



Comments on the draft report “Towards a more sustainable single market for business and consumers” (2020/2021(INI))

IMCO Committee

June 2020

Key points

- A- Sustainability has been a driver for the video games sector for many years. In cooperation with the European Commission, the console manufacturers signed the [Games Consoles Voluntary Agreement \(VA\)](#) to improve the energy and resource efficiency of games consoles. In addition, the largest video game companies gathered in September 2019 to launch the [UN Playing For The Planet Alliance](#), making commitments to preserve the environment.

- B- ISFE has identified three issues of concern in the draft report that would unduly impact the manufacturers of video game consoles and negatively affect consumers.

a. Software updates are necessary to improve the service or energy saving features

The proposal to add to the list of unfair commercial practices under the Unfair Commercial Practice Directive ([Directive 2005/29/EC](#)) “slowing performance following an update”: This is of concern because console manufacturers often proceed with updates to implement technical requirements, to include new features to improve the service, or to add or improve anti-piracy and energy saving features. These updates may, on rare occasions, lead to a reduction in some measures of performance. Measuring the performance of devices such as consoles is complex and dependent on many different features and functions, all of which contribute to give the consumer an engaging gaming experience. There is no single metric by which gameplay performance can be measured, and while it is possible that an update may result in the performance of a console being ‘slower’ if measured by one metric of performance, the general gaming experience may still be improved or remain the same.

- i. ISFE recommends the deletion of the reference to “slowing performance following an update” (Article 1-f) of the draft report).*

b. Repairs of devices in authorised repair centres, and protection of Intellectual Property rights, are crucial from a product safety and consumer protection perspective

The explanatory statement to the draft report states that it is “unacceptable that intellectual property mechanisms make carrying out product repairs the prerogative of the designer or distributor”, and the draft report further calls on the Commission to establish a consumers’ right to repair “by guaranteeing unrestricted access of information concerning repairs, maintenance and parts for all those involved in the repair industry and all consumers”.

Console manufacturers recognise the importance for consumers to have access to durable goods that can easily be repaired when malfunctioning, hence why they all offer in- and out-of-warranty repair services in authorised centres enabling access to repair for the entire lifetime of a console. However, because key internal components of a console form part of a security system that consists of technological protection measures (“TPMs”) that are deployed to protect against copyright infringement, console manufacturers cannot directly provide spare parts to independent repair companies without compromising these security systems and technology. The use of TPMs to protect against copyright infringement is recognised and legally protected by Article 6 of the Copyright Directive 2001/29/EC and recognised by the CJEU in its 2014 ruling in the Nintendo v PC Box case (Case C-355/12). The deployment of TPMs by the video games console manufacturers benefits all those who create and develop games for consoles, and not just the platform holder. With a secure hardware system in which to create and publish new games, developers (who are often SME’s) are more willing to make the financial investments necessary to support the development of new games. This in turn benefits the consumer who has a wider array of games and interactive experiences to enjoy. TPMs have allowed the game industry to move beyond packaged goods and to embrace new digital technologies and distribution models. The 2003 WIPO Guide to the WIPO Copyright Treaty stated that the application of TPMs is “a key condition for the protection, exercise and enforcement of copyright in the digital, networked environment”¹.

This peculiar situation has been acknowledged in the freshly reformed Waste Framework Directive ([Directive \(EU\) 2018/851](#)), which established that spare parts, technical information and repairs instructions should be made available, **if it does not compromise the product’s safety or quality, nor intellectual property rights**². These three boundary conditions of accepted European law must be reflected in any future ‘Right to Repair’ proposals.

ii. *ISFE recommends:*

- *to align the provisions in the draft report with established European Law to recognise the importance of encouraging repair while preserving product safety, quality, and intellectual property rights*
- *to rephrase article 5-a) as follows “by guaranteeing access to information concerning repairs, maintenance and parts for all consumers”.*
- *that the Rapporteur reconsiders the explanatory statement which states that it is “unacceptable that intellectual property mechanisms make carrying out product repairs the prerogative of the designer or distributor”*

c. **The legal guarantee period should be aligned with the Directive on certain aspects concerning contracts for the sales of goods**

The proposal to “bring the duration of legal guarantees and periods of presumed conformity into line with estimated lifetime of products”: Games consoles are an evolving ecosystem which are regularly updated via software updates and new hardware models. Associated with repeated usage, this “interactive” nature does not preserve the consoles from a slight decrease of performance over time. Although console manufacturers offer repair services beyond a period of two years following the date of purchase, it is not impossible that a console, 5 years after its

¹ “Guide to the Copyright and Related Rights Treaties Administered by WIPO”, WIPO Publication No. 891(E), 2003, pp 215-216.

² [Directive \(EU\) 2018/851](#), Article 9(e)

date of purchase, will not be as fast as it was on its first day. This is why ISFE believes that aligning the period of legal guarantee with the provisions included in the Directive on certain aspects concerning contracts for the sales of goods ([Directive \(EU\) 2019/771](#)), set on two years, constitutes a fair compromise between the interests of both the seller and the consumer³.

- iii. *ISFE recommends the alignment of the period of legal guarantee with the provisions of Directive (EU) 2019/771; and recommends to Members of the European Parliament to delete Article 1 – d) from the report*

Background information

Sustainability is a major driver for the video games sector

1. ISFE shares the European Parliament’s conviction that addressing climate change is one of the most critical challenges of the 21st century. In September 2019, video games companies, including ISFE members, joined the **Playing For The Planet Alliance** on the occasion of the UN Secretary-General’s Climate Action Summit. Backed by the United Nations, members of the Alliance made concrete commitments ranging from green activations in games to reducing their carbon emissions and plastic usage⁴.
2. Following the adoption of the EcoDesign Directive in 2009 ([Directive 2009/125/EC](#)), leading console manufacturers (Microsoft, Nintendo, and Sony) agreed with the European Commission to further improve the energy efficiency of games consoles. The self-regulatory measures proposed by the console manufacturers were shown to generate greater energy saving than through the alternative adopted regulatory measures. Over the lifetime of current generation consoles⁵, Signatories of the Agreement estimate energy savings to exceed 48.2TWh, which is equivalent to Portugal’s annual energy production⁶. In addition, compliance with the Agreement is checked annually by independent inspectors⁷. Their engagement is codified under the [Games Consoles Voluntary Agreement](#) (VA), and includes concrete provisions related to energy and resource efficiency (including repairability and recyclability) which are applicable for both current and future generations of games consoles⁸.
3. Many video games studios in Europe took measures to encourage greener behaviours within their working environments. This includes for instance encouraging employees to travel by train rather than by plane, investing in call-in facilities to support remote meetings, or favouring the use of renewable energy to perform daily tasks. Within the French developer and publisher Ubisoft, employees even constituted themselves into “Green communities” so they could provide recommendations to their hierarchy on how to transform their working environments into places that are more respectful towards the planet.

³ [Directive \(EU\) 2019/771](#), Recital 41

⁴ A full list of members and their commitments can be reached at <https://playing4theplanet.org/private-sector/>

⁵ PlayStation 4, PlayStation 4 Pro, Xbox One, Xbox One S, Xbox One X

⁶ Estimate verified in the European Commission’s independent consultants’ study published in 2019 on <https://efficientgaming.eu/>

⁷ s In their [latest report](#), experts concluded that all three signatories meet the requirements of the VA

⁸ More information on the Games Consoles Voluntary Agreement can be found at <https://efficientgaming.eu/>

Durability is an essential feature for games consoles: why software updates are necessary

4. Manufacturers design consoles to have a long life. The economic model is based on the sale of games more than consoles. There is an economic incentive to extend console life allowing the user to continue to purchase more games without having to spend money on replacement consoles or repairs.
5. Games consoles constitute for more than 135 million players in Europe their gateway to entertainment and each is unique in the experience it offers to its players. Video games console manufacturers strive to ensure that their products offer the highest quality and standards possible to ensure that players enjoy their gaming experiences. Durability is part of such quality standards that a player can safely expect when he or she purchases a console.
6. Each console has its own technical specificities, with a unique hardware, operating system (OS), and features. Due to these differences, developing a game for a specific console takes time and resources for the video game developer. Developers will first choose on which console they would like to release their game based on various criteria, such as, but not only, computing power, technological innovation, and durability.
7. In addition, it is not uncommon for publishers to release games on older devices as these are still functioning and consumers are still using them, sometimes more than a decade after their release. For example, Ubisoft released in 2019 its latest iteration of Just Dance, *Just Dance 2020*, on the Nintendo Switch, the Wii U, but also on the Wii, a console released in 2006 and not commercially in circulation since 2013⁹.
8. Given the complex nature of consoles, console manufacturers regularly do maintenance and security updates to ensure continuity of the service. Also, when a new generation of consoles is released, they continue to update their older devices for several years so that consumers can safely continue to enjoy their games, even if they do not purchase the new device. Microsoft updated last November the OS of the Xbox 360¹⁰, a console originally released in Europe in 2005.
9. Console performance is not based on a single metric, but rather on many features and functions that contribute to a gaming experience. The Lawrence Berkeley National Laboratory, University of California, conducted an investigation in 2018 on gaming performance benchmarks, concluding: "Mandatory system-level standards for gaming devices are highly problematic given the inability to consistently and meaningfully benchmark energy use per service (performance) delivered (most of these services are highly subjective and difficult or impossible to quantify), together with technologies and software that are evolving more rapidly than standard-making processes can adapt. Moreover, selecting a single metric upon which to base standards could stifle innovation while failing to recognize true efficiency improvements and their relation to user experience."¹¹

⁹ <https://www.mcvuk.com/business-news/just-dance-2020-might-be-the-last-game-released-on-nintendo-wii/>

¹⁰ Patchnote available here : <https://support.xbox.com/help/xbox-360/console/system-update-operating-system>

¹¹ Mills, et al. (2018). Green Gaming: Energy Efficiency without Performance Compromise. Lawrence Berkeley National Laboratory, pp.11. Access at [this address](#).

10. Some updates designed to implement enhanced technical requirements (such as energy efficiency requirements in the EcoDesign Directive or in the Games Console Voluntary Agreement) or to add new features, might lead to a slowdown in performance (dependant on the metric measured) in response to greater energy savings and/or the implementation of additional features. Therefore, the proposal in the draft report to add, “slowing performance following an update” to the list of unfair commercial practices under the Unfair Commercial Practice Directive ([Directive 2005/29/EC](#)) would contradict the objective of the resolution and hamper the continuous efforts by console manufacturers to reduce the energy consumption of their products.

11. ISFE recommends the deletion of the reference to “slowing performance following an update” (Article 1 of the draft report).

Repairs of devices in authorised repair centres, and protection of intellectual property rights, are crucial from a product safety and consumer protection perspective

12. Console manufacturers recognise the importance for consumers to have access to durable goods that can easily be repaired when malfunctioning. Under the [Games Consoles Voluntary Agreement](#) (VA), they offer consumers the possibility to repair and/or refurbish their devices in authorised repair centres during the commercial guarantee period, whilst also offering an out-of-warranty repair service to ensure access to repair over the entire lifetime of a console. Authorised repair centres ensure repairs meet the required quality and safety standards without compromising consoles systems and their technology by adequately protecting both proprietary components and games developers’ intellectual property (see points 14 to 16 below).

13. The freshly reformed Waste Framework Directive ([Directive \(EU\) 2018/851](#)), which should be implemented in Member States by 5 July 2020, recognises the importance of preserving a product’s safety and security, as well as its intellectual property rights. Its Article 9 establishes that spare parts, technical information, and repairs instructions should be made available, **if they do not compromise the product’s safety and quality, “without prejudice to intellectual property rights”**¹². These three boundary conditions of accepted European law must be reflected in any future ‘Right to Repair’ proposals.

14. Many key internal components of games consoles are part of an encrypted system: A complex combination of digital and physical components which include security features, known as “technological protection measures” (TPMs), that are crucial to protect the intellectual property of both the game console manufacturer and of the publishers of the video games titles available on the device. TPMs are the result of many years of research by console manufacturers to ensure that no malicious actors can access and retro-engineer proprietary components in the consoles or engage in piracy of any protected material available on the console. Console manufacturers use TPMs to enhance the safety and integrity of their consoles, which ensures a secure ecosystem on which content creators and software developers can rely. Conversely, actions that weaken copyright

¹² [Directive \(EU\) 2018/851](#), Article 9(e)

protections open the floodgates of mass infringement and threaten the economic input that the video game industry contributes to Europe.

15. Authorised repair centres use proprietary diagnostic software that contain detailed proprietary blueprints to identify components within a console that require repair. In addition, because most parts of a console form part of an encrypted system protected by TPMs to preserve the device against hacking and game piracy, console manufacturers cannot directly provide spare parts or similar diagnostic software to independent repair companies without compromising consoles systems and technology. Furthermore, as recognised by the Joint Research Centre in 2019, some repairs require "appropriate technical skills that most consumers do not have. If a product is not properly repaired, consumer safety could be compromised"¹³.
16. It is impossible for console manufacturers to guarantee that repairs performed by third party repair operators will respect the safety and security requirements of the console as well as the quality standards manufacturers honour. For instance, a new power supply which does not meet the required technical specifications could lead a console to overheat and consume far more energy than usual. At worst, a third-party repair operator's intervention could deteriorate the console beyond repair possibility, forcing players to invest in a new device if they wish to continue enjoying their games. Therefore, console manufacturers offer consumers out-of-warranty repair services, even several years after the initial purchase.
17. **Considering the above, and to ensure a high level of consumer protection, ISFE recommends**
 - ***to align provisions in the draft report with established European Law to recognise the importance of encouraging repair while preserving product safety, quality, and intellectual property rights***
 - ***to rephrase article 5-a) as follows "by guaranteeing access to information concerning repairs, maintenance and parts for all consumers"***.
 - ***that the Rapporteur reconsiders the explanatory statement which states that it is "unacceptable that intellectual property mechanisms make carrying out product repairs the prerogative of the designer or distributor"***

Importance of aligning the legal guarantee period with the Directive on certain aspects concerning contracts for the sales of goods

18. Video game consoles are considered as "goods with digital elements" under the Directive on certain aspects concerning contracts for the sales of goods ([Directive \(EU\) 2019/771](#)). The text holds sellers liable for any lack of conformity of goods for a minimum period of two years following the date of purchase, and recognises that such a period is considered reasonable by market participants¹⁴ as it "usually reconciles the interests of both the seller and the consumer"¹⁵.
19. Video game consoles are an evolving ecosystem in which players can enjoy thousands of games from a wide range of developers and publishers. They can also include various features, such as, but not

¹³ Cordella, et al. (2019). Analysis and development of a scoring system for repair and upgrade of products, Joint Research Centre Technical Reports, 2019, p.132. Access [here](#).

¹⁴ [Directive \(EU\) 2019/771](#), Recital 41

¹⁵ [Directive \(EU\) 2019/771](#), Recital 43

only, access to the Internet, streaming and VOD services, or chatrooms, which are not always owned or operated by console manufacturers. The very nature of consoles makes them constantly interact with third-party actors, as these need to update their games or services. In addition, console manufacturers themselves perform updates to implement new technical requirements or to add new features (see point 8).

20. Although consoles are renowned for their durability, this “interactive” nature associated with repeated usage does not prevent the devices from experiencing a slight decrease of performance over time. And although console manufacturers offer repair and refurbishment services for their devices, it is not impossible that a console, 5 years after its date of purchase, will not be as fast as it was on its first day. This is why ISFE believes that aligning the period of legal guarantee with the provisions included in the Directive on certain aspects concerning contracts for the sales of goods ([Directive \(EU\) 2019/771](#)), set on two years, constitutes a fair compromise between the interests of both the seller and the consumer¹⁶, and does not prevent consumers from getting their devices repaired beyond that period.

21. ISFE recommends the alignment of the period of legal guarantee with the provisions included in Directive (EU) 2019/771; and recommends to Members of the European Parliament the deletion of Article 1 – d) from the report.

About ISFE

22. ISFE represents the video games industry in Europe and is based in Brussels, Belgium. Our membership comprises national trade associations in 18 countries across Europe which represent in turn thousands of developers and publishers at national level. ISFE also has as direct members the leading European and international video game companies, 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 tablets.

23. ISFE’s purpose is to serve Europe’s video games ecosystem by ensuring that the value of games is widely understood and to promote growth, skills, and innovation policies that are vital to strengthen the video games sector’s contribution to Europe’s digital future. The video games sector 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. In 2019, the size of Europe’s video games industry was €21 billion and it registered a growth rate of 55% over the past 5 years in key European markets¹⁷. Video games have a proven ability to successfully drive new business models. The digital transformation with the growth of online and app-based gaming represents today 76% of the industry’s total European revenues. Via the launch of new high-performance consoles and the strong growth of mobile gaming, the industry offers players across Europe and in all age groups the possibility to enjoy and engage with video games¹⁸. Today 51% of Europe’s population plays videogames, which is approximately 250 million people, and 54% of the players regularly play on consoles.

END

¹⁶ [Directive \(EU\) 2019/771](#), Recital 43

¹⁷ ISFE Key Facts 2020 from GameTrack Data by Ipsos MORI and commissioned by ISFE <https://www.isfe.eu/isfe-key-facts/> (to be updated in June).

¹⁸ See also <https://www.isfe.eu/data-key-facts/>