Spolek pro ochranu osobních údajů

Comments on the EDPB's draft "Guidelines 3/2025 on the interplay between the DSA and the GDPR"

We welcome the opportunity to provide feedback on the recently published EDPB draft Guidelines 3/2025 on the interplay between the DSA and the GDPR ("Guidelines").

We greatly appreciate the EDPB for preparing these Guidelines addressing a very interesting question concerning the protection of personal data.

First, we would like to draw attention to a fundamental problem we frequently encounter in the current EU soft law framework. A number of guidelines concerning intermediary services are drafted primarily based on experience with Very Large Online Platforms (VLOPs). However, situations and resources available to smaller European online services are either not considered at all or not sufficiently taken into account. However, these platforms do not usually process data to the same extent as VLOPs, their IT systems are not structured in a similar way as VLOPs, and they are not able to adapt them quickly. As a result, these services are often unable to comply with the requirements set out in such soft law instruments. This, in turn, reinforces the dominant market position of VLOPs, which have the necessary means to comply with such interpretation of digital regulation. Increasing the overall regulatory burden across the ecosystem also leads to the withdrawal of some independent supporting service providers, which further makes smaller platforms more dependent on large technology providers (as is the case, for example, in the field of targeted advertising). Therefore, it is essential to carefully assess the degree of regulatory requirements imposed on providers and to differentiate them according to their size (in particular the size of the platform, not necessarily the size of the provider as such).

Specific comments

We would highly appreciate if the EDPB could clearly express its view on what roles (controller, processor, joint controller, or no role under the GDPR at all) are, in its opinion, applicable to the following actors with respect to the processing of personal data within these services:

- providers of particular intermediary service (social network, online advertisement platform, online auction platform, marketplace etc.);
- users of such service who share content containing personal data of third parties or moderate/manage comments on their own profiles;
- website operators who incorporate typical intermediary service plug-ins (such as the Facebook Comments Plugin).

Practice would benefit greatly from clearer rules, as the conclusions from the CJEU judgment in Case C-40/17 and Guidelines 8/2020 cannot always be applied unambiguously.

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Point 9

We generally agree with the EDPB's view that „*As a consequence, it is clear that the DSA does not derogate, as lex specialis, from the general rules on the processing of personal data under the GDPR nor the rules that particularise the GDPR with respect to the processing of personal data in the electronic communication sector under the ePrivacy Directive."* However, we note that in certain cases a *lex specialis derogat legi generali* relationship may exist — for instance, in relation to Articles 26(3) or 28(2) of the DSA.

Point 15

We note that many types of services or content against which measures are taken (for instance, due to the use of vulgar language or minor editing of uploaded content) will typically not constitute cases *„which in turn may have significant negative impacts on them."*

We also wish to emphasize that, with respect to intermediary services, not only the users' freedom of expression but also that of the service providers themselves must be considered (see ECHR judgment *Google LLC and Others v. Russia*, no. 37027/22).

Point 17

We believe that in this context, Article 6(1)(e) GDPR could also serve as a relevant legal basis, see for example obligations according to *Guidelines on measures to ensure a high level of privacy, safety and security for minors online, pursuant to Article 28(4) of Regulation (EU) 2022/2065 (C/2025/5519)*.

We would also welcome clarification from the EDPB concerning the legal basis applicable to service providers who carry out *"voluntary own-initiative investigations or other measures to detect, identify and remove (or disable access to)"* content that violates their terms of service (and is not illegal per se). Although this process is not explicitly mentioned in Article 7 of DSA, it frequently occurs in practice and is compliant with the DSA's objectives.

Point 18

We would like to highlight that, in practice, if the content itself contains personal data or was posted by a registered individual, the processing of personal data cannot be avoided - if for no other reason, then at least to ensure compliance with DSA requirements.

Point 20

We are not sure what is the intended meaning of the EDPB's statement: *"…To comply with its obligation under Article 17 GDPR, the intermediary service provider may need to detect the allegedly illegal content…"*
We note that notifications should contain clear information specifying the location of the illegal content (Article 17(2)(b) DSA). Therefore, disproportionate "detection" requirements should not be imposed on service providers where such content has not been clearly identified.

Points 20–21

We believe that Article 6(1)(c) GDPR does not provide an appropriate legal basis, because:

- the DSA does not explicitly impose a legal obligation to remove illegal content once notified (this obligation can only be indirectly inferred from recitals, such as Recital 22, but not from the legal (normative) text itself);
- DSA does not specify what personal data must be processed or to what extent within the notice & action mechanism;
- a legal basis under Article 6(1)(c) does not allow data subjects to exercise the right to object.

We consider Article 6(1)(e) GDPR to be a more suitable legal basis in this context.

Point 24

We do not consider that actions under Article 24 DSA should automatically trigger a need to prepare a Data Protection Impact Assessment (DPIA). In practice - particularly 'for online platforms - various individual actions may be necessary to address illegal content in many individual cases, and the preparation of a general DPIA would constitute a purely formal exercise. Proportionality assessments should be carried out on a case-by-case basis taking into account the circumstances of the relevant case, and imposing a formal DPIA requirement would merely increase bureaucracy.

Point 27

We would like to point out that in practice, personal data of numerous other individuals - not only those mentioned in the content itself - are often processed. It is not uncommon for a notice within the *notice & action mechanism* to relate to a broader dispute between parties also involving content on other platforms or other individuals. Although we agree that service providers in such cases qualify as data controllers, the conclusion that "*In such cases therefore the hosting service providers will qualify as controllers and will have to respect and process personal data in accordance with the GDPR"* does not provide any additional practical value. For instance, in practice, third parties are generally not directly informed by the controller that their data are being processed in connection with notice & action mechanism (i.e. exceptions under Article 14 GDPR are applied). We would therefore welcome more practical and specific guidance from the EDPB.

Point 29

We note that in some cases, requesting a name, surname, or contact details is necessary to process the notice at all (see, for example, Recital 50 DSA or notice & action mechanism under Directive (EU) 2019/790).

We would also appreciate the EDPB's view on whether it is permissible for a provider to offer the notice & action mechanism solely via e-mail. While the provider would in such a case always have at least the notifier's e-mail address, we consider such a solution consistent with both the DSA and the GDPR, given the widespread use of temporary or single-use e-mail accounts and will make it easier for affected individuals to submit notifications.

Point 30

We note that service providers are under no obligation to request any additional information and may process the notice solely on the information provided therein.

Point 31

We recommend explicitly stating that a link to the privacy notice on the website hosting the notice & action form is sufficient.

Point 33

In our view, most notifications will not entail consequences falling under Article 22 GDPR (with regard to the usual content of posts on platforms). For those exceptional cases where Article 22 does apply, guidance should clarify the handling of special categories of personal data contained in the disputed content itself (for example, health data or sexual orientation of a third party).

Point 42

It is unclear on what basis the EDPB introduces the requirement for *"strictly necessary"* processing rather than simply *"necessary"* (unless derived from specific legislation such as the ePrivacy Directive).

With regard to the conclusion that „*taking into account that Article 23 allows only for suspension issued 'for a reasonable period of time'*", we would like to point out that the interpretation of this provision of the DSA and its compliance with the EU Charter of Fundamental Rights (regarding the temporary nature of suspension) has not yet been clarified, particularly in terms of the right to conduct a business and the freedom of expression of service providers (see also our comment on point 15).

Point 52

We point out that the controller may not always be identical to the service provider (e.g., where targeting is carried out by an AdTech company ordering the advertisement or in the advertisement chain). Article 26 DSA is rather unclear in this respect (see point 65 as well).

Point 75

We note the overall ambiguity of the regulation. Online platform providers — particularly smaller EU-based ones — often merely provide advertising space (e.g., through Real-time bidding platform) without knowing whether the advertisement is targeted or participating in the targeting process in any way. A balanced solution is needed that allows small platforms to comply reasonably without being overburdened with verification obligations or exposed to disproportionate risks of fines.

Point 77

We would appreciate clarification on whether providers are required to disclose (i) information generally used for targeting, or (ii) information used for targeting a specific user seeing the advertisement. As in the previous point, we emphasize the excessive regulatory burden on smaller European platforms and the fact that targeting is not always performed by the platform itself but may involve multiple actors. EU law should be interpreted in a way that enables the emergence of new smaller EU-based platforms. A too rigid interpretation of Article 26 DSA risks further market concentration, allowing only VLOPs performing targeting internally to comply with this provision, while preventing the operation of independent third-party targeting services for other platforms or websites.

Point 92

Again, we consider Article 6(1)(e) GDPR to be a more suitable legal basis for data processing mentioned. Regarding special categories of personal data, we note the problem mentioned above that such data - even relating to third parties - are often contained within the content itself.

Point 93

While we agree with the EDPB's conclusion that „*Therefore, providers of online platforms should in particular avoid age assurance mechanisms that enable unambiguous online identification of their users (e.g., by asking them to submit proof of their identification via government-issued ID) on the basis of Article 28*" we note that ECHR case law in certain instances points toward mandatory identification (see, for example, case *Delfi AS v. Estonia*, application no. 64569/09).

We are grateful for the opportunity to provide our comments on the draft Guidelines. We would like to thank the EDPB very much for its efforts to clarify various issues related to the processing of personal data. We hope that our comments will help in formulating the final version of the guidelines.

If you are interested in further information about the actual functioning of smaller EU-based intermediary services, we are of course available for further consultation.

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