



ISFE comments on the Croatian Presidency's revised text of the ePrivacy Proposal

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.

Introducing legitimate interests is necessary to align the text of the ePrivacy Proposal with the GDPR

ISFE strongly supports the Presidency's objectives to simplify the text of the ePrivacy Proposal and further align it with the General Data protection Regulation (GDPR). The latter is an objective that was set in the previous Council Conclusions of 3 and 4 December 2018² which has not yet been met. We believe that the introduction of a legitimate interest principle is the best possible way to fulfill this objective. The previous versions of the proposal mandated explicit consent for activities that in many cases would rely on legitimate interests or one of the other legal grounds under the GDPR. This was a major cause for the lack of alignment between the ePrivacy proposal and the GDPR.

Why is the legitimate interest basis important for the video games industry?

Video games are a complex mix of art and software that constantly evolve in line with consumers' requirements and expectations. As players interact with games, data about their activity is generated. This "gameplay" data is often used to improve the game experience for players, for example to identify if there is a large problem being experienced by the majority of the players or to find users of a similar skill-level or playstyle in order to ensure the most competitive gaming experience. Gameplay data also plays an essential role in the way companies are detecting software errors or bugs and fraudulent behaviour by the players.

Gameplay services, and in particular mobile games, often need to rely on the processing and storage capabilities of the user's device to collect such gameplay data. Unfortunately, the exceptions listed under Article 8.1.c and 8.1d are not adequate to justify all situations where such processing is required. Providers will need to rely on individual requests for specific consent which will lead to consent fatigue or, in case of underage users, a cumbersome parental consent process. The new rules are not capable of reducing the number of consent requests directed to users in situations that do not raise any genuine privacy concerns.

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

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

ISFE is however concerned about the way the legitimate interest ground has been added to the legal provisions of the text. We fear that the text would still negatively impact the balance with the GDPR and jeopardize a smooth implementation of the legal framework.

The exclusion of children's data and profiling data from the legitimate interest ground conflicts with the GDPR.

Invoking Article 6.1(f) of the GDPR for the processing of children' data or data to determine the nature and characteristics of the end-user or build his profile is very much allowed under the GDPR. This has been confirmed by guidance³ from the European Data Protection authorities.

Article 6.1(f) of the GDPR requires a balancing of the legitimate interests of the controller, or any third parties to whom the data are disclosed, against the interests or fundamental rights and freedoms of the data subject and places particular emphasis on the need to protect children. This is recognised in Recital 38 of the GDPR which says that children require specific protection with regard to their personal data because they may be less aware of the risks and consequences of the processing. However, the emphasis on protecting children does not prohibit the use of this legal basis but merely requires the controller to consider the data protection risks and take measures appropriate to the risks involved.

Legitimate interests can also be invoked for profiling activities if they are not solely based on automated processing and do not produce a legal or similarly significant effect on the end-user. In such a case, Article 22.1 of the GDPR does not apply.

The exclusion of children's data and profiling data from the legitimate interest ground is a disproportionate measure.

The purpose of the Article 6.1(f) balancing exercise is not to prevent any negative impact on the data subject. Rather, its purpose is to prevent disproportionate impact(s) on the data subject⁴. This is a crucial difference. For the controller's legitimate interest to prevail, the data processing must always be 'necessary' and 'proportionate'.

However, by stating that a provider's legitimate interest will always be overridden when children' data or data to determine the nature and characteristics of the end-user or build his profile is processed, the regulator deprives the provider from the ability to demonstrate that such processing can have a minimal or no effect at all on the interests or fundamental rights and freedoms of the end-user. Situations in which such impact is minimal or non-existent, including in the context of processing children's and profiling data, are actually quite common in the video games industry. This is because our sector understands the importance of implementing safeguards and has undertaken a number of initiatives that go beyond mere compliance with the law and set standards to protect (children's) privacy.

Gameplay data is for instance often collected and stored in a way that does not allow companies to identify the consumer directly. Gameplay data is typically classified with a unique key per player. The player's account information is generally stored separately, and video games companies apply technical

³ -[Children and the GDPR](#), Guidance by the ICO, p. 19-20
-[Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679](#), Article 29 Working Party, p. 21

⁴ -[Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC](#), Article 29 Working Party, p. 41

and organizational measures to prevent easy linking between the game play dataset and the players' account information prove problematic to progression or remember content that was recently played.

Profiling can be used to serve a wide range of purposes, including fixing areas of a game that prove problematic to progression, identify fraud, remember content that was recently played, provide hints to the player, create scoreboards or personalise gameplay settings. All these processing activities enable or improve the gameplay experience and have little to no impact on the rights and freedoms of the end-user. Depriving companies from using the legitimate interest ground in these processing situations would therefore be a disproportionate measure.

Recommended changes to the text:

ISFE members recommend deleting under Article 8.1(g) that “the end-user’s interests shall be deemed to override the interests of the service provider where the end-user is a child or where the service provider processes, stores or collects the information to determine the nature and characteristics of the end-user or to build an individual profile of the end-user”...

ISFE members also recommend deleting the same extract from Article 6b.1(e) of the revised text.

ISFE Secretariat, February 2020