



## ISFE Comments on the Portuguese Presidency's revised e-Privacy Proposal

The Interactive Software Federation of Europe (ISFE) represents the European video games industry. ISFE's membership comprises national trade associations in 15 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.

ISFE's purpose is to serve Europe's video games ecosystem by ensuring that the value of games is widely understood and to promote growth, skills, and innovation policies that are vital to strengthen the sector's contribution to Europe's digital future. The video games sector represents one of Europe's most compelling economic success stories, relying on a strong IP framework, and is a rapidly growing segment of the creative industries. In 2019, Europe's video games industry was worth €21bn, and the industry has registered a growth rate of 55% over the past 5 years in key European markets<sup>1</sup>.

ISFE welcomes the publication of the new proposal by the Portuguese Presidency. We welcome the introduction of modifications to ensure GDPR consistency and legal certainty for users and businesses and we strongly support its overall aim to set a balance between the high-level protection of the fundamental rights to private life and protection of personal data on electronic communications on the one hand, and the fostering of developing new innovative technologies on the other. In order to ensure that this balance is fully achieved, we call on the Portuguese Presidency to take into account the following considerations when continuing the negotiations on this file.

- **Article 3 (2) (representative).** A deadline of "one month from the start of its activities" has been added for a provider not established in the Union to appoint a representative in order to "to provide legal security and certainty". ISFE considers this an unrealistic timeframe for any company located outside Europe, and in particular for an SME, to designate a representative in the Union and communicate that to a Supervisory Authority.
- **Article 6 (1)(a-b) and 8(1)(c) (alignment to the GDPR's performance of a contract legal ground)** ISFE welcomes the changes in the text permitting processing of electronic communications data if "necessary to provide an electronic communication service" and permitting processing of metadata if "necessary for the performance of an electronic communications service contract". Along with the deletion of the word "technically" in 8(1)(c), these changes allow for a better alignment with the legal ground in the GDPR which allows processing that is necessary for the performance of a contract (Article 6.1(b)). Such an alignment is necessary to ensure that in-game communication services that fall within the definition of an interpersonal communication service can continue to protect their users, in particular children, against bullying, cheating and harassment.
- **Article 6(c) and 8(g) (compatible processing)** ISFE is supportive of the changes in the text allowing the processing of electronic communications metadata and the use processing and storage

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<sup>1</sup> ISFE Key Facts 2020 from GameTrack Data by Ipsos MORI and commissioned by ISFE <https://www.isfe.eu/data-key-facts/>

capabilities of terminal equipment and the collection of information from end-user's terminal for further compatible processing, aligned with Articles 5 (1) (b) and 6 (4) of the GDPR. The proposed changes are however too restrictive as profiling data is not included in this legal basis. Profiling can be used for a wide range of purposes that have no impact on an individual's right to privacy. When profiling is used to fix areas of a game that prove problematic to progressing in the game, tackling identify fraud, remembering content that was recently played, providing hints to the player or creating scoreboards or personalize gameplay settings, it does not endanger the privacy of the player. Profiling data should therefore not be excluded from the further compatible processing legal basis. Furthermore, the requirement to anonymise or erase data "when it's no longer needed" seeks individual handling of data sets and ignores the typical periodical deletion runs in a database environment. The proposal should recognize the practical difficulties that providers will face and provide for the necessary flexibility, for instance by requiring a more flexible timeframe for such deletion runs.

- **Article 6(1)(d) (Processing of electronic communications data for compliance with a legal obligation)** ISFE welcomes the amendment in the draft proposal to permit processing of electronic communications data if "necessary for compliance with a legal obligation". While this article is limited to EU or Member State laws that are aimed at safeguarding "the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the safeguarding against and prevention of threats to public security," providers may be required to process electronic communications data to comply with other legal obligations such as taxation, accounting, or administrative recordkeeping. ISFE therefore recommends aligning the legal obligation ground to the analogous ground in the GDPR (Article 6(1)(c)).
- **Article 8(1)(d) (audience measurement)** ISFE believes that further changes to this provision are necessary to ensure that it can be invoked to measure not just the number of users, but the performance of the whole service. 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. As the exceptions listed under Article 8.1.c and 8.1.d are not solid enough to justify situations where gameplay providers need to collect data analytics on a user's device, they 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.
- **Article 8(1)(e) and Recital 21(b) (software updates)** Video game companies must regularly provide updates and patches to games via the internet that improve existing content and user experiences. These software updates sometimes contain security updates along with non-security related bug fixes. Requiring separate consent for such multi-purpose updates whereby users may decline and create security vulnerabilities, would undermine, rather than enhance privacy and security. ISFE therefore recommends clarifying that multi-purpose updates are permissible without consent and to delete the following sentence in Recital 21b: *"Software updates that do not exclusively have a security purpose, for example those intended to add new features to an application or improve its performance, should not fall under this exception"*.