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# EGDF response on the public consultation on the Data Act

## About EGDF

1. **The European Games Developer Federation e.f. (EGDF)<sup>1</sup>** unites national trade associations representing game developer studios based in 18 European countries: Austria (PGDA), Belgium (FLEGA), Czechia (GDACZ), Denmark (Producentforeningen), Finland (Suomen pelinkehittäjät), France (SNJV), Germany (GAME), Italy (IIDEA), Netherlands (DGA), Norway (Produsentforeningen), Poland (PGA), Romania (RGDA), Serbia (SGA), Spain (DEV), Sweden (Spelplan-ASGD), Slovakia (SGDA), Turkey (TOGED) and the United Kingdom (TIGA). Through its members, EGDF represents more than 2,500 game developer studios, most of them SMEs, employing more than 40,000 people.
2. **The games industry** 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. The European digital single market area is the third-largest market for video games globally. In 2021, Europe's video games market was worth €23bn, and the industry has registered a growth rate of 22% over 2020 in key European markets<sup>2</sup>. There are around 5 100 game developer studios and publishers in Europe, employing over 87 000 people.<sup>3</sup>
3. **For game developer studios, access to data and control over data** in the games industry B2B value chain are the two key factors defining your creative and artistic possibilities, your possibilities to interact with your players, secure the privacy of your players, and your ability to scale and grow your business. Consequently, European rules for B2B data sharing define the future of the European games industry.

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<sup>1</sup> For more information, please visit [www.egdf.eu](http://www.egdf.eu)

<sup>2</sup> ISFE Key Facts 2021 from GameTrack Data by Ipsos MORI and commissioned by ISFE <https://www.isfe.eu/data-key-facts/>

<sup>3</sup> 2019 European Games Industry Insights report: [http://www.egdf.eu/wp-content/uploads/2021/08/EGDF\\_report2021.pdf](http://www.egdf.eu/wp-content/uploads/2021/08/EGDF_report2021.pdf)

## I. Business-to-government data sharing for the public interest

4. Like all other sectors in society, national tax authorities and statistical authorities regularly request game developer studios and publishers to provide access to their data. As the games industry is a consumer-facing industry, it is also cooperating with law enforcement agencies around the globe by providing access to data of players being investigated on criminal activities. Furthermore, the industry is increasingly collaborating with research institutions on data-driven games research.
5. Therefore EGDF welcomes, in principle, the Commission's objective to promote fair and transparent business to government (B2G) data sharing and overcoming barriers related to it. The B2G data sharing should be based on the following principles:
  - **Full automation:** All administrative reporting to public authorities (e.g., tax and statistical authorities) should be fully automated. As long as entrepreneurs always have a possibility to call for redress from human officials, EGDF warmly welcomes the use of AI-based automated decision making in eGovernment services, as it is likely to speed up bureaucratic processes significantly.
  - **Strict commitment to "ask only once principle":** The Commission should not forget that for SMEs, access to governmental data (e.g. data from immigration authority on the status of immigration process), portability of public data (e.g. trade register data), and free cross-border flow of data between public sectors and companies (e.g. on tax reporting) are equally important ways to reduce the administrative burden as the B2G data flows. "Ask only once principle" should be applied to all public services across Europe.
  - **Interoperable on national and EU level:** All European public eGovernment solutions should be built up to be interoperable with other services on national and European levels (e.g. joint European standards for B2G tax reporting)
  - **Creating commercial incentives for B2G data sharing through public procurement:** Currently, especially in emerging serious games markets, there are not enough financial incentives to take extra steps to enable B2G data sharing. It is particularly important that B2G data sharing is encouraged through public procurement practices. The costs of gathering and formatting data for governmental use should be appropriately reimbursed. Public support is needed to develop technical tools that reduce the costs related to data sharing.
  - **Security:** Both national governments and the Commission should pay special attention to the security of the eGovernment systems. European governments

have to invest in cutting-edge data security measures to avoid data breaches. Public authorities should be particularly careful when confidential business data is moved from one country to another for, for example, audit purposes (e.g. measures against data pitching). Additional safeguards, like specific rules and limitations for and transparent reporting on how the data is used, are needed to ensure that data will be used only for the public interest purpose for which it was requested.

- **Creating legal certainty and building global administrative standards:** The EU has to minimise legal uncertainty by harmonising different rules across the Member States and by building a clear framework on what data can be shared and on what conditions. Europe has to go beyond technological standardisation and be the global trendsetter in regulatory practices and administrative standards (e.g. VAT systems and VAT reporting systems for digital markets).
  - **Proportionality and reasonableness:** Public authorities should minimise the administrative burden by following the principle of data minimisation when it comes to non-personal business data.
6. For small and micro games industry companies, the reporting obligations of a different kind form a time consuming and financially significant administrative burden. Therefore the main focus of B2G data-sharing initiatives should be on full automation of tax reporting and statistical reporting obligations. Only when existing B2G data sharing practices have been fully automated should the EU open discussions on new mandatory data access requirements. Otherwise, the new EU regulation only risks creating yet another layer of burdensome administrative bureaucracy hindering the growth of European SMEs.
  7. Consequently, at the moment, any new B2G access requests should not be compulsory, as further mandatory disclosure is likely to bring extra administrative burden for European SMEs and may disincentivise companies from making further investments in innovation. The Commission should instead foster voluntary private-public partnerships based on contractual agreements with clear data security guarantees, and it should provide incentives for businesses, such as public support for research and innovation.
  8. When B2G data sharing is mandatory, the Commission should ensure that public authorities provide clear and detailed information to businesses on the data range necessary to fulfil a specific request. Therefore, access requests should be evaluated on a case-by-case basis and formulated much more narrowly than just broadly referring to “the public interest as defined in EU and national law”. An overly broad justification by merely referring to general reasons of public interest would require companies to share a broad range of data sets that may risk disclosing sensitive business information and create serious security concerns.
  9. The rule of law is increasingly eroding in the Union. Thus new B2G data sharing rules should provide appropriate safeguards for businesses to nullify data requests from the

authoritarian EU Member States. Proposed limitations on how long public bodies may use or store specific data sets and transparent reporting obligations on how the government uses the data are not enough. For example, suppose an authoritarian government would require companies to keep HR statistics on gender, sexual and ethnic minorities working for the company and request direct access to that data. In that case, businesses need to have a clear right to declare such requests null and void.

## II. Business-to-business data sharing

### Data-driven game design means the return of the economies of scale

10. The games industry is a pathfinder of the data economy. The game industry was the first cultural and creative industry to start experimenting with data-driven content creation. It was also among the first industries to hire data scientists to explore the possibilities of new content creation technologies and digital distribution and marketing platforms.
11. Nowadays, data is an essential resource for games industry SMEs and vital for all game developer studios and publishers. Good player experience that is enabled by access to player data is a crucial part of a successful game. Player data has become the critical route to player-centric improvements in gameplay, identifying bugs, building less toxic online communities and improving monetisation and marketing of games. Data-driven game development emerged from mobile and browser games, and it is becoming an increasingly important part of PC and console game development as well.
12. Step by step weakening access to the data is currently one of the key megatrends restructuring the games industry value chain for the European games industry SMEs. Dominant actors in the games industry value chain are increasingly using artificial limitations on data access as a tool to secure their market dominance. As an outcome:
  - Access to data (and tools needed to analyse that data) is becoming increasingly unreliable in the games industry value chain. Losing their essential data analytics tools is one of the main business risks of SME game developers. Sometimes a platform can suddenly block the access to data needed to use those tools. Sometimes the service provider can get acquired and/or closed down by their competitors.
  - Simultaneously, third-party tools provided by industry giants are increasingly becoming complete black-boxes (e.g. Facebook and Google), vacuuming data from games and giving increasingly less in return. Those who can invest in in-house data tools and competence. Those who can't are facing increasingly difficult times to grow their business.
  - Key digital game distribution platforms are introducing Netflix or Spotify like cloud gaming platforms, where game developers have a much more limited direct access to player data than on platforms where games are downloaded as a

stand-alone application. Other cultural and creative sectors in Europe have had much more limited access to data on their audience than the games industry. It has significantly hindered the innovation, competitiveness and development in those sectors. Now, instead of opening the data access for European creators in all cultural and creative sectors, the market forces are limiting the data access even in the European games industry.

13. Furthermore, the industry is getting fragmented in the walled data gardens dominated by big platforms and major publishers. These, usually non-European, corporate groups are fighting over direct access to the biggest amount of accumulated first-party customer data.
14. To sum it up, due to the constantly rising importance of user data in game design, economies of scale have returned to the games industry. Those who have the best access to player data are able to outperform those who have weaker access to data. The European games industry is now approaching a situation where becoming part of a usually non-European corporate group might be the only way forward. Consequently, it is essential that the new B2B data rules:
  - European creators of digital artistic content have a right to access the data on their audience. In the games industry, all platforms (including cloud streaming platforms) should provide access to relevant player data for game developers and always allow game developers to integrate their games to their own cloud back-end.
  - Enable European SMEs to build joint data sharing services to compete with global giants.

### **European creators of digital artistic content have a right to access the data on their audience**

15. In principle, players, not platforms, should be the ones who decide how their personal data is used and who has access to it. Now, big platforms are using, for example, privacy concerns as an excuse to move the power of limiting or allowing the data use from players to their own hands. Especially when it comes to big social media (e.g. Facebook) and mobile platforms (Apple and Google) data holders give access to data at unreasonable conditions, e.g. unilateral change of contractual terms and disproportionate restriction of the use of data.
16. Consequently, EGDF warmly welcomes new data access rights introduced in Digital Markets Act for gatekeeper platforms. However, their effective implementation requires that Data Act secures the availability of standards for interoperability that allow data sharing and exploitation at low marginal costs and, in some cases, structures enabling

the use of data for computation without actually disclosing the data (e.g. company-specific Key Performance Indicators on platforms).

17. First of all, all platforms (including cloud streaming platforms) should always allow game developers to integrate their games into their own cloud back-end.
18. Secondly,, game developers and publishers should have:
  - Timely access to personal (e.g. location of the players needed for following local consumer protection rules) and non-personal (e.g. sales data needed for tax reporting ) data needed to fulfil their regulatory responsibilities.
  - Access to player data needed for data-driven game design. Europe needs a regulatory framework, where all creators using music, video or game streaming services or applications stores to publish their content and services have a right to access their user data on those platforms and a possibility to transform that data for third-party services (if approved by the users) for helping them to create new content.
  - Access to B2B data and interoperable APIs for data transfer that allow transfer of their data to third-party services. In particular, game developers need to be able to access benchmarking data on the performance of their game on different platforms and the right to transfer that data to third-party services aggregating and analysing the performance of the games on other platforms. This would allow game developers to make informed decisions on which platforms they want to operate in.
  - Access to all data collected from their players through third-party SDK's. Currently, Facebook and Google are increasingly moving in a direction where game developers have fewer and fewer possibilities to manage, optimise and monitor the performance of the services.

### **Facilitating B2B data sharing through data sharing services**

19. The main challenges on sharing data between game developer studios are not technological:
  - **Lack of trust between parties involved in B2B data sharing:** Often, a neutral third party is needed to facilitate data sharing so that it remains fair and non-burdensome to manage
  - **The data holder refused to give data on the basis of competition law concerns:** There is significant regulatory uncertainty related to how much non-historical and confidential data companies are allowed to share under European competition law rules.

- **The data holder is prevented by law to give access to data and there is no legal basis for the data holder to give access to data:** GDPR sets strict, but understandable limitations, on B2B sharing of personal data.
  - **The data holder gave access to data at an unreasonable price:** As an outcome of the limited B2B data access, there is little competition in the markets. Therefore many leading games industry benchmarking services are able to price their services in a way that they are not accessible for micro-companies.
20. Therefore, EGDF warmly welcomes steps taken in the Data Governance Act to introduce more legal certainty through data sharing services that European SMEs could use for pooling both personal and non-personal data. The goal of these data syndicates/ data sharing providers should be to keep both the responsibilities and control completely in the hands of European game developer studios and publishers. In order to secure the privacy of players, these data sharing providers should be GDPR processors acting for the game developer studios acting as GDPR controllers. Data should not be shared with any third parties.
21. Data sharing services would create an alternative way for European SMEs to enrich their data in a controlled environment without becoming part of a global corporate group.

### **III. Tools for data sharing: smart contracts**

22. The games industry is currently experimenting with combining NFTs with smart contracts. However, these experimentations are in such an early state that no clear market trends have not yet emerged.

### **IV. Clarifying rights on non-personal Internet-of-Things data stemming from professional use**

23. The playful Internet of things (IoT) is expected to bring one of the next big disruptions to the games industry at the end of this decade. Boosted by the currently implemented 5G infrastructure, autonomous cars and sensing environments are expected to become important new platforms for games. However, at the moment, IoT games are still an experimental niche. However, IoT games have been introduced to toys-to-life consumer markets (connecting real-world toys with digital games).
24. Serious games are another market segment where IoT games are currently developed. In emerging medical games markets, for example, access to data from medical IoT devices is minimal. Without widespread public procurement requirements to open data access to

these devices for the development of third-party applications, the growth of the serious IoT game markets are likely to be extremely slow.

## **V. Improving portability for business users of cloud services**

### **Orchestration services as a market access opportunity for European cloud services**

25. When a game becomes a viral hit, it has to be able to scale up from thousands of players locally to millions of players globally in some days. European cloud platforms aren't big enough for enabling game developers to scale up their businesses quick enough. Therefore, the new opportunities for European cloud services are most likely connected with cloud orchestration services like Kubernetes that allow some of the services used by European game developer studio to be given to smaller cloud operators. For more information, please visit: <https://kubernetes.io>

### **Lack of interoperability between APIs**

26. On the other hand, the fact that each cloud service has a different API makes migrating from a cloud service to another difficult. On the other hand, these APIs enable specific cloud services to deliver maximum added value optimised for the specific cloud service. This would not necessarily be completely possible with a more standardised approach. In addition, as even the biggest game developer studios have no negotiation power towards leading cloud service providers, unilaterally changing contract terms and changes in APIs create uncertainty for game developer studios.

### **Lack of standards for comparing services**

27. Furthermore, comparing pricing and thus competing in cloud service markets is very difficult due to the huge variety of services available and differences in billing methods. There is no standard for, for example, measuring hardware as a service usage between providers which is a common pricing criterion.

### **Limitations for data transfers**

28. Some cloud services provide a short time window once a year when it is possible to migrate to another service. This, combined with contracts tying businesses to one service provider for two or three years, makes migration unnecessary difficult.

### **The self-regulatory SWIPO Codes of Conduct should be given more time to prove their worth**



29. EGDF welcomes the SWIPO Codes of Conduct as a step in the right direction. However, it is still too early to estimate its market impact.

## **VI. Complementing the portability right under Article 20 GDPR**

30. The fact that third-party application developers like game developers and publishers do not have access to data from smart devices is one of the key things hindering the growth of the app economy in Europe. In the end, individual owners of smart connected objects should be the ones deciding whether or not they want to port their data from devices to third parties. However, it is important to keep in mind that GDPR consent or agreement is not the only legal basis for a smart device manufacturer to share the data from the device with third parties. In some cases, legitimate interest, for example, might apply.
31. At the same time, it is important to keep in mind that despite guidance from the data protection authorities, businesses are still struggling with the implementation of the portability right under Article 20 of the GDPR. In particular, the wide interpretation of the scope of this right by these authorities has generated significant concern. It is far from clear in all circumstances what the range, quality and format of the data should be when a request for data portability is received. In the video games industry, only few data can be converted into something that is meaningfully applicable in the context of another game.
32. Like other data protection rights, the right to data portability is often misused. Not only do players sometimes make extensive requests when they do not agree with a company decision that was taken in a different context. Video game companies that face criticism can sometimes be hit with attacks from large crowds attempting to flood them with expensive data access requests.
33. The Commission should further fine-tune the conditions under which this right can be invoked by providing clearer rules on the type and “usefulness” of the data in scope. Businesses should be allowed to protect themselves from requests that are made to protest or make life more difficult without a ‘real’ interest in getting any data.

## **VII. Intellectual Property Rights – Protection of Databases**

34. The scope of the protections provided under the database directive is strictly limited to databases that have required quantitatively and/or qualitatively significant investment to build. Consequently, the database directive has had little significance for the games industry so far, but it is expected to become more important for the industry when the

business models from the sports industry relying on the protection of databases become more widely used in the games industry.

35. So far, the database directive has not been an obstacle for legitimate data access in our sector. The commission should carefully examine if there would be other less complex and more straightforward ways to facilitate B2B data access and use.

## **VIII. Safeguards for non-personal data in international contexts**

36. The ability to transfer data worldwide and reach our customers globally is critical to our industry. The technical provision of gameplay services requires maximum flexibility regarding the storage location of the data. Regulatory interventions should try to avoid further restrictions to international data transfers beyond what is already legally required in the EU/EEA.
37. In order to defend European companies against foreign intelligence services stealing their data, the Commission should
  - Introduce an obligation for data processing service providers (e.g. cloud service providers) to notify the business user every time they receive a request for access to their data from foreign jurisdiction authorities, to the extent possible under the foreign law in question
  - Introduce an obligation for data processing service providers to notify to the Commission, for publication on a dedicated EU Transparency Portal, all foreign extraterritorial laws to which they are subject and which enable access to the data they store or process on behalf of their business users
  - Introduce an obligation for data processing service providers to put in place specified legal, technical and organisational measures to prevent the transfer to or access of foreign authorities to the data they store or process on behalf of their business users, where such transfer or access would be in conflict with EU or national laws or applicable international agreements on exchange of data
38. The Union has to defend its digital industries against European and foreign intelligence services. As video games have become one of the most popular cultural mediums all over the globe, they are also used by national intelligence agencies for mass surveillance purposes. Consequently, the Commission must go beyond regulation on platforms on trying to limit the activities of foreign and European intelligence agencies. The Commission should
  - Secure that no Member States allows their intelligence agency to hack into and steal data from video games or penetrate online player communities. For more information, see for example:  
<https://edition.cnn.com/2013/12/09/tech/web/nsa-spying-video-games/index.ht>

[ml](#) or

<https://www.theguardian.com/world/2014/jan/27/nsa-gchq-smartphone-app-angry-birds-personal-data>

- Start immediate diplomatic action against any country on the globe that allows their intelligence services to spy on Europeans by hacking into and stealing data from video games or penetrate online communities, and
- Pressures any country on the globe remove any surveillance regulation that breaches European data protection and other rules.

**For more information, please contact**

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