Public Consultation on the EDPB's Guidelines 03/2025 on the interplay between the DSA and the GDPR

1. Video Games Europe welcomes the opportunity to provide comments on the guidelines issued by the European Data Protection Board (EDPB) on the interplay between the DSA and the GDPR. Our members welcome the issue of Guidelines and Recommendations by the EDPB as they promote a common understanding of the European data protection framework and provide a harmonised interpretation of key provisions in the GDPR. This will help to ensure an effective and meaningful implementation of the GPDR.

2. Video Games Europe supports the overall aim of the guidelines to contribute to the consistent interpretation and application of the DSA and of the GDPR by the competent supervisory authorities under each regulation. We will highlight our comments following the order of the table of contents and corresponding paragraph numbers. The most important points that we wish to make are:
    - The EDPB should, in line with the principle of sincere cooperation, consult with the European Board for Digital Services and ideally publish the Guidelines jointly. They should also agree with other competent authorities on a common EU level approach on the use of age assurance technologies.
    - The guidelines should focus solely on providing recommendations in relation to the provisions that overlap with the GDPR, and refrain from commenting on other topics that pertain specifically to the DSA, such as deceptive design patterns under the DSA. The Guidelines should also avoid providing specific interpretations of the DSA.
    - The Guidelines should recognise that detection tools required to comply with the DSA and promote online safety cannot function without processing any personal data and offer a more lenient understanding of automated detection and content moderation's privacy implications.
    - Where legal obligations following Article 6.1(c) GDPR qualify as a legal basis for detection of illegal content, the Guidelines should highlight the CJEU ruling La Quadrature du Net II which allows for the general and indiscriminate retention of IP addresses by service providers to detect online copyright infringements.
    - The Guidelines should recognise that automated processing under Article 7 DSA is authorised by Union or Member State law and therefore falls under the exception in Article 22.1(c).
    - The Guidelines should recognise that suspension of an account on an online platform should not automatically be considered as *significantly* affecting a data subject's data protection rights and that these rights are subject to limitations under the GDPR.

VIDEO GAMES EUROPE aisbl
Rue Guimard 15 | 1040 Brussels | Belgium
T + 32 2 612 17 78 | info@videogameseurope.eu
Transparency Register Identification Number: 20586492362-11

- Gamification should be removed from the list of examples of deceptive design patterns.
- The Guidelines should include criteria that support a thorough assessment of the effects of automated advertisement delivery models on data subjects.

1. General comments

3. The Guidelines correctly acknowledge that both the DSA and GDPR have the same hierarchical value and need to be applied in a compatible way, enabling a coherent application. Video Games Europe welcomes in this context the references the CJEU rulings **Republic of Malta v European Commission** (Case T-653-16) and **Meta v. Bundeskartellamt** (Case C-252/21) highlighting the importance of the principle of sincere cooperation. However, the EDPB seems to immediately undermine this equivalence in §11 by underlining "*the singular importance that the fundamental right to the protection of personal data has in the TFEU*" and by stating that "*a consistent and coherent interpretation of the DSA and the GDPR should not lead to lowering the level of protection of the fundamental rights to privacy and data protection as enshrined in primary and secondary EU law*".

4. Furthermore, we regret that the EDPB did not, in the spirit of the principle of sincere cooperation, consult with its counterpart under the DSA nor publish the text as joint guidelines. Such a joint effort would not only benefit data subjects, but also intermediary service providers by improving legal certainty of how the DSA on the one hand and the GDPR, on the other, are applied. As the guidelines are only issued by the EDPB, seemingly without having consulted the DSCs, they should focus solely on providing recommendations in relation to the provisions that overlap with the GDPR, and refrain from providing interpretations of all other articles in the DSA.

2. Specific issues

2.1 Voluntary own-initiative investigations and legal compliance in relation to illegal content (Article 7)

5. The Guidelines argue in §14 that multimedia-based or text-based machine-learning tools used for detecting illegal content must comply with the principle of data minimisation and the privacy by design and default obligations. It is then stated that "*Insofar as possible*, *these actions should not involve any processing of personal data".* Video Games Europe would like to point out that for detection tools to function properly and at the scale necessary to address these harms, they must process content shared by users, with the aim of identifying when that content contains or is illegal content, which is personal data. Such tools must also process various types of technical data that relate to the device and/or the software installed on it. Such data will often be considered personal data as it may identify the user directly or when combined with complementary information to allow identification. It would therefore be very unlikely if detection tools could function without processing any personal data. We suggest that adhering to the principle of data minimisation is sufficient to reflect data

subject rights while enabling functional multimedia- or text-based machine-learning tools to detect illegal content.

6. The Guidelines caution in §15 that technologies for voluntary detection and tackling of illegal content may generate wrong or inaccurate results about a data subject's involvement in abusive practices and further state that "*these risks are further exacerbated by the fact that the error rates of some existing technologies (such as pattern recognition) tend to be rather high*". This statement on high error rates is however only a point-in-time assessment for some technologies and may not be accurate for all technologies or remain accurate going forward. While risks of inaccurate results are valid, presenting high error rates as fact risks overstating the issue and reduces the forward-looking value of the Guidelines. This risk should instead be assessed on a case-by-case basis and could for instance be framed as a factor in a legitimate interest balancing test.

7. Video Games Europe welcomes that Article 6(1)(f) GDPR (legitimate interests) is recognised in §17 as the most suitable legal basis available for the processing by intermediary service providers in the context of voluntary own-initiative investigations or other measures to detect, identify and remove (or disable access to) illegal content under Article 7 DSA.

8. Legal obligations may also qualify as a legal basis under Article 6(1)(c) GDPR to the extent that they require the processing of personal data. While the Guidelines correctly state that "*such legal obligations should be clear and precise and their application should be foreseeable to persons subject to it, in accordance with the case-law of the CJEU*" Video Games Europe would welcome in this context also a reference the CJEU ruling **La Quadrature du Net II** (LQDN II, Case C-470/21) of 30 April 2024 which allows for the general and indiscriminate retention of IP addresses by service providers to detect online copyright infringements, provided that specific safeguards are in place.

9. Video Games Europe is concerned by statements in §22 that certain types of automated processing under Article 7 DSA may qualify as decisions based solely on automated processing, including profiling, that are prohibited under Article 22.1 GDPR. It is argued that some decisions by intermediary service providers to remove allegedly illegal content could significantly affect recipients of the service whose content is removed. However, we want to point out that automated processing under Article 7 DSA would clearly be authorised by Union or Member State law and therefore fall under the exception in Article 22.1(c). Recital 71 confirms that such an exception may include the use of automated decision-making for monitoring and preventing fraud or to ensure the security and reliability of a service provided by the controller. Video Games Europe would welcome if the EDPB could provide examples of the rare case in which such processing would be prohibited under Article 22.1 GDPR.

10. Furthermore, Video Games Europe would like to point out that human involvement is not required in the context of a *decision* that is based solely on automated processing which produces no legal effects on the data subject or similarly affects him or her. First,

we are concerned that the EDPB takes a too broad interpretation of the concept of a "decision" as it refers in §85 to cases where a recommender system presents *recommendations* and where algorithmic processes could *propose* content, services or products that significantly affect data subjects. We point out that recommendations or proposals do not amount to decisions. The Opinion of Advocate General Pikamäe in the CJEU **SCHUFA Case** (C-634/21), to which the EDPB refers as justification, only deals with a *decision* to deny a credit. Secondly, it is important to note that the simple removal of content and temporary or permanent suspension of an account on a service like a video game or video game platform, do not produce a legal or similarly significant effect on data subjects. We call on the EDPB to make this clear in §22.

11. §33 recalls that in cases where removal of illegal content *could* fall under the scope of Article 22 GDPR, this provision imposes strict conditions on decisions based solely on automated processing, including profiling, that produce legal effects, or similarly significantly affect the concerned individual. It is unclear why the scope of this statement is broadened by using the verb "could". Video Games Europe recommends deletion.

2.2 Processing of personal data in notice and action mechanisms and in internal complaint-handling systems (Articles 16, 17, 20, and 23)

12. The Guidelines state in §42 that it is *likely* that decisions by providers of online platforms to suspend their relevant activities in respect of persons they consider to be engaged in abusive behaviour may significantly affect their rights. Video Games Europe strongly questions the use of the word "likely" in this statement. Suspension of an account due to a clear violation of the terms and conditions of a service should not automatically be considered as significantly affecting a data subject's data protection rights, nor is suspension of an account a legal or significantly similar effect on a data subject.

13. The Guidelines point in §42 also to the importance of the accuracy and data minimisation principles when accounts are suspended based on Article 23 DSA. Video Games Europe would like to caution that there is some tension between these principles as minimising the amount of data processed may negatively affect the accuracy of the personal data. We recommend that the Guidelines further clarify this point. Furthermore, the Guidelines highlight that the suspension of an account is without prejudice to the data subject rights under the GDPR. The EDPB should consider adding here that the right of access is subject to limitations and should not adversely affect the rights and freedoms of others, following Artikel 15(4) GDPR. Such freedoms and rights may include trade secrets or intellectual property rights, as recognised in recital 63 GDPR.

2.3 Deceptive design patterns (Article 25)

14. The Guidelines correctly identify in §43 that the prohibition in Article 25(1) DSA on deceptive design patterns shall not apply to practices covered by the GDPR. As there is no overlap with the GDPR, it is unclear why the topic of deceptive design patterns

under the DSA, for instance as a potential source of a systemic risk in §46, is at all included in these Guidelines.

15. The Guidelines provide in §47 a list of examples of deceptive design patterns that includes "gamification". Video Games Europe objects in the strongest possible words to the characterisation of gamification as a prohibited practice *in itself*. Gamification is defined as the application of game design elements and principles to non-game contexts to increase user engagement. It is used in the context of education and skills as it contributes to the transformation of learning and teaching processes.[1] It supports the development of skills in creativity, innovation, conceptual understanding, problem-solving, as well as an increase in concentration. We strongly recommend the EDPB to remove gamification from this list so as not to imply that gamification is a term to be associated only with negative consequences as opposed to the neutral practice it is

2.4 Advertising transparency and prohibition of presenting advertisements based on profiling using special categories of data (Article 26)

16. The Guidelines provide in §62 a non-exhaustive list of characteristics of a processing activity that should be taken into account to assess whether an automated decision to present a specific advertisement to an individual would produce legal effects or similarly significantly affects him or her. Many of these characteristics, however, focus on the nature of the profiling and the way advertisements are presented, rather than their impact on data subjects. We recommend the EDPB to include criteria that support a thorough assessment of the effects of automated advertisement delivery models on data subjects.

2.6 Protection of minors (Article 28)

17. The Guidelines indicate in line with recital 71 DSA that there are other means than processing additional personal data for a provider to be aware that its service is used by minors such as when its terms and conditions permit minors to use the service, when its service is directed at or predominantly used by minors, or where the provider is otherwise aware that some of the recipients of its service are minors. The Guidelines however go further than recital 71 DSA adding that a service can be directed at or predominantly used by minors "*by reason of certain features or content promoted on the service*". Video Games Europe requests deletion of this addition. We believe that the EDPB should not provide additional guidance on a recital in the DSA that does not overlap with the GDPR.

18. Video games Europe agrees with the rationale in §95 that "*age assurance should be carried out depending on the risk for minors and taking into account the necessary and proportionate processing of personal data, with particular consideration to the*

[1] See also: Huang, R., Ritzhaupt, A. D., Sommer, M., Zhu, J., Stephen, A., Valle, N., et al. (2020). The impact of gamification in educational settings on student learning outcomes: A meta-analysis. *Educational Technology Research and Development*.

impacts of such measures on fundamental rights of the recipients of the service". The Guidelines however take a strict stance on age assurance by stating in §92 that the processing of special categories of data, e.g. biometric data for the purpose of uniquely identifying a natural person, in particular a child, should be avoided. Similarly, §93 argues that age assurance mechanisms that enable unambiguous online identification of their users should also be avoided, while §94 states that providers of online platforms should not estimate or verify and permanently store the age or age range of the recipient of the service as a result of their age assurance process. These recommendations do not seem to be fully aligned with the guidelines on age assurance of other competent authorities that argue for a more flexible approach, such as the European Commission's Article 28 DSA Guidelines.

19. Video Games Europe believes that a thorough assessment is needed before deciding whether to put in place any age assurance method to determine whether such a measure is appropriate and lawful or whether the required level of protection may be achieved by relying on other less far-reaching measures. We therefore call on the EDPB to consult with other competent authorities, the European Board for Digital Services and the European Commission in order to agree on a common EU level approach on the use of age assurance technologies. Varied recommendations by different authorities makes it challenging for providers to implement such technologies on their services.

2.9 Governance and Enforcement

20. Video Games Europe agrees that in the light of the principle of cooperation competent authorities should cooperate and consult each other to the largest extent possible, even where no specific cooperation mechanisms exist. We expect that such cooperation should also take place prior to the adoption of guidance or decisions in matters that are covered by both authorities. It is unclear why the Guidelines differ here by stating in §118 that "*the consultation of a competent authority under a different framework should take place, inter alia, when the consulted authority has issued a decision concerning the conduct (or similar conduct) of the intermediary service provider that is under assessment by the consulting authority*." Video Games Europe recommends clarifying this point.

Video Games Europe secretariat, October 2025

About Video Games Europe

Since 1998, Video Games Europe has ensured that the voice of a responsible video games ecosystem is heard and understood. Its mission is to support and celebrate the sector's creative and economic potential and to ensure that players around the world enjoy the benefits of great video game playing experiences. Europe's video games sector is worth €26.8bn and accounts for 116,000 jobs. 54% of Europeans are video game players. We publish a yearly Key Facts report with the latest data on Europe's video games sector.

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