



EUROPE'S
VIDEO GAMES
INDUSTRY



European
Games Developer
Federation

ISFE & EGDF observations on the proposal to review the Product Liability Directive (2022/0302(COD))

March 2023

Executive summary

- ISFE and EGDF oppose a generalised inclusion of standalone software in the definition of 'product'.
- The text of the proposal does not ensure legal clarity regarding the notions of standalone software, software as a component of a product, software as a service, and digital services.
- Since video games are interactive entertainment and are recognised as unique and complex works by the CJEU, relying on the protections offered by the Computer Programs Directive on the one hand, and on the other hand on the 2001/21/EC Copyright Directive for the artistic and creative elements in a game such as the narrative, the visual images or the music.
- The current inclusion would expose game developers to a substantial, unjustified, and disproportionate liability regime.

1. ISFE and EDGF acknowledge the importance of revising the Product Liability Directive (PLD), as the Directive dates from 1985. However, we considers that the [European Commission's proposal](#) would present substantial issues for the video games sector on multiple levels, ranging from lack of legal clarity to practical enforcement problems of the provisions.
2. In particular, the industry has a long-standing commitment to minor protection. In 2003, responding to a call from the Council of the European Union for a harmonised age rating system for video games, the industry established the PEGI (Pan European Game Information) system – a successful self- and co-regulatory system aimed at informing consumers, players and parents of the age appropriateness of a game and guiding the industry: Today 38 countries in Europe use the PEGI system¹. The PEGI system, however, is more than just the visual labels displaying the appropriate age for a specific game ranging from 3 to 18: the system's backbone is its Code of Conduct which is a set of rules to which every publisher that uses the PEGI system agrees contractually. The Code addresses age labelling, promotion and marketing, independent consumer redress, and importantly, safe online gameplay.
3. Another building block of minor protection are the best-in-class parental control tools such as those available on consoles and now also on some other devices and platforms. These are a crucial pillar of the industry's safety-by-design approach and allow to manage and set limits for play time, online interaction with other player and spending. These have been in place for 20 years , and continue to improve and expand the features available to parents and guardians. Digital market players now introduce control tools very similar to those present on video game consoles.²
4. Bearing all this in mind, along with the already existing legislation applicable to video games, ranging from consumer protection, consumer contract law, data protection, privacy, cybersecurity, to various platform regulations, ISFE and EGDF caution against broad horizontal

¹ www.pegi.info

² See for example Google Family Links introduced in 2017.

legislation which could generate complex (or even unsolvable) overlaps, which will not offer the necessary clarity for economic operators.

- **Scope and definitions**

5. ISFE and EGDF are concerned by a number of issues posed by some of the definitions set out in Article 4 of the EC proposal.

- **Scope of ‘new technologies’**

6. Recital 3 of the PLD proposal refers to the fact that the proposed revision of the PLD is designed to ensure that ‘new technologies’ are covered by liability rules.
7. The reference to ‘new technologies’ creates a considerable degree of uncertainty regarding the scope of products covered by this legislation, as video games are not a new technology: some of the creation tools and delivery methods may be ‘new’, but the very concept of a video game cannot be considered a new one and games are first and foremost a way of cultural and artistic expression³.

- **Software as a ‘product’**

8. Video games are complex works, according to the CJEU⁴: they comprise both software and several other types of copyrighted material, from music to script, from images to character models. Reducing a video game to ‘software’ would be the equivalent of reducing a book to the paper it is printed on. This highlights the complex nature of video games which is interactive entertainment and a form of cultural expression.
9. We are concerned that the inclusion of software, particularly standalone software, within the definition of ‘product’ under 4(1) could pose substantial difficulties, and may unintentionally include video games and by this impose liability rules that have been developed for product safety, on video games. The horizontal nature of this legislation, sets out the same broad liability rules for very different kinds of products that can be deployed in multiple scenarios and for a wide range of uses.⁵ The risks they present will therefore often depend on how the user deploys them. Typically AI enable video games do not pose risks to players’ safety, as recognized by the European Commission in the [AI Act proposal’s press release](#).⁶
10. Strict liability regimes are intended for high-risk or hazardous situations where the life and physical integrity of persons are concerned – they are powerful tools that should be reserved for those situations where a risk of material harms exist. The software used in video games may of course include flaws, imprecisions or bugs - and consequently, video games today are generally subject to frequent updates/patches. The PLD’s approach of software flaws is inconsistent with how software development works in practice – it is an iterative process, dependent on multiple factors, from hardware usage and efficiency, consumer feedback, creative feature introduction, among

³ The first video game was created by William Higginbotham in October 1958, the classic Tennis for Two, very similar to the 1972 hit Pong. Many other early examples of video games created in the 1960’s and 1970’s exist. The 1970’s brought the introduction of home video game consoles, with Magnavox Odyssey, designed by German-American engineer Rudolf Baer, which sold over 350.000 units by 1975. Released in 1977, the Atari 2600 sold approximately 30 million units by 2004. The Nintendo Entertainment System, released in 1984, sold over 61 million units.

⁴ [Case C-355/12](#) §29: “Videogames (...) constitute complex matter comprising not only a computer program but also graphic and sound elements, which, although encrypted in computer language, have a unique creative value which cannot be reduced to that encryption. (...)”

⁵ European Commission [Q&A on the Product Liability Directive](#) “The revised product liability rules will apply to all products, from garden chairs to cancer medicines, from agricultural products to advanced machinery but also to software updates.”

⁶ “The legal proposal allows the free use of applications such as AI-enabled [video games](#) or spam filters. The vast majority of AI systems fall into this category. The draft Regulation does not intervene here, as these AI systems represent only minimal or no risk for citizens’ rights or safety.”

many other factors. Thus, the matter of damages emerging from ‘defective’ software is a nebulous one, even in the abstract.

11. As stated above, video games are complex works, and assessing putative damages emerging from such products will always entail a substantial degree of subjectivity. Additionally, in several games currently available on the market, users can create their own game elements, scenarios or characters, make additions or modifications⁷ to games, or even create new games altogether.⁸ This further highlights the fact that video games are multi-layered works, and that video game publishers do not always have full control of the design of a player experience – economic operators can recommend caution and provide guidelines, but ultimately, consumers will decide how they will use a game.

- **Software is not a homogenous category**

12. Importantly, risks presented by software can **vary widely** and the current wording of the PLD proposal does not acknowledge this aspect – the risk associated with software that operates an assembly line robot is not the same as the one with a software that enables a video game. Consider that in the surveys included in the EC’s Impact Assessment document, when asked whether ‘consumers should get compensation under the Directive if the following intangible items are defective and cause physical/property damage?’, the agreement rate for apps used on a device, but which don’t operate it (the category under which video games would fall), was half of that of the most concerning categories.⁹ Similarly, when asked whether they agreed or disagreed ‘that consumers should get compensation under the Directive if the following intangible items are defective and cause physical/property damage?’, the category under which video games fall (considering the definition in the proposal, ‘Software that is used on a device but does not drive the device (e.g. a gaming app on a computer or other device)’), **was by far the least consensual of all the available categories**.¹⁰ These survey responses are another indication that applying a homogenous treatment to all types of software in this sensitive aspect is perhaps overly undiscerning.
13. Further, as video games have not been assessed within the impact assessment, we are concerned with the broadening of scope of the PLD without valid, empirically substantiated basis.
14. Consequently, the complex legal nature of video games, along with the ‘imperfect’ nature of software, are unsuitable for a coherent application of a no-fault liability regime across 27 Member States, as there is a considerable degree of variation in civil jurisprudence across these countries, and would likely result in an uneven application of the proposed Directive.

- **Regulatory overlap**

15. It is important to consider the interplay of the proposed revision of the PLD with Directive (EU) 2019/770¹¹, known as the Digital Content Directive (DCD), in what conformity is concerned.
16. Article 6 of the PLD proposal takes a very broad approach regarding the assessment of defectiveness (and consequently conformity) of a product, relying on somewhat subjective language, including the expression ‘reasonably foreseeable’ misuse of a product, an important

⁷ Commonly known as ‘mods’

⁸ Commonly known as ‘user-generated content’ (UGC)

⁹ [Commission Staff Working Document – Impact Assessment Report](#), p. 66: only 42% of respondents agreed, and 35% disagreed

¹⁰ *Ibid*, p. 68: only 48% of respondents strongly agreed, compared to the next lowest category, 66%

¹¹ [Directive \(EU\) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services](#)

notion which is not further elaborated upon, neither in a recital of the proposal, nor in the accompanying Explanatory Memorandum nor the [EC Staff Working Document on impact assessment](#). Any defectiveness standard must be objective and clear, so as to avoid overreaching into quality considerations.

17. A product should not be considered defective as a result of issues related to safety-relevant cybersecurity requirements as laid out in Article 6(1)(f). Cybersecurity is an ongoing struggle against existing and evolving threats and cybersecurity professionals constantly strive to stop malicious actors. The idea that a product manufacturer can be liable for an unknown vulnerability exploited by an evolving threat puts an undue burden on those trying to stop malicious actors.
18. Moreover, this matter is further complicated by the fact that nowhere in article 6 is there a reference to user negligence: only recital 41 refers to the fact that 'it should be possible to reduce or disallow the economic operator's liability where injured persons themselves have negligently contributed to the cause of the damage.' This is an important element to ensure that self-responsibility and consumer awareness is not legislated away. Article 12(2) does provide for cases where the damage is caused both by the defectiveness of the product and by the fault of the injured person, and ISFE welcomes this provision.
19. Article 8 of the DCD sets out objective requirements for conformity for digital content/services in a thorough and more specific manner than the PLD does: digital products should 'be fit for the purposes for which digital content or digital services of the same type would normally be used', and 'be of the quantity and possess the qualities and performance features, including in relation to functionality, compatibility, accessibility, continuity and security, normal for digital content or digital services of the same type and which the consumer may reasonably expect, given the nature of the digital content or digital service'.
20. Consequently, Article 8 of the DCD is a more adequate and specific assessment mechanism for software conformity than the current PLD proposal, which takes a very broad approach – applicable to a wide array of products ranging from drinking glasses to video games. ISFE is of the opinion that compliance with article 8 of the DCD is sufficient to ensure consumer trust and safety regarding video games, and that the PLD proposal risks creating significant legislative overlap, without sufficiently adding to consumer safety in what concerns digital content.
21. In addition to the DCD, the General Data Protection Regulation also applies to video games, as does the Unfair Commercial Practices Directive and the Consumer's Rights Directive, which overall offer a substantial degree of consumer protection in relation to video games.
22. The application of such a strict liability regime to video games could very well disincentivise the creation of video games in the EU, given the potential litigation exposure that would be created by this legislation. As the video games sector is a considerable driver in terms of innovation, investment and reskilling for the digital age, ISFE and EGDF believe that serious consideration should be given to the impact this would have on Europe's digital and cultural future.
23. In light of these considerations, **ISFE and EGDF contend that complex works which are composed both of software and other copyrighted material, such as video games, should not fall under the definition of 'product' in the proposed revision of the Product Liability Directive.**

About ISFE

The [Interactive Software Federation of Europe](#) (ISFE) represents the video games industry in Europe. ISFE's membership comprises 19 major publishers and national trade associations in 15 countries throughout Europe. Our national associations in turn represent hundreds of games companies across Europe that produce and publish interactive entertainment and educational software for use on personal computers, game consoles, portable devices, smartphones and the Internet. The video games sector represents one of Europe's most compelling economic success stories: In terms of consumer spending, the European video games market was worth an estimated €23bn in 2021. The industry now includes over 5,100 European game developer studios and publishers that enjoy an estimated combined annual turnover of €12bn and employs approximately 90.000 people across the continent.

About EGDF

The [European Games Developer Federation](#) (EGDF) unites 23 national trade associations representing game developer studios based in 22 European countries: Austria (PGDA), Belgium (FLEGA), Croatia (CGDA), Czechia (GDACZ), Denmark (Producentforeningen), Finland (Suomen pelinkehittäjät), France (SNJV), Germany (GAME), Italy (IIDEA), Netherlands (DGA), Norway (Virke Produsentforeningen), Poland (PGA and IGFP), 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.