ISFE Position Paper on the Proposal for a Directive on Contracts for the Supply of Digital Content

ISFE represents the European video games industry. Our membership includes 16 major publishers of interactive software and trade associations in 18 countries throughout Europe which represent hundreds of game companies of all sizes. The interactive software industry, representing publishers and developers of video games, **is the fastest growing sector of the European content industry** with consumer spending estimated at more than **€20 billion in 2015** out of a global market of €68 billion. Our industry was "born digital" and is one of the greatest success stories of the digital sector so we welcome the European Commission's Digital Single Market initiative and would like to help the Commission achieve practical and innovative solutions in its legislative agenda.

We are concerned nonetheless that the draft Directive does not take sufficient account of certain digital realities, in particular the role that data plays in developing digital content and where consumers' interests and expectations really lie.

ISFE recommends that the draft Digital Content Directive should be reviewed with a view to aligning its provisions with those of the current EU Consumer Acquis. The overall scope of the Directive should be narrowed to create legislation that is lean, practical and fit for purpose to drive growth in the digital economy. You will find below a short summary of our main concerns and recommendations to streamline the Directive so that it fits with the digital world while ensuring a high standard of consumer protection.

1. Digital Content Definition (Art 2.1)

The proposed Directive sets out a new definition of digital content encompassing data and services allowing **the creation, processing, storage or sharing of data**. This contradicts the existing definition in the **Consumer Right Directive** which defines digital content as "*data produced and supplied in digital form".* The definition of digital content used in the Consumer Rights Directive was painstakingly agreed by stakeholders and has allowed for flexible and effective positions to be reached throughout the EU on how best to treat digital content. The use of different definitions for the same concept can only lead to confusion and legal uncertainty.

This extended definition of digital content will likely cover game-related services such **as basic websites** and **chat applications,** as well as other service-like features of games that use experimental functionality to improve content for users, so removing the incentive for businesses to develop such services and push them to 'scale back' certain functionalities.

- ***ISFE Recommendation - Amend***

ISFE suggests aligning the definition of digital content with the Consumer Right Directive. ISFE suggests classifying "service-like features" (such as multiplayer functionalities) as 'continued transmission' but not 'services'.

2. Definition of Supplier (Art.2)

It is not clear from the draft directive **who should be regarded as the Supplier and who should be regarded as a third party acting on behalf of the Supplier**. There are many contradictions in the text

(Art.2, Art.5, Rec.47) while **clarity is indispensable here** as many obligations will stem from this definition**.** In the video games industry for example, the digital content can be supplied to the consumer by a retailer, an online platform or by a game developer or publisher.

- ***ISFE Recommendation - Amend***

ISFE suggests that the Supplier should be defined as the undertaking that receives monetary consideration from the consumer in exchange for the digital content (the final distributor), notwithstanding that ultimately the publisher or developer of the game will remain the best placed to remedy conformity issues.

3. Conformity: Pre-contractual information and modification of digital content (Art. 2, Art. 6.1, Art. 15)

The draft Directive sets out requirements that digital content should conform to pre-contractual information such as **duration, quantity and quality** – all of which are generally acceptable for our industry. However, the Directive also seeks to regulate on an unnecessarily detailed level, such as providing that the content must conform to the "version" advertised while simultaneously requiring that the consumer must always receive the most up to date version of the content. This is likely to cause problems for high street retailers who cannot update the digital content they sell on a tangible medium.

Restrictions on how companies can modify digital content will actually make free updates and patches – a long established tradition of our industry that greatly benefit consumers – a "risk" for games companies. As an example, a digital game, as a piece of software, needs to perform various updates and improvements all along its 'life cycle' to remain attractive and work with updates to users' operating systems and hardware. Consumers appreciate that updating software is never an exact science and fully understand that the game that they purchase initially will often not be the same game a year later. The evolution of games has been a feature of our industry for nearly three decades.

Art. 15 proposes that where digital content is modified the following overly strict formalities should be observed:

- *Explicit notice on a durable medium (art. 15.1(b))* : that would mean **one email per day** for some games which are subjected to many updates at the beginning, hence **turning notifications into 'spam'-like emails**
- *A 30 day possibility to end the contract* after each modification of it *(art.15.1(c))* : as there are many updates which could be considered as a modification**, the 30-day period could run over the entire duration of the initial contract** and make any long-term engagement pointless
- The possibility for consumers to retrieve their data in case of termination of the contract *(art.15.1(d))* due to a modification. **This would again lead to major technical problems as games are constantly adapted and modified on the basis of collected data**.

- ***ISFE recommendation - Amend***

The Provisions in the Directive that deal with defining conformity and the modification of digital content ***need to be adapted to certain digital 'realities'*** *to avoid harming innovation and the evolution of digital content. Clarity and flexibility with these provisions are crucial for the video games industry.*

4. Scope of the text: Contracts Against Price to be Paid or Counter-performance Other than Money (Data) (Art 3.1)

The Directive includes digital content provided for counter-performances other than money such as data or content provided by the consumer within its scope.

The right to the protection of personal data, a fundamental right enshrined in Article 8 of the European Charter of Fundamental Rights, is of paramount importance in the digital economy. Europe has some of the most fit-for-purpose data protection legislation in the world to vindicate this right, which will be reinforced soon by the introduction of the General Data Protection Regulation. The inclusion of data within the scope of the Directive significantly overlaps with existing legislation in the European Union Data Protection Acquis and does not provide any discernible value to consumers, whilst at the same time imposing unmanageable administrative burdens on industry that will harm innovation and the roll-out of different kinds of services and products.

In the games industry, most data collected are **anonymous and unusable outside of the gaming context**. These data are used by game developers to detect a bugs and to improve content for users. This is comparable to **telemetry** in the way that data are collected and mainly processed in the benefit of the gamers' experience and not at their expense.

This interactive relationship between game developers and players has been and remains essential in the development of most popular games. Some games, such as World of Warcraft, have been evolving for more than a decade in line with their players' expectations. Many games companies have been able to use data provided by users to fix issues with different kinds of hardware and software on which the game might be played.

- ***ISFE Recommendation – Delete***

ISFE opposes as a matter of principle the inclusion in the directive of data as 'counter-performance'. We believe that it will hamper emerging start-ups seeking to use data in their business model. If policymakers decide to take this route, ***ISFE asks for clear criteria and definition of what a 'commercial use" is****. In the Commission proposal, commercial uses covered are defined against a negative list of excluded uses, all of which are generally unclear and difficult to interpret.*

Given the variety of types of data and ways to collect and process them, the concepts "actively" providing counter performances (art 3.1) and "directly" and "indirectly" provided data (rec. 14) also need to be further explained.

5. Burden of Proof (Art.9)

Article 9 states that suppliers must bear the Burden of Proof in demonstrating that the digital content conforms to the contract with a requirement that the Consumer help the supplier "determine" their digital environment (technical specifications). This can be reversed when it is ascertained that the digital environment is incompatible with the content.

The shift of the Burden of Proof onto businesses and the absence of a reasonable time limit during which consumer rights must be exercised is unrealistic and will cause exorbitant compliance costs for businesses.

- ***ISFE Recommendation - Delete***

*ISFE suggest a **time limit** to be set otherwise a provider could owe consumers obligation for decades.*

6. Retrieving of Data and Refraining from Using Data (Art. 13 and Art. 16)

The draft Directive states that suppliers should refrain from using any data, personal or otherwise, provided by the consumer after the contract has been terminated and must provide functionality that enables consumers to retrieve their data provided as counter performance once the contract is terminated.

This is a major cause of concern for video games industry. Data collected **are essential to and inseparable from many of the updates performed on a game.** This would be technically infeasible to implement and retrieved data will be of no use for the consumer out of the specific game context in which it was generated (e.g. in that specific game).

Returning all data collected in this process to the player would not only involve considerable technical challenges (ironically this would include meticulously tracking and logging every single player's action!) but will also greatly slow innovation and the development of new games.

- ***ISFE Recommendation - Delete***

All "data based" remedies included in the Directive should be removed as they are unnecessary and overlap with existing protections provided for in the EU Data Protection Acquis.

7. Long Term Contracts (Art. 16)

The draft directive states in Art.16 that after a 12-month period the consumer should be able to terminate any contract for digital content whenever they want.

Long term contracts are a guarantee of steady revenues for content providers in exchange for a lower rate for customers. If this is not applicable beyond the first year of a contract **it will destroy a long-established games industry business model that provides value to consumers and which is available in hundreds of other industries.**

- ***ISFE Recommendation - Delete***

There is no justification for this provision – it is harmful to consumers and harmful to businesses.

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