



Proposal for an e-Privacy Regulation Recommendations for the Finnish Presidency

The Interactive Software Federation of Europe (ISFE) represents the European video games industry. ISFE's membership comprises national trade associations in 18 countries throughout Europe which represent in turn hundreds of games companies at national level. ISFE also has as direct members the leading European and international publishers, many of which have studios with a strong European footprint, that produce and publish interactive entertainment and educational software for use on personal computers, game consoles, portable devices, mobile phones and the Internet.

The video game industry is the fastest growing sector of the European content industry, with a revenue of €21 billion in 2018 and a growth rate of 15% in key European markets. Games are also a major driver of the European app economy: 75% of downloads on the Apple Store are games and 6000 apps are released daily on the Google Play Store. With a successful community of European and UK-based app developers and publishers affirming their strong position worldwide, mobile gaming is expected to represent 44% of industry growth in 2019¹.

On 6 and 7 June 2019, the Council of Ministers took note of the progress and the state of play in the examination of the Proposal for an ePrivacy Regulation (the Proposal). Although the Romanian Presidency has addressed several issues raised by the Ministers, ISFE is concerned that the objective to achieve a “fully balanced text... aligned on the General Data Protection Regulation” as was set in the previous Council Conclusions of 3 and 4 December 2018² has not been met yet. **The Proposal, as currently drafted, will still have a considerable negative impact on the clarity of the legal framework** and will hamper rather than foster the ability for the EU to develop a vibrant Digital Single Market. The review of GDPR scheduled for Spring 2020, and the upcoming Council review, would be a good opportunity to consider both laws together, before pressing ahead with the Proposal. Recent guidance by DPAs and upcoming court cases are further changing the way how the legal framework needs to be implemented which will affect the balance between the two laws.

ISFE calls for the Finnish Presidency to take into account the following 4 key-considerations that do not affect the Regulation's main objective of ensuring the confidentiality of communications.

- **Further changes to Article 8 are necessary to ensure that any provider of an information society service, developer of a software application, or manufacturer of an internet enabled device can properly provide their services or products.**
 - Understanding how consumers react to a product or service is not just important but essential in many digital industries. Any change to our ability to monitor how people play will have a direct impact on our sector's ability to develop and create new games or fix problems to ensure a good gaming experience. It is unclear how Article 8 overlaps with the requirements under GDPR, which are still bedding. A definitive statement is needed that Article 8 only applies to the initial installation of a cookie, app or similar technology. Furthermore, the exceptions listed under Article 8.1.c and 8.1d need to be expanded to justify situations where gameplay providers need to collect data analytics on a user's device. Without such improvements, significantly more consent requests will be sent to

¹ <https://www.isfe.eu/data-key-facts/>

² <https://www.consilium.europa.eu/media/37382/st14971-en18.pdf> see page 15

customers than envisaged under GDPR. There is a risk of consent fatigue and, in case of underage users, a cumbersome parental consent process.

- **ISFE supports the removal of Article 10.**
 - The privacy settings in Article 10 would remove any incentive for third party providers to innovate and offer better privacy-friendly services than their competitors which may result in less rather than more protection of users' privacy. They would concentrate power in the hands of a few software companies and deprive consumers of the ability to share more data with the companies that they trust, in particular if they can be applied on mobile operating software as the definition seems to suggest. It remains however unclear how they can be implemented on smartphones and voice assistants. It would also be extremely cumbersome and costly to impose such settings on browsers provided as an ancillary service on a games console which is no longer commercially distributed.
- **ISFE supports changes to Article 11 adding references to Articles 23 (1) (i) and (j) of the GDPR.**
 - Article 11 should allow national law enforcement to continue to have the means to investigate IP infringements and right holders to effectively pursue civil law claims. To effectively implement Article 8 IPRED, Member States must be allowed to impose limited exemptions from confidentiality of communications for the protection of the fundamental rights and freedoms of others and for the enforcement of civil law claims.
- **ISFE supports the introduction of the new Recital 11a and recommends adding one small amendment which further clarifies the scope of an interpersonal communication service.**
 - Recital 11a is instrumental in providing the legal certainty for video games companies that aim to protect children from harassment, bullying, cheating, sexual abuse and other illegal activities by monitoring and/or recording chat communications. Chat room monitoring has always played a key role in the fight against hate speech and child sexual abuse, both of which are policy objectives for which regulatory initiatives have been or are being developed. ISFE however recommends introducing one small amendment in Recital 11a as the example of an online games communication channel that does not constitute an interpersonal communications channel should also include communications that are publicly available to anyone of a general segment of users (e.g., a team), but not necessarily all persons playing the game.

Recommended changes to the current text:

- **ISFE members recommend clarifying that, as under current law, Article 8 applies only to the use of processing and storage capabilities of terminal equipment (i.e. installing a cookie or an app), and not the further processing of the data.**
- **ISFE members recommend to better align Article 8.1d with Recital 21, to allow the use of processing and storage capabilities of terminal equipment, not just for web audience measurement, but for any assessment of the effectiveness of a delivered information society service, internet enabled device or software.**
- **ISFE members recommend allowing third party processors to carry out such assessments on behalf of an information society provider in compliance with Article 28 of the GDPR.**
- **ISFE members recommend amending recital 11a to ensure that chat room communications that are publicly available to anyone of a general segment of users are also excluded from the scope.**

<i>Text proposed by the Commission</i>	<i>Presidency proposal</i>	<i>ISFE suggested amendments</i>
<p>8.1 The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds:</p>	<p>8.1 The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware, other than by the end-user concerned shall be prohibited, except on the following grounds:</p>	<p>8.1 The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, including about its software and hardware Storing information or gaining access to information stored on terminal equipment, other than by the end-user concerned, shall be prohibited, except on the following grounds:</p>
<p>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.</p>	<p>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 or by a third party on behalf of the provider of the information society service provided that conditions laid down in Article 28 of Regulation (EU) 2016/679 are met.; or</p>	<p>8.1(d) if it is necessary for assessing the effectiveness and stability of a delivered information society service or Internet enabled device or software, such as web audience measuring, provided that such measurement assessment is carried out by the provider of the information society service requested by the end-user, manufacturer of the device or developer of the software or by two or more of them provided that conditions laid down in Articles 26 of Regulation (EU) 2016/679 are met, or by a third party on behalf of them provided that conditions laid down in Article 28 of Regulation (EU) 2016/679 are met; or</p>
<p>Article 10.1 Software placed on the market permitting electronic communications, including the retrieval and presentation of information on the internet, shall offer the option to prevent third parties from storing information on the terminal equipment of an end-user or processing information already stored on that equipment.</p>	<p>Deleted</p>	<p>ISFE supports deletion as proposed by the Presidency.</p>
<p>Article 10.3 In the case of software which has already</p>	<p>Deleted</p>	<p>ISFE supports deletion as proposed by the Presidency.</p>

<p>been installed on 25 May 2018, the requirements under paragraphs 1 and 2 shall be complied with at the time of the first update of the software, but no later than 25 August 2018.</p>		
<p>Article 11.1 Union or Member State law may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 5 to 8 where such a restriction respects the essence of the fundamental rights and freedoms and is a necessary, appropriate and proportionate measure in a democratic society to safeguard one or more of the general public interests referred to in Article 23(1)(a) to (e) of Regulation (EU) 2016/679 or a monitoring, inspection or regulatory function connected to the exercise of official authority for such interests.</p>	<p>Article 11.1 Union or Member State law may restrict by way of a legislative measure the scope of the obligations and rights provided for in Articles 5 to 8 where such a restriction respects the essence of the fundamental rights and freedoms and is a necessary, appropriate and proportionate measure in a democratic society to safeguard one or more of the general public interests referred to in Article 23(1)(a) (c) to (e), (i) and (j) of Regulation (EU) 2016/679 or a monitoring, inspection or regulatory function connected to the exercise of official authority for such interests. ...</p>	<p><i>ISFE supports inclusion of the additional references.</i></p>
<p>Recital 11a New</p>	<p>Recital 11a ...Also, where access to electronic communications is available for anyone, e.g. communications in an electronic communications channel in online games which is open to all persons playing the game, such channel does not constitute an interpersonal communications feature. This reflects the end-users' expectations regarding the confidentiality of a service.</p>	<p>Recital 11a ...Also, where access to electronic communications is available for anyone, e.g. communications in an electronic communications channel in online games which is open to all persons playing the game, such channel does not constitute an interpersonal communications feature. This reflects the end-users' expectations regarding the confidentiality of a service.</p>