



INTERACTIVE SOFTWARE  
FEDERATION OF EUROPE  
*Europe's video games industry*

## **Proposal for a Directive on Better Enforcement and Modernisation of EU Consumer Protection Rules**

### **ISFE Position Paper**

**Transparency Register ID Number: 20586492362-11**

#### **Summary:**

ISFE welcomes the Commission's initiative to achieve a more coherent interpretation, implementation and enforcement of EU consumer law. ISFE supports, in particular, the awareness and educational campaigns announced as part of the legislative package and the efforts made to simplify rules, address overlapping requirements and ensure better consistency. ISFE has however identified four areas of concern to Europe's video games sector outlined below on the above referenced Directive.

1. ISFE opposes the introduction of contractual and non-contractual remedies based on a minimum harmonisation approach. This will eliminate all benefits that traders obtain from an EU-wide rule because Member States may introduce new specific national requirements that will foster fragmentation and increase compliance burdens on businesses across the EU.
2. ISFE considers it very important to clarify when the contractual right to compensation will apply and how it relates to other consumer compensatory remedies to avoid any possible overlap.
3. ISFE welcomes the introduction of common criteria to help ensure penalties are proportionate. However, ISFE is concerned by the potential negative effect on the growth of the digital economy, innovation and as a consequence, consumer choice, resulting from a maximum fine level of at least 4 % of a trader's annual turnover in one or more Member States.
4. ISFE is concerned that the wider effects of the extension of the scope of the Consumer Rights Directive on various industries and business models have not been properly considered and calls for clarity on consumers' entitlements on termination of a contract for the supply of free digital content within the 14-day withdrawal timeframe.

#### **Introduction**

The Interactive Software Federation of Europe (ISFE) represents the European video games industry. Our membership comprises 16 major publishers and national trade associations in 17 countries throughout Europe. Our national associations in turn represent hundreds of games companies across Europe. Our industry is a world leader in driving new business models for the 21st century, and our annual contribution to the EU economy is now estimated at approximately €19 billion (Newzoo). [www.isfe.eu](http://www.isfe.eu)

On 11 April 2018, the European Commission presented its 'New Deal for Consumers', a legislative package reviewing 5 key EU consumer law directives based on evidence gathered during the evaluation of the Consumer Rights Directive and the Consumer Acquis REFIT in 2017. The overall conclusion of the REFIT was that the EU consumer legislative framework is still fit for purpose. It only recommended simplifying

the regulatory landscape where this is fully justified, ensuring stepped-up enforcement and easier redress when the substantive law provisions in question are breached, while ensuring that all stakeholders have better knowledge of rights and duties.

The New Deal for Consumers aims to fulfil these objectives with two legislative instruments, a proposal for a Directive on “Better Enforcement and Modernisation of EU Consumer Protection Rules” and one for a Directive on “Representative Actions for the Protection of the Collective Interests of Consumers”, as well as with a series of non-legislative initiatives to increase both traders' and consumers' knowledge of their rights and duties.

**ISFE strongly supports communication and awareness raising campaigns that aim to provide additional guidance and clarification of the legal framework.** Our members have engaged in self-regulatory solutions that further enhance the level of consumer protection and witnessed an increase in awareness and vigilance among traders about their compliance with consumer protection law which has resulted in a high level of consumer satisfaction in our sector. ISFE therefore welcomes the series of non-legislative actions that were announced as part of the legislative package and is convinced that they will achieve a more coherent interpretation, implementation and enforcement of EU consumer law.

The New Deal for Consumers Package aims to modernise existing rules in the current consumer acquis. In this context, **ISFE especially appreciated the efforts that were made to address and simplify certain overlapping information requirements in the Consumer Rights Directive (CRD) and the Unfair Commercial Practices Directive (UCPD).** ISFE strongly supports the streamlining and regrouping of these provisions as they have become obsolete with technological change and imply unnecessary compliance burdens for businesses.

### **EU-wide rights to individual remedies/redress against unfair commercial practices: contractual and non-contractual remedies based on the minimum harmonisation approach**

The Proposal for a Directive on “Better Enforcement and Modernisation of EU Consumer Protection Rules” aims to ensure as a minimum that contractual remedies provided by the Member States should include the right to contract termination in addition to the non-contractual right to compensation for damages. Member States would not be prevented from maintaining or introducing rights to additional remedies for consumers harmed by unfair commercial practices in order to ensure full removal of the effects of such practices.

**Introducing such intervention on the basis of a minimum harmonisation approach will eliminate all benefits that traders may obtain from an EU-wide rule as Member States may introduce new specific national requirements that will foster fragmentation and increase compliance burdens on businesses.** In line with the Better Regulation Principles, ISFE believes that a regulative intervention on the European level must be proportionate to the overall objective of providing a more coherent interpretation, implementation and enforcement of EU consumer law. As such, EU action should not obstruct the establishment of a uniform and easy understandable legal framework for remedies against unfair commercial practices.

While Article 3(2) of the UCPD expressly provides that it “is without prejudice to contract law and, in particular, to the rules on the formation, validity, or effect of a contract” it has not prevented the introduction of specific national provisions providing contractual consequences in case of breaches of the

UCPD. At the same, consumers can also rely on national contract law to seek individual remedies. **ISFE is concerned that the introduction of an additional non-contractual right to compensation without further qualification will incentivise and result in a high level of spurious consumer law infringement claims**

This will further be facilitated by the Proposal for a Directive on Representative Actions for the Protection of the Collective Interests of Consumers potentially allowing millions of European consumers seeking damages which may have a substantial effect on the competitiveness of European businesses. For companies with large amounts of customers, such as in the video games industry where 50 % of the European population in age group 6-64 play video games, the concern is clear and understandable.

Based on these concerns, ISFE recommends to remove the minimum harmonisation approach from the provisions related to contractual and non-contractual remedies and clarify when the non-contractual right to compensation will be applied and how it relates to other remedies in cases of overlap.

European Commission proposal	Suggested Amendments
1(4)2 Contractual remedies shall include, as a minimum, the possibility for the consumer to unilaterally terminate the contract.	1(4)2 Contractual remedies shall include, <del>as a minimum</del> , the possibility for the consumer to unilaterally terminate the contract.
1(4)3 Non-contractual remedies shall include, as a minimum, the possibility of compensation for damages suffered by the consumer.	Non-contractual remedies <del>shall include</del> , <b><i>such as a minimum</i></b> the possibility of compensation for damages suffered by the consumer, <b><i>may be available where appropriate, where contractual remedies do not provide adequate relief and evidentiary standards quantifying actual damage are met.</i></b>

### **A proportionate, effective and deterrent approach to the variety of national financial penalties**

The Proposal states that current national rules on penalties differ significantly across the Union and do not ensure that effective, proportionate and dissuasive fines can be imposed on infringing traders for widespread infringements or widespread infringements with a Union dimension. To facilitate more consistent application of penalties it proposes to introduce common non-exhaustive criteria for the application of fines.

**While ISFE welcomes the adoption of the principle of proportionality and the introduction of common criteria to help ensure that the fine structure has sufficient safeguards against excessive penalties, ISFE is concerned that the proposed open-ended fine structure and potential level of fines will nevertheless create uncertainty and a substantial negative effect on the growth of the digital economy, which in turn will result in less innovation, less consumer choice and higher prices.** This is especially true for digital industries where any minor infringement can easily have a “widespread” or a union-level dimension. The financial impact might even be bigger when seen in conjunction with the Proposal for a Directive on Representative Actions for the Protection of the Collective Interests of Consumers. Enforcement authorities should always consider carefully the circumstances of each violation whereby

finances, damages or other penalties previously imposed must be taken into account when evaluating any previous infringement.

The Commission’s impact assessment provides no evidence of a clear link between dissuasive financial penalties and a substantially higher level of compliance in Member States. In fact, the Member States that apply high fines do not always achieve better compliance levels<sup>1</sup>. ISFE believes that the best compliance results will be obtained where companies have easy access to information and guidance on how to implement consumer law. Deterrence through fines and sanctions is obviously necessary to address undesirable behaviour such as deceptive and/or fraudulent undertakings, however it should not become de facto the main enforcement objective.

ISFE recommends deleting the proposed maximum fine level of 4% of a trader’s turnover to avoid a substantial negative effect on the growth of the digital economy.

European Commission proposal	Suggested Amendments
1(5) 4. Member States shall ensure that the penalties for widespread infringements and widespread infringements with a Union dimension within the meaning of Regulation (EU) No 2017/2934 include the possibility to impose fines, the maximum amount of which shall be at least 4 % of the trader's annual turnover in the Member State or Member States concerned.	<b><i>Deleted</i></b>

**The 14-day right of withdrawal from contracts where consumers provide data instead of paying with money.**

The Proposal aims to ensure consistency between the scope of application of the CRD and the Digital Content Directive (DCD) which applies to contracts for the supply of digital content and digital services. Consequently, the requirements of the CRD will also apply to contracts for the supply of a digital content where the consumer provides personal data instead of money.

ISFE is concerned that the extension of the scope of the CRD to the various free-to-play business models has not been properly considered. Free-to-play is an important part of the successful ‘app economy’ where mobile games represents 50% of downloaded apps, which is by far and large the most popular apps. **It is unclear what the 14-day right of withdrawal would mean in the context of the supply of free digital content.** For any personal data received by the content provider the rules in the DCD refer to the GDPR where the right to data portability allows a data subject to retrieve his personal data but only on own request. In contrast, user-generated-content needs under the DCD always be returned to the

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<sup>1</sup> Comparison between the overview of maximum fines ([Commission Staff Working Document Impact Assessment part 2](#), page 38) and the [Consumer Conditions Scoreboard 2017 edition](#) (page. 42).

consumer after termination of the contract. Both rules apply regardless whether the consumer terminates within 14 days or not.

ISFE therefore recommends clarifying that the 14-day right of withdrawal period would not have any relevance when consumers terminate a contract for the supply of digital content based on the provision of personal data instead of money.

European Commission proposal	Suggested Amendments
<p>(28) Article 16(m) of Directive 2011/83/EU provides for an exception to the right of withdrawal in respect of digital content that is not supplied on a tangible medium if the consumer has given prior consent to begin the performance before the expiry of the right of withdrawal period and acknowledged that he thereby loses the right of withdrawal. Article 14(4)(b) of Directive 2011/83/EU provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain consumer's express consent and acknowledgment is accordingly only relevant for digital content, which is provided against the payment of the price. It is therefore necessary to amend Article 16(m) to the effect that the requirement for traders to obtain the consumer's prior consent and acknowledgment only applies to contracts that place the consumer under an obligation to pay.</p>	<p>(28) Article 16(m) of Directive 2011/83/EU provides for an exception to the right of withdrawal in respect of digital content that is not supplied on a tangible medium if the consumer has given prior consent to begin the performance before the expiry of the <b>14-day</b> right of withdrawal period and acknowledged that he thereby loses the right of withdrawal. Article 14(4)(b) of Directive 2011/83/EU provides for a contractual sanction when this requirement is not fulfilled by the trader, namely, the consumer does not have to pay for the digital content consumed. The requirement to obtain consumer's express consent and acknowledgment <b>and the 14-day right of withdrawal period are</b> is accordingly only relevant for digital content, which is provided against the payment of the price. It is therefore necessary to amend Article 16(m) to the effect that the requirement for traders to obtain the consumer's prior consent and acknowledgment only applies to contracts that place the consumer under an obligation to pay.</p>