European
Games Developer
Federation

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About EGDF

The European Games Developer Federation e.f. (EGDF) unites national trade associations representing game developer studios based in Austria (PGDA), Belgium (FLEGA), Czechia (GDACZ), Denmark (Producentforeningen), Finland (Suomen pelinkehittäjät), France (SNJV), Germany (GAME), Italy (IIDEA), Malta (MVGSA), Netherlands (DGA), Norway (Produsentforeningen), Poland (PGA), Romania (RGDA), Spain (DEV), Sweden (Spelplan-ASGD), Slovakia (SGDA), Turkey (TOGED) and the United Kingdom (TIGA). Altogether, through its members, EGDF represents more than 2000 game developer studios, most of them SMEs, employing more than 25 000 people.

Questions for input and evidence – scope

1. What are the appropriate criteria to use when assessing whether a firm has Strategic Market Status (SMS) and why? In particular:

The Furman Review refers to 'significant market power,' 'strategic bottleneck', 'gateway', 'relative market power' and 'economic dependence'
- **How should these terms be interpreted?**
- **How do they relate to each other?**
- **What role, if any, should each concept play in the SMS criteria?**
- **Which, if any, existing or proposed legal and regulatory regimes, such as the significant market power regime in telecoms, could be used as a starting point for these criteria?**
- **What evidence could be used when assessing whether the criteria have been met?**

2. What implications should follow when a firm is designated as having SMS? For example:

- **Should a SMS designation enable remedies beyond a code of conduct to be deployed?**
- **Should SMS status apply to the corporate group as a whole?**
- **Should the implications of SMS status be confined to a subset of a firm's activities (in line with the market study's recommendation regarding core and adjacent markets)?**

The SMS status should apply to a subset corporate group as a whole. Many of the leading platforms are actually part of huge global conglomerates. For example, game developers do not just use Google Play owned by Alphabet to access to markets, just to name few, they use Alphabet's ad networks for advertisement, attribution and analytics services to measure effectiveness of advertisement, operating system running the game, cloud services for hosting the files, crash analytics, performance measurement tools, hosting services, machine learning tools,

data base services, authentication and cloud messaging services. Consequently, the evaluation of SMS status should make visible the potential gatekeeper role in the whole value chain evaluating elements going beyond digital distribution platforms.

At the same time it is important to remember that, for example, the corporate group under Alphabet has a number of business lines that do not have any direct link to the digital content and services like companies focusing on drone-based delivery of freight or autonomous driving. Consequently, the SMS status should apply to relevant subsets of companies in the value chain.

3. What should be the scope of a new pro-competition approach, in terms of the activities covered? In particular:
   ● **What are the criteria that should define which activities fall within the remit of this regime?**
   ● **Views on the solution outlined by the Furman Review (paragraph 2.13) are welcome.**

4. What future developments in digital technology or markets are most relevant for the Taskforce's work? Can you provide evidence as to the possible implications of the COVID-19 pandemic for digital markets both in the short and long term?

Access to B2B data defines the future of freedom of arts: EGDF would like to remind that freedom of arts is one of the key fundamental rights. As an example of the games industry demonstrates, many forms of artistic creation are increasingly becoming data-driven. For example, an increasing number of games are developed based on constant feedback from their players through automated data collection.

Furthermore, game developer studios are a leading form of art using procedurally generated elements to create in-game digital content and even whole digital worlds. EGDF fully agrees that the future of the arts is in the cloud. However, as long as digital content is generated on user devices game developers have full control over technologies used to enable artistic expression and interacting with their audience. On games streamed from the cloud to user-devices this is no longer the case.

Furthermore, one of the key elements hindering the innovation and development of other cultural and creative sectors in Europe is the fact that they have so far had much more limited access to data on their audience than the games industry. Consequently, access to data is going to be one of the key questions defining the meaning of freedom of arts in the digital era. It is going to define the ways the audience is interacting with digital artistic content and how data can be used to teach AIs to create new works of art.

B2B
data interoperability defines freedom to conduct business:
The freedom to conduct business is one of the key fundamental freedoms in Europe. The ways, for example, dominant platforms are forcing game developers to use the services provided by the platform (e.g. payment services or marketing tools) is significantly limiting competition in markets and limiting the right of European game developers to enter markets by using services they find optimal for their business and consumers

Questions for input and evidence – remedies

5. What are the anti-competitive effects that can arise from the exercise of market power by digital platforms, in particular those platforms not considered by the market study?

Bundling:
Often platforms are bundling use of one of their services together with use of another of their services. Google for example forces game developers to use google analytics while using google advertising networks. This creates a significant market access barrier for small specialized European service providers.

Contract term setting technical limitations:
Often the contract terms of major platforms make it very difficult to use third party service providers. For example, Apple has set contractual limitations for allowing third party payment systems on its platforms and is setting technical limitations for using other advertisement attribution solutions than their SKAdNetworks. Similarly, the challenges open source Godot game engine is facing with accessing console game development markets are a good example of limitations console manufacturers set for their development environments.

Contract terms with short notification times:
Apple announced on two month's notice that it will make it extremely difficult for third parties to access advertising identifiers. Although Apple's decision can be well justified from a privacy perspective, giving only two months for third party services to rebuild their systems relying on Advertisement Identifiers caused significant challenges for small European service providers.

Business uncertainty:
As the Apple iOS14 changes, currently platforms are able to introduce significant changes in the data value chain on extremely short notice. This brings significant market uncertainty for all actors in the value chain as they cannot be sure when the cornerstones of their data pipelines are going to be banned by their distribution platform.

Furthermore, as more and more smaller service providers are acquitted and closed down by major platforms, using the service of small service providers comes increasingly with a risk of suddenly losing a key service provider under a critical situation. Consequently, it is harder for smaller service providers to get new B2B customers.

Limited opportunities to develop your business models through platforms: At the moment, Apple for example, set's significant limitations on what payment systems game developers can use. At the same time, Youtube does not provide ways for game developers to monetise videos about their games. Game developers should receive a remuneration similar to that of music producers from the advertisement in "let's play" videos. Now, many video streaming services provide music producers a share of remuneration for the music used in the videos. The same practise should be applied to game developers whose content is used in gameplay videos. At a minimum, game streamers should have an opportunity to donate the advertisement revenue paid to them to game developers.

UK content creators have to be able to follow UK regulation:Timely access to information is required for tax reporting. Unfortunately, platforms sometimes fail to provide data in time. It should not take more than a month for platforms to deliver a sales report. Some platforms provide their monthly sales reports for SMEs so late that the SMEs are not able to fulfill their national tax reporting responsibilities in time.

Furthermore, at the moment some platforms, who are not taking care of their VAT payments for B2C transactions, might not provide all information about consumer location for taxation purposes they have access to for suppliers. This is a particularly big problem for crowdfunding platforms operating through pre-payments.

Now when General Data Protection Regulation (GDPR) has entered into force, it is crucial that game developers have effective means to evaluate what kind of data protection risks and liabilities the use of intermediation

services brings for them. Under the GDPR, a game developer and an intermediation service have to agree on what personal data game developer gives for the intermediation service and how it is processed (and vice versa). However, at the moment a game developer has no oversight on what kind of personal data and for what reasons the company behind an intermediation service is collecting in general through all its services. Therefore, what kind of role the personal data aggregated by the game developer for the intermediation service plays and what kind of data protection risks it carries in this wider picture .

Unfortunately, intermediation services are allowed to force a game developer to use their own internal technical tools and solutions for handling the data no matter how questionable game developers would find them from the data protection perspective.

Making censorship transparent: At the moment, discoverability/findability is the biggest challenge for all European content creators operating in the digital environment. New and novel regulatory solutions should be developed to address the transparency of content that is forbidden in a platform and operations of the research algorithms and practices related to editor's choices. UK citizens have a right to know what is shown to them and what kind of content is hidden from their eyes.

6. In relation to the code of conduct:

- **Would a code structure like that proposed by the market study incorporating high-level objectives, principles and supporting guidance work well across other digital markets?**
- **To what extent would the proposals for a code of conduct put forward by the market study, based on the objectives of 'Fair trading', 'Open choices' and 'Trust and transparency', be able to tackle these effects? How, if at all, would they need to differ and why?**

EGDF believes that the proposed code structure would work well and hopes that if implemented it would also be able to target impact. However, in order for that to happen the code of conduct should be mandatory for all key platforms. Furthermore, the scope of the objectives should be widened:

- Fair trading: It is not enough that terms of service are fair and reasonable, they have to also be clear and understandable. Furthermore, in order to bring much needed predictability to the markets, the code should include at least 3 month notification time about any major changes in the terms.
- Open choice: EGDF fully agrees on this principle. The code has to be very explicit in making clear that this also includes payment services, analytic services etc. In order to ensure that this really is possible also in the future, this part of the code has to talk about open APIs and access B2B data for third party service providers.
- Trust and transparency: This part should also address transparency of possible co-operation the platform is having with the UK or foreign intelligence service and other security agencies as required by local surveillance regulation (e.g. Assistance and Access Bill in Australia), as any back doors for public authorities significantly increase the data breach risks.

7. Should there be heightened scrutiny of acquisitions by SMS firms through a separate merger control regime? What should be the jurisdictional and substantive components of such a regime?

The CMA should further prioritise scrutiny of mergers in digital markets and closely consider harm to innovation and impacts on potential competition in its case selection and in its assessment of such cases.

The Furman report notes that over the last 10 years the 5 largest firms have made over 400 acquisitions globally. None has been blocked and very few have had conditions attached to approval, in the UK or elsewhere, or even been scrutinised by competition authorities.

Concentration in digital markets can have benefits but could also have negative consequences. Concentration in digital markets could potentially raise effective prices for consumers, reduce choice, reduce innovation and harm quality. Concentration in digital markets could potentially prevent new companies from entering the market or scaling up.

8. What remedies are required to address the sources of market power held by digital platforms?

- What are the most beneficial uses to which remedies involving data access and data interoperability could be put in digital markets? How do we ensure these remedies can effectively promote competition whilst respecting data protection and privacy rights?
- Should remedies such as structural intervention be available as part of a new pro-competition approach? Under what circumstances should they be considered?

General remedies:

- Bringing back conformity with the law and B2B contract: Currently, large B2B platforms rarely introduce any changes to their services even if a game developer studios specifically raise their concerns about legality and conformity of some parts of their services.
- Returning access to service: When a large B2B platform blocks the access to a certain third-party service for an unjustified reason, they should return the access to the service.
- Price reduction: Where applicable, e.g. when a B2B service does not work as promised, game developer studios should be entitled to a price reduction.
- Compensation for damages: When, for example, a digital distribution platform takes down a game for reasons breaching the B2B contract between the game developer and platform or European law, a game developer studio should be entitled to full compensation on estimated lost sales.

Remedies related to data:

- Access to data allowing game developers to follow regulatory requirements: As platforms and operating systems are closest to players and have therefore access to most information about them, they should be obligated to provide necessary anonymised data for fulfilling legal obligations in privacy friendly way:
  - **Location data**: The location data of customers is needed to identify the region where they are coming from in order to know what regulatory framework should be applied to them on the global level. Unfortunately, the platforms or operating systems do not necessarily communicate this automatically for the applications installed on the device.
  - **Use of protection of minors and accessibility tools**: Currently game developers do not necessarily know if protection of minors functions have been activated on the user device. If the operating system would communicate this information to all applications on the user device, the game developers would be able to take necessary precautions automatically. The same applies to accessibility functions on operating system level. Information about them being activated would help game developers to propose activating accessibility features also in the game.
  - **Financial data:**

- **Data needed for tax reporting**: Game developers do not always get their financial data from platforms in time for their mandatory tax reporting. Currently, it takes for, for example, Google seven days to provide accurate financial information on the sales through their platform from the previous month. However, many studios that are part of corporate groups have to report their financial data for their mother company in five days after the end of reporting period. This leads to the significant unnecessary administrative burden for game developer studios as tax reporting data has to be constantly corrected.
- **Data needed to remove refunded in-game purchases**: At the moment, platforms do not always communicate to game developers, which players have asked their money back from their in-game purchases. This data would be needed to remove the in-game items from those players that have asked a refund.
- **Consent management data**: At the moment, a number of advertisement frameworks are pushing for consent as a lawful basis for processing personal data. However, game developers do not necessarily have access to sufficient data to connect the consents with each player.
- **Fair access to B2B data**
  - **Carbon footprint data:** EGDF agrees that some data should be classified as a public good. One of them should be the CO_2 footprint of different services in the digital value chain. Currently, game developer studios are struggling to identify their own carbon footprint in order to compensate for it. Unfortunately this has to be done based on rough estimates as there is no access to CO_2 footprint data of different B2B services the studios are using (like cloud, advertisement, game engines etc.). Full transparency of CO_2 footprint would allow game developer studios to introduce green procurement solutions pushing B2B service providers to cut down their carbon emissions.

9. Are tools required to tackle competition problems which relate to a wider group of platforms, including those that have not been found to have SMS?

- Should a pro-competition regime enable pre-emptive action (for example where there is a risk of the market tipping)?
- What measures, if any, are needed to address information asymmetries and imbalances of power between businesses (such as third-party sellers on marketplaces and providers of apps) and platforms?
- What measures, if any, are needed to enable consumers to exert more control over use of their data?
- What role (if any) is there for open or common standards or interoperability to promote competition and innovation across digital markets? In which markets or types of markets? What form should these take?

Addressing information asymmetries and power imbalances
The challenge with any competition law approach is that it is hopelessly slow. Digital markets are changing constantly and the windows of opportunity for European start-ups to scale up their activities to become global unicorns are usually short. A good example of this is are European cloud game services. The first cloud based European mobile game streaming service, entered in the markets 2018. This happened one years before Apple and Google introduced their own subscription based services in 2019. Because of contractual restrictions the streaming service has not been able to launch their service on Apple. And now the company has restructured its activities for games for children.

Even if European Union would have started a competition investigation against Apple in 2019, it would have taken years before the Commission would have reached any conclusions and by that moment the window of opportunity

for European companies would have been hopelessly gone. Consequently, European Union needs a regulation for unfair B2B contract terms for non-negotiable B2B contracts.

Consequently, the most effective way forward is to introduce a regulation of unfair non-negotiable B2B contract terms:

- Ending arbitrary behaviour: The platform holders should be obligated to only act towards content creators for reasons that are justified, and not to act as they please
- Unfair share of regulatory burden:
  Often the platforms push all the obligations of following UK regulation to the hands of the developers.
- Full data transparency:
  Data isn't just a question of developer's access to data from platforms. An equally important question is how the platforms are using the data collected by developers that they are forced to give for platforms. This is a particularly important issue, because the platforms themselves are leaking data collected by developers to third parties. Consequently, game developers do not usually have any overview of how a platform is actually using the data and as a platform de facto reserve the rights to use the data as they wish.
- Consumer returns:
  It is often unclear how platforms are going to share the information of those customers who have asked to return their payments or the information comes with a significant delay. For example, a user X buys an in-game item for 3 EUR. The item is sold for him or her by the game, he or she uses them in the game and they are "gone". Days or weeks later, the platform gives a developer the information that the user already requested a refund directly after paying in (days or weeks ago). Thus real-time information on topics around contracts/payment is needed.
- Non-assertion clauses:
  Platforms might force you to grant all IPRs for them for your content. Nowadays it is rare to see full non-assertion clauses, but e.g. Amazon AWS still has a version. Because developer cannot sue Amazon or others in the ecosystem, it means effectively that they can exploit your IPR free-of-charge
- A regulation is the same for all, B2B contract terms are not:
  As usual, it remains to be seen if the rules are going to be the same for all. So far, Apple has had preferential treatment of certain big tech companies like Facebook, allowing them to do more than other companies on their platform. To secure that the UK competition authorities have ways to monitor the market development and identify potential market failures, any differentiated treatment should be made completely transparent
- Clear and understandable contract terms:
  Big game developer studios are able to develop their in-house data analytic tools, but at the moment it is unclear whether or not Apple's decision will make market access significantly harder for start-up companies that have relied on third-party services in their data analytics.
  As an outcome of R&D focused Business Finland funding, Finland is well known for developing excellent data-driven third party services for game development. For example, Helsinki based Applifier, for example, was sold to Unity and Omniata to King. The current uncertainty around the meaning of Apple's new contract terms and market practices to be introduced with iOS14 are creating significant market uncertainty and market access barriers for both the European mobile game developers and the companies developing third party data-driven B2B services. This clearly demonstrates why B2B contract terms should always be clear and understandable in the data value chain, in particular, when dominant market players introduce major changes impacting the whole data value chain. Furthermore, it is clear that two months, in the middle of the European holiday season, is not long enough notification time to allow companies to redesign their services completely.

Giving control to consumers on their data:
Consumers, not Big Tech companies, should decide if they are ready to share their data with a game developer studio:
It is very difficult for a game developer studio to get the data that Facebook, for example, has collected from the player of a game even if the players would consent on sharing the data with a game developer. So it is double negative: Facebook forces companies to implement tracking, and then they do not share the data with the studio. Platforms and other third party services should leave it up to the studios to decide if and what kind of tools they want to implement (including payment services or advertisement tools) and for players to decide whether or not they allow their data to be used for this or not. In particular, advertisement networks, social media services, platforms or other service providers should not force companies directly or indirectly (bad ranking, no good new deal/ downgrade or business disadvantage of any kind) to implement non-data-protection-friendly or unstable tools.

It is not a sign of healthy markets if game developers have to approach each SDK from any service provider as a potential malware. Obligation to provide necessary data to fulfill legal obligations:
At the moment, a number of advertisement frameworks are pushing for consent as a lawful basis for processing personal data. However, game developers do not necessarily have access to sufficient data to connect the consents with each player.

Promoting innovation:
Open or common standards are going to have only a limited impact on the markets practices hindering competition and innovation, because the challenges are less technological and more contractual. Consequently, the task force should identify certain key data sets that should always be accessible for third party services. If these data sets are personal data, the data subjects, not platforms, should be the ones deciding whether or not third-party services should be allowed to access this data or not.

Questions for input and evidence – designing procedure and structure

10. Are the proposed key characteristics of speed, flexibility, clarity and legal certainty the right ones for a new approach to deliver effective outcomes?

11. What factors should the Taskforce consider when assessing the detailed design of the procedural framework – both for designating firms and for imposing a code of conduct and any other remedies – including timeframes and frequency of review, evidentiary thresholds, rights of appeal etc.?

12. What are the key areas of interaction between any new pro-competitive approach and existing and proposed regulatory regimes (such as online harms, data protection and privacy); and how can we best ensure complementarity (both at the initial design and implementation stage, and in the longer term)?