slightly less than two in three (64%) stated that they themselves could not imagine which problems involving data protection existed "in detail" but if so much was written about it, such problems were surely bound to exist. Only about 6% of the interviewees reported bad experiences of their own regarding deficient data protection or data misuse. If one takes into account that interviewees often tend to pretend to have had experiences of their own when confronted with "problem topics", this figure must be rated as very low.' (Quoted from the *Datenschutz-Berater Journal*, July 1985.)

As mentioned before, these surveys cover the Federal Republic of Germany. The legal situation prevailing in the Federal Republic of Germany has become generally known by now. As far as all countries are concerned, this means that one ought at least to take the following into consideration:

The development of the law will not be guided by the will and needs of the population. Rather, the topic is apt to be misused. Some few people will enhance their own status by panic-mongering and will be able to force through provisions which are inappropriate.

It is not certain that this will come to pass. However, the risk is greater than will at first be assumed. Besides, this is precisely why you are here: in order, if at all possible, to recognise such potential developments in the first place and to prevent them from happening in the second.

The risk is to be taken all the more seriously as the international organisations are active precisely in the field of data protection law, as everybody knows, and moreover in the institutions of these international organisations, the wrong people prevail, according to the experience gathered to date. For instance the person who, in the Federal Republic of Germany, is most vociferous against market and social research, is the Chairman of the Committee of Experts on Data Protection of the Council of Europe. His best comrade-in-arms is likewise sitting on this Committee. Inciden-

tally, this Committee is made up exclusively of representatives of public agencies; other experts have been excluded.

5. Counter-measures

Therefore, even market and social researchers from countries enjoying exemplary legal theory and practice, such as our Danish colleagues, cannot rest on their laurels. The aspects to be considered in particular have already been compiled by E.S.O.M.A.R. in the form of a checklist. This checklist is still complete, even when taking into account the most recent experience. For the sake of clarity, the most important aspects at the present time are briefly recapitulated here:

5.1. Recognition of market and social research as a scientific activity and as research

The experience accumulated to date confirms without any exception that market and social research would unnecessarily move into a decisively weaker position if it did not succeed in being recognised as a scientific activity and as research. The recognition of market and social research as a scientific and research activity in the Federal Republic of Germany has so far been able to prevent worse things from happening. Incidentally, it was shortly after the Rome Congress that in a tax suit the court confirmed that market and social research is regularly a scientific and research activity. The expert opinion which helped market and social research decisively in this tax litigation is available as an E.S.O.M.A.R. publication. This opinion drafted by *Professor Strothmann* may just as well be used for any other dispute. So its use is not limited to tax litigations or fiscal disputes.

5.2. No written consent of the interviewee

Anyone who accepts the demand for the interviewee's consent in writing, commits methodical and financial suicide. Everyone in E.S.O.M.A.R. is aware of that.

5.3. The information of the interviewee

The same holds true for the so-called informed consent. Every market and social researcher knows the following: market and social research, as everyone in this body is aware, must as a rule establish an unbiased behaviour and attitude. The interviewee to whom the objective has been described in detail is no longer able to react in an unbiased manner. This is precisely why the objective must not be pointed out in detail. The legitimate rights of the interviewee are not violated by that. It was inter alia for the purpose of not violating the legitimate rights of the interviewee that the principle of anonymous survey results was established.