

## Public Consultation on the EDPB's Guidelines 02/2024 on Article 48 GDPR

### Response from VIDEO GAMES EUROPE

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1. Video Games Europe welcomes the opportunity to provide comments on the draft Guidelines 02/2024 on Article 48 GDPR by the European Data Protection Board (EDPB). Our members welcome the issuing 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. Overall, we find that the Guidelines adopt a conservative and rather negative stance on data transfers to non-EU authorities, e.g., for law enforcement purposes. It is important to keep in mind that while Article 48 has an impact on the enforceability and recognition of requests from non-EU authorities, it does not make such requests illegal. Already today, EU Member States send numerous requests to companies in the US (as was demonstrated in the [2024 SIRIUS EU Electronic Evidence Situation Report](#)), a practice which is likely to only increase when the e-Evidence Regulation will be in force.
3. Regarding the legal bases for processing, the EDPB notes in §21 that *"the use of consent as a legal basis will usually be inappropriate in certain areas, especially if the processing of the data is related to the exercise of authoritative powers"*. While consent would obviously not be an appropriate legal basis in a context of compulsory powers, we disagree that it would be "usually inappropriate". Particularly, in a B2B relationship, e.g. between a cloud provider who is subject to a request from non-EU authorities and a customer, informed consent could well function as a proper legal basis, in particular as large cloud providers usually make a General Terms and Conditions commitment to redirect such requests to the customer (which is in accordance with the [US DoJ guidance to US prosecutors of December 2017](#)).
4. While the EDPB finds in §25-26 that a controller may sometimes have a legitimate interest to comply with a request from a non-EU authority, it seems to nonetheless reject the possibility to rely on article 6 (1) f), in view of the CJEU ruling **Meta Platforms Inc and Others v Bundeskartellamt** ([case 252/21 - §124](#)) and the EDPB's own 2019 legal assessment of the impact of the US Cloud Act. We respectfully disagree with this position. Firstly, the question at hand in the CJEU 252/21 case concerned the large-scale (*"potentially unlimited"*) gathering of personal data, to enable answering forthcoming law enforcement requests, rather than case by case responses to individual legal requests of authorities. We therefore think that the said case law is not applicable and observe that the CJEU in that same case expressly recognizes the legitimacy to respond to legally binding requests.

5. In addition, the EDPB Guidelines only make a partial reference to its 2019 [joint EDPB-EDPS response to the LIBE Committee on the impact of the US Cloud Act on the European legal framework for personal data protection](#) in footnote 16. This assessment does not downplay the importance of the legitimate interest balancing test as such but notes that it may be difficult to consider the applicable US standards and procedural guarantees, the applicable protection and proportionality principles, and the right to an effective remedy in the absence of an international agreement. Precisely those elements have been assessed carefully in the Commission's adequacy decision of 10 July 2023 regarding the EU-US Data Privacy Framework (DPF) (see §90-118). The general assessment of due process protections and other safeguards contained in U.S. criminal procedure law that the Commission provided in its adequacy finding is therefore relevant for its current inquiry into whether legitimate interests can constitute a valid legal basis for compliance with requests from authorities with the US, or at least for intra-company transfers in view of answering such requests. The EDPB Guidelines should clearly reflect this.
6. Finally, we are surprised to see that in its assessment of data transfers under Chapter V in §29 the EDPB refers extensively to the provision of appropriate safeguards (article 46(2) GDPR) but remains silent about the use of an adequacy decision (article 45 GDPR), including the Commission's landmark decision of 10 July 2023 regarding the EU-US DPF, as a possible basis for the transfer of personal data. This is especially relevant as the US Department of Justice sends access requests for US headquartered companies directly to their US entity, even if the data is located outside the US. This will likely also be the case for any European companies with a relevant US presence. Hence, such access requests may require data flows between EU and US establishments within one company. In the same vein, we are surprised to see that §32 of the Guidelines, which states that the requirements in article 48 GDPR for an international agreement are "*without prejudice to other grounds for transfers under this chapter*", only deal with the transfer possibilities under article 49 GDPR and do not mention article 45 GDPR. We think that the EDPB Guidelines should include clearer references to article 45 GDPR as one of the possible additional grounds for data transfers.

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7. Since 1998, Video Games Europe has ensured that the voice of a responsible 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. Video Games Europe represents 19 European and international video game companies and 13 national trade associations across the continent. Europe's video games sector is worth €24.5bn, and 53% of Europeans are video game players. We publish a yearly [Key Facts](#) report with the latest data on Europe's video games sector.