



Additional comments to ISFE's response to the European Commission's Public Consultation on the Data Act

1. ISFE welcomes the opportunity to respond to the Public Consultation on the Data Act and supports its overall objective of ensuring fairness in the allocation of economic value among actors of the data economy. Our sector understands how important data is for economic development. Without data, our industry would not exist. Data is not just fundamental for the development and creation of new video game content; it also plays an essential role in ensuring that consumers can purchase and access this content and that they can enjoy a good and frictionless gameplay experience. The following comments are complementary to ISFE's formal response to the Public Consultation.

B2G data access requests should be justified more narrowly

2. While we agree with the Commission's objective to promote fair and transparent B2G data sharing and overcome related barriers, we are concerned with the way such access requests may be justified. An overly broad justification by merely referring to general reasons of public interest would require companies to share a broad range of data sets which may risk disclosure of sensitive business information and create serious security concerns. Private sector data is often the result of investments and usually entails commercially sensitive information that allow a company to have a competitive advantage.
3. The Commission should ensure that businesses have clear and detailed information on the data range necessary to fulfil a specific request. Access requests should therefore 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". Furthermore, access requests should not be compulsory, as mandatory disclosure may disincentivise companies from making further investments in innovation. The Commission should instead foster voluntary private-public partnerships that are based on contractual agreements with clear data security guarantees and should provide incentives for businesses, such as in the area of research and innovation.

Contractual freedom should remain the bedrock of B2B data sharing.

4. ISFE strongly supports the goal of increasing data sharing between businesses and improving access to data for SMEs and start-ups. However, the proposed general rules on fairness of contract terms or modalities of access should remain voluntary in all cases, as they may not always be appropriate for data sharing practices in a specific business

context. Different sectors may have completely different needs to share or acquire data with or from other businesses.

5. In the video games industry, data is usually shared with specialised third-party providers for the technical supply and optimisation of a gameplay service. Collective analysis of players' data, for instance, can help companies to detect software errors, bugs, or "bottlenecks" within the game where players fail the tasks at hand. Such analysis may also help to disclose fraudulent behaviour, provide contextual advertising, or match players based on location and skill in order to set up multiplayer game sessions.
6. Contractual agreements between commercial actors can differ substantially depending on the objective of the data sharing and the potential risks to which the data can be exposed. Companies should therefore always be able to freely enter into data sharing agreements after careful consideration of all the implications. Mandatory sharing schemes would disrupt functioning data sharing models and make collaboration more difficult. Furthermore, additional compliance burdens that such mandatory requirements may bring risk disincentivising companies from continuing to share their data or to invest in innovation.

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

7. ISFE members welcome the work that has been done in the context of the SWIPO process. We consider it far too early to propose binding obligations or standard contractual clauses, as these Codes have only been in force for little more than one year. While they should be given more time to be fully implemented on the market, the Commission should actively promote their use and could do so by adding them to the upcoming Cloud Rulebook.

The right to data portability should be further clarified

8. 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.
9. 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.

10. 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.

Existing layers of legal protection should not be weakened

11. On-screen action in a video game is determined by a combination of software operation and user input. The data that is processed by a video games company is based on a specific code format which only has relevance in the context of a specific game. This underlying code is protected under the EU Computer Programs Directive as well as subject to non-disclosure agreements under the licensing agreements allowing gameplay.
12. The video game’s code only works in the context of a particular game and should not be shared. Revealing the code would allow other companies to copy the game and would weaken the technological protection measures put in place to prevent piracy and keep players safe from hackers. The code is the incentive that justifies the investment in the game and ensures the competitive advantage on the market.
13. The database directive has limited significance for the games industry, and it is not an obstacle for legitimate data access in our sector. A review of the Database Directive “to facilitate data access and use” could potentially overlap with other intellectual property rights and weaken the legal and technological protection measures currently in place. It may also create conflicts with data protection requirements or existing contractual obligations leading to legal uncertainty and potential litigation.

Global data flows should not be hindered by new policy initiatives

14. The ability to transfer data around the world and to 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. The potential of receiving requests for government access to stored data has no impact on the selection of data processing service providers due to its very low occurrence.
15. However, if requests for government access to stored data would come with a requirement not to inform users, they would conflict with our legal obligation to inform users of such access requests. ISFE therefore would support introducing a requirement 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.

About ISFE

16. The Interactive Software Federation of Europe (ISFE) comprises [national trade associations](#) covering 18 countries throughout Europe which represent in turn hundreds of games companies at national level. ISFE also has as direct members the leading European and international publishers, many of which have studios with a strong European footprint, that produce and publish interactive entertainment and educational software for use on personal computers, game consoles, portable devices, mobile phones and the Internet.
17. The video 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. All in all, there are around 5,000 game developer studios and publishers in Europe, employing over 85,000 people. In 2020, Europe's video games industry was worth €23bn, and the industry registered a growth rate of 22% over the previous year in key European markets¹.

ISFE Secretariat, September 2021

¹ [ISFE Key Facts 2020](#) from GameTrack Data by Ipsos MORI and commissioned by ISFE.