



Transparency register number: 57235487137-80

19.01.2021

EGDF response on the EDPB Guidelines 05/2021 on the Interplay between the application of Article 3 and the provisions on international transfers as per Chapter V of the GDPR

About EGDF

1. **The European Games Developer Federation e.f. (EGDF)**¹ 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 markets². There are around 5 100 game developer studios and publishers in Europe, employing over 87 000 people.³
3. **The free flow of data between the EU and third countries is crucial for European game developer studios.** Regulatory obstacles on the free flow of data create significant market access barriers for European SMEs operating in global digital markets, and it will adversely impact anyone working in Europe's digital economy.

¹ For more information, please visit www.egdf.eu

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

³ 2019 European Games Industry Insights report: http://www.egdf.eu/wp-content/uploads/2021/08/EGDF_report2021.pdf

Cross-border remote work

4. **Cross-border remote and hybrid work is becoming a norm.** First of all, as the games industry is a global business, industry representatives are constantly traveling around the globe and often need to access the company data infrastructure from anywhere on earth. Secondly, as an outcome of the COVID19 pandemic, remote and hybrid work from third countries has become a norm. Furthermore, the games industry is an excellent example of an industry suffering from an acute talent shortage. Consequently, even small European game developer studios often hire employees that work for them from other countries across the globe.
5. **EDPB should base its evaluation of the role of remote working employees and other persons that are under the direct of the authority of the controller on its *Guidelines 07/2020 on the concepts of controller and processor in the GDPR*⁴:**

"If the controller decides to process data itself, using its own resources within its organisation, for example through its own staff, this is not a processor situation. Employees and other persons that are acting under the direct authority of the controller, such as temporarily employed staff, are not to be seen as processors since they will process personal data as a part of the controller's entity. In accordance with Article 29, they are also bound by the controller's instructions."

6. **EDPB should further clarify its approach to different cross-border remote work practices by evaluating whether or not remote working staff is bound by controller's instructions and whether or not they process the data as a part of controller's entity.** Usually, a game developer studios have at the moment four options :
 1. **Hiring the person directly as a cross-border commuting employee** might be possible in rare cases with some EU neighbouring countries. **The EDPB should clarify, as explained in *Example 5 of the draft guidance document, that cross-border remote work from third countries by any directly employed employee does not qualify as a transfer of personal data.*** Any directly employed employee should not be considered to be another controller or processor, but an employee, and thus an integral part of the employer acting as a data controller.
 2. **Hiring the person as a seconded employee through a third-party service provider acting as an employer of record in the third country** is currently the most common approach to tackling cross-border remote work-related bureaucratic challenges. This approach is particularly important for European SMEs with insufficient financial resources to establish a subsidiary in a third country.

It is important to note that in this case, the game developer studio only transfers or otherwise makes available personal data related to the employee to the employer of record in the third country. All other personal data (e.g. personal data related to the players of a game) stays strictly within the game developer studio. The seconded employee is usually subject to contractual and technical restrictions securing that he, she or they cannot disclose the data to the employer of

⁴ For more information, please see paragraph 78:
https://edpb.europa.eu/system/files/2021-07/eppb_guidelines_202007_controllerprocessor_final_en.pdf

record. **Consequently, any fully seconded employee should not be considered to be another controller or processor but should be considered to be acting under the direct authority of the game developer studio (the controller), and thus Chapter V of the GDPR should not apply.**

3. **Establishing a local subsidiary in the third country and hiring the person through it** is the most common approach for cross-border remote work for non-SME game developer studios that have already an existing network of legal entities across the globe. **The EDPB should clarify whether or not *example 2* of the draft guidance document also covers relations between a controller established in the EU and its subsidiary established outside the EU.**
4. **Hiring the person as a self-employed consultant from a third country** is currently another popular approach for hiring people cross-border. However, as there are significant taxation uncertainties associated with this model, this approach is likely to become less popular in the future. As explained in the *example 2* of the draft guidance document, in general, the provision of data will be considered as a transfer of personal data to a third country, and therefore Chapter V of the GDPR applies when a self-employed consultant is running his, her or their activities through a company.

However, when a self-employed consultant from a third country is acting as a freelancer or a sole trader, instead of incorporating a company with other people, they are operating under the direct authority of the game developer studio and as a part of the game developer studio. **Therefore, freelancers should not be considered to be another controller or processor but should be considered to be acting under the direct authority of the game developer studio (the controller), and thus Chapter V of the GDPR should not apply.**

For more information, please contact

Jari-Pekka Kaleva
Managing Director, EGDF

jari-pekka.kaleva@egdf.eu
+358 40 716 3640
www.egdf.eu