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EGDF response on the EDPB Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR

About EGDF

1. **The European Games Developer Federation e.f. (EGDF)¹** unites 24 national trade associations representing game developer studios based in 22 European countries: Austria (PGDA), Belgium (FLEGA and WALGA), Croatia (CGDA), Czechia (GDACZ), Estonia (Gamedev Estonia), Finland (Suomen pelinkehittäjät), France (SNJV), Germany (GAME), Italy (IIDEA), Lithuania (LZKA), Netherlands (DGA), Norway (VIRKE Produsentforeningen), Poland (PGA and IGP), Portugal (APVP), Romania (RGDA), Serbia (SGA), Slovakia (SGDA), Spain (DEV), Sweden (Spelplan-ASGD), Switzerland (SGDA), Turkey (TOGED) and the United Kingdom (TIGA). Through its members, EGDF represents more than 2 500 game developer studios, most SMEs, employing more than 45 000 people.
2. **The games industry represents one of Europe's most compelling economic success stories.** Located at the crossroads of the ICT and cultural industries, the game industry is one of the rapidly growing segments of the cultural and creative industries. In 2022, there were around 5 300 game developer studios and publishers in the EU, employing over 90 000 people and running a combined turnover of over €19bn². In 2023, Europe's video games market was worth €25,7bn, and the industry has registered a growth rate of 5% in key European markets³. The European digital single market is the third-largest video game market globally.
3. **Generally speaking EGDF welcomes further guidance on legitimate interest** and finds the guidance document reasonable. However, some details would benefit from additional clarification.

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

² EGDF-VGE 2023 European games industry insights report
<https://www.egdf.eu/wp-content/uploads/2024/06/2022-European-video-games-industry-insight-report.pdf>

³ ISFE-EGDF 2023 Key Facts <https://www.videogameseurope.eu/publication/2023-video-games-european-key-facts/>

EDPB guidelines should address imbalances in the value chain

4. **Global tech conglomerates often dictate the legal basis used for data processing.** The main challenge for game developers lies in the complexity of huge digital ecosystems and the power imbalance. Large service providers, often processors under GDPR, do not view their role as mere suppliers. Often, the large service providers decide the legal basis for data processing, not the European companies using their services. Furthermore, provided technologies are typically essential, and even when there are viable alternatives, the transfer to the use of alternative technologies may be an extreme technical challenge, costly, or nearly impossible while keeping the game running.
5. **Global tech conglomerates are not transparent about their analysis of chosen legal basis.** Third parties, especially the leading global service providers, are unwilling to share their own analysis of their chosen legal basis (not to mention onward transfers). This leads to a situation where game companies are expected to trust into the black box of unavailable documents, including the crucial balancing test analysis.
6. **Lack of transparency leads to unfair risks for European game companies.** When new interpretations either destroy the earlier chosen legitimate interest as the legal base or when it is revealed that the legal basis has always been inadequate for the third parties, the lack of legal basis may contaminate the entire database collected under a now non-compliant legal basis. A very realistic situation would be that the game company knew nothing about this beforehand. Since, under the strict GDPR rules, all personal data collected without a valid legal basis under Article 6 cannot be processed, game companies should stop processing such personal data at once.
7. **There is much uncertainty about changing your legal basis from a more lenient to a more strict one.** What is the actual process if, after new interpretations, a diligent organisation wants to review its legal basis? Now, there are only rumours of discussions with relevant DPAs, unofficial schedules, safeguards, and information for the end users. The actual costs can be extremely significant and may not be covered by small or even mid-sized companies without fear of losing their entire business.
8. **The European game developer studios carry the risk.** The game developer studios, who in the first place had no choice but to trust warranties given by their global third-party service providers, must also bear the burden of those warranties breached. In almost all standard, de facto non-negotiable, terms of services of the big service providers, there is no remedy for breach of warranties, merely a possible credit against the last invoice(s), and there is a limitation of liability that excludes any damages for interruption of business or sales or loss of sales. Furthermore, proving that third parties were guilty of either gross negligence or intentional misconduct, most game companies are not in a position to seek any judicial remedies from courts against these global tech conglomerates. This creates an additional layer of competitive disadvantage and business risk for the companies based in the EU.
9. **Consequently, the guidelines should further explore in paragraph 68 if third parties in the data value chain relying on the legitimate interests as a legal base, in addition to data subjects themselves, have the right to obtain information on the balancing test upon request. Furthermore, guidelines must provide guidance on how to transition from a legitimate interest to another legal basis if needed.**

EDPB guidelines should not make too far-reaching conclusion on CJEU's judgment in Meta v. Bundeskartellamt,

10. **In the draft guidelines (example 5, page 18), the EDPB states, "Further, the users of the online social network cannot reasonably expect those data to be processed even for other purposes such as product improvement."**
 - **This statement can lead to a dangerous generalisation of the underlying judgment.** The case was about Meta using data collected not only from the service used by the user but also from other Meta services and from third-party properties (via Facebook Business Tools) for product improvement.
 - It can be argued that users do not expect data to be harvested across the internet for Meta's product improvement. However, it would be important for the EDPB to avoid giving the impression that legitimate interests cannot support product improvement, as such, as a legal basis. In particular, the analysis should look quite different when data collected purely from within a specific service is used to improve that same service (as, for example, in the case of video game analytics).
11. **Considering how central use case product improvement is across a myriad of products and services, it should feature more prominently in the draft guidelines.** The EDPB must look at the phenomenon from a balanced view that duly considers the interests of both the end-users and the businesses. Currently, the draft guidelines note only that product improvement can be considered "legitimate" as an interest per se (para 16) but also provide the above-mentioned negative view of product improvement in the context of the balancing test required to process personal data based on a legitimate interest.

EDPB should avoid unclear concepts in its guidelines

12. **EDPB should avoid unclear concepts in its guidelines.** For example, concepts like "*the chilling effect on protected behavior*" (paragraph 46) should be either supported with more clarifying guidance on how they restrict the use of a legitimate interest or avoided.

For more information, please contact

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